



## Executive summary

This article looks at existing categories of forced migrants in the context of climate change to analyse protection possibilities. Climate change impacts include an increase in the frequency and severity of weather hazards. Disasters and degradation can serve as a direct cause of displacement, or as an indirect cause of displacement through conflicts. Much climate change-related forced migration is likely to remain internal and regional in the foreseeable future. As internally displaced persons the forced migrants are protected according to the 1998 Guiding Principles on Internal Displacement. For those who cross borders and enter other countries, there seems to be a serious protection gap. They are not considered refugees unless they are fleeing persecution on certain grounds. The human rights approach differs from general forced migration law by focusing on needs rather than cause. If return is neither possible nor reasonable due to circumstances in the place of origin and personal conditions including particular vulnerabilities, a person should receive protection regardless of the initial cause of movement. Some countries grant complementary or temporary protection. An important rationale for international protection is that some of the most exposed and vulnerable states to climate change impacts may be unwilling or unable to protect the forced migrants. Other countries may also have a responsibility since climate change is mostly the fault of the rich and developed countries. Since most of the affected and displaced will never reach the rich countries, this responsibility must also manifest itself through investments in adaptation in developing countries and other support for the most affected, including humanitarian response.

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## Climate of Displacement, Climate for Protection?

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The Migration Unit at DIIS regularly presents public seminars about current migration research, the so-called Migration Seminars. The seminars shall contribute to disseminate and discuss findings about migration with a wide audience, such as students, development organizations, embassies, and NGOs.

## **CLIMATE OF DISPLACEMENT, CLIMATE FOR PROTECTION?**

Reports of the Intergovernmental Panel on Climate Change (IPCC) have authoritatively established that human-induced climate change is accelerating, and December next year the current climate change negotiations will be concluded in Copenhagen. But there is still a lack of information about the complex dynamics of climate change and displacement. Some of the key questions that need to be addressed are: What types of displacement are likely to be triggered by climate change? What are the protection possibilities and gaps in existing international law? What are possible mechanisms and tools to address the gaps? My approach to terminology and typology is to primarily draw on existing categories of protected persons, and possibilities to provide protection within these categories. This also has the psychological advantage of not suggesting that the displaced are a new category of persons who are wholly without protection and international recognition. An analysis of these categories and climate change displacement will also make the protection gaps more clear.

## **CLIMATE CHANGE IMPACTS AND DISPLACEMENT**

Climate change impacts include gradual degradation, e.g. desertification, and an increase in the frequency and severity of sudden onset hazards, e.g. floods and cyclones. The number of recorded natural disasters has doubled from approximately 200 to over 400 per year over the past 20 years. Nine out of ten can be considered climate-related. Disasters and degradation can serve as a direct cause of displacement, or as an indirect cause of displacement through conflicts. Sudden onset disasters often highlight weaknesses in gov-

ernment response and exacerbate domestic tensions, potentially triggering conflict and displacement. Disasters and degradation can also lead to increased competition over scarce resources and mass displacement in itself can contribute to a competition for already scarce resources. Regardless of the underlying causes, those displaced by conflict internally or across borders are recognised in protection instruments. In the following, I focus on the disaster displaced.

## **CLIMATE CHANGE REFUGEES**

The terms climate change refugee and environmental refugee are widely used in the current debate on climate change. According to some claims, there will be hundreds of millions of climate or environmental refugees within a few decades. Figures vary depending on definition, data and discourse. Today, the terms and estimated number of displaced are often used to sensitize public opinion and decision-makers to the issue of global warming. Some actors seem to be supporting a fear in the developed countries that they, if not literally flooded, will most certainly be flooded by the climate change refugees. By “securitising” the issue of climate change, environmentalists and others have succeeded in getting it onto the agenda of decision-makers. On the other hand, the security discourse can make new areas relevant for military considerations and promote repressive tendencies. A language of emergency can also remove climate change impacts from the ordinary reach of human rights law – either legally due to derogation clauses or rhetorically and discursively. The environment and security people do not necessarily have a protection perspective and the best interests of the displaced in mind. The terms climate refugee and environmental refugee have

no legal basis in international refugee law, and their use could potentially undermine the international legal regime for the protection of refugees. It can also create confusion regarding the link between climate change and displacement.

The potential of adaptation gives reason for hope and challenges the determinism in the debate. While the number of affected in disasters has risen steadily, the number of fatalities has been reduced due to among other factors successful disaster risk reduction and prevention. Importantly, climate change impacts depend not only on physical *exposure*, but also on the *vulnerability/resilience* of the areas and people, including capacity to adapt. Due to physical exposure and vulnerability, it is likely that developing countries in lower latitudes will continue in the near future to be the most affected. Climate change impacts can impoverish the vulnerable and reduce their mobility even further. While the developed countries bear the main responsibility for climate change, one could question whether the dynamics of climate change and forced migration can and should be portrayed as a threat image of masses of refugees flooding over western borders.

### **INTERNALLY DISPLACED PERSON**

Today two thirds of forced migrants are displaced within their own country. Most climate change-related forced migration is likely to remain internal and regional in the foreseeable future, and much will be rural-urban migration. Internally displaced persons (IDPs) are broadly and descriptively defined in the Introduction of the 1998 Guiding Principles on Internal Displacement as

persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.

This non-exhaustive definition includes all those displaced internally because of climate change impacts. Rather than a separate convention, the 1998 Guiding Principles is a synthesis, drawing out relevant parts of human rights law, refugee law by analogy and international humanitarian law. It is seen as “soft law”, i.e., the principles are not binding in a strict legal sense but provide authoritative guidance on the obligations of a state in a specific area. Their authoritative character derives mainly from the content, not the process as they were never negotiated by governments. They are increasingly implemented in laws and policies on both national and regional levels.

### **REFUGEE**

According to the 1951 Convention relating to the Status of Refugees, Art. 1A(2), as modified by the 1967 Protocol, a refugee is a person who

owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinions, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a na-

tionality and being outside of the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Importantly, the grounds listed in the 1951 Convention are not necessarily why people leave; they leave because they are *persecuted* in some way on these grounds. In reality, a person may not, for example, be politically active, but if someone believes them to be politically active and therefore persecutes them, they may become a refugee. Persecution is not defined, and there is place for evolution of the concept. Serious or systematic human rights violations are normally considered to amount to persecution. We have already seen litigation against the biggest polluters – most prominently the Inuit case against the US<sup>1</sup> – based on human rights and ideas of joint liability. Following the cyclone Nargis in May 2008, France and other countries accused the Burmese Junta of breaching fundamental human rights by not providing adequate disaster relief and for rejecting international aid. Recently in the case of “Budayeva and others v. Russia” the European Court of

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<sup>1</sup> Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States Submitted by Sheila Watt-Cloutier, With the Support of the Inuit Circumpolar Conference, on Behalf of All Inuit of the Arctic Regions of the United States and Canada, 7 December 2005.

For more information and updates see [www.earthjustice.org](http://www.earthjustice.org)

For climate change law and jurisprudence in general see [www.climatelaw.org](http://www.climatelaw.org)

Human Rights found a breach of the right to life because the authorities had not acted adequately in preventing a mud-slide<sup>2</sup>. Could we talk of climate change persecution? Who would be the persecutor(s)? The state for failing to protect its citizens from the impact of climate change, and/or states bearing most of the responsibility for the climate change?

The 1951 Convention definition covers instances in which the home state does not provide protection for one of the grounds and in which someone is persecuted for one of the recognised grounds (by a non-state agent) and the state simply does not protect. The Convention definitely applies in situations where the disaster victims flee from their homeland because their government has consciously withheld or obstructed assistance in order to punish or marginalize them on one of the five grounds.<sup>3</sup> The environmental factor comes in not as a ground, but as a form of persecution.

Regional refugee instruments may be more directly applicable in cases of climate change impacts and displacement. In art. 1(2) of the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, the refugee definition has been broadened to encompass persons compelled to leave *inter alia* due to “events seriously disturbing public order in either part or the whole of his country of origin or nationality”. In Latin America, the 1984

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<sup>2</sup> Case of Budayeva and others v. Russia, 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment of 30 March 2008

<sup>3</sup> “Climate change, the environment, natural disasters and human displacement: a UNHCR perspective”, 29.10.08. Policy Development and Evaluation Service, UNCHR.

Cartagena Declaration on Refugees Section III(3) adds the criterion “massive violation of human rights”. Overall, however, there seems to be a protection gap for many cross-border displaced. Some suggest amending the 1951 Convention. But any initiative to modify the refugee definition would risk a renegotiation of the convention, which, in the current political context, may result in a lowering of protection standards for refugees and even undermine the international refugee protection regime altogether.

### STATELESS PERSON

The case of “sinking” small island states constitutes a particular challenge. As a consequence of sea levels rising, areas become uninhabitable. In extreme cases island states would disappear entirely. If and when this occurs, the population would be permanently displaced to other countries. It remains to be seen whether they will become stateless persons under international law. According to the 1954 Convention Relating to the Status of Stateless Persons, Article 1, a stateless person is “a person who is not considered as a national by any state under the operation of its law”. Persons who possess a nationality in formal terms but whose nationality is ineffective are generally referred to as *de facto* stateless persons. Stateless refugees are protected under the 1951 Refugee Convention. Current legal regimes are hardly sufficient to address the very specific needs of the “sinking” island citizens, including relocation. Many criticise existing relevant law for being weak in general, merely dealing with prevention and reduction of statelessness. Regulation at an international or regional level seems to be needed.

### MIGRANT

Pre-emptive migration is a phenomenon and possible solution which must be recognised. The “Pacific Access Category” of the Government of New Zealand, which is an immigration scheme for the population of Pacific islands threatened by rising sea level, offers opportunities for “would be” displaced persons. Each year a fixed number of people are granted work and permanent resident permits. Carried out correctly, expansion of legal labour migration could assist most affected countries and enhance protection of the individual, as well as supply regions of the world such as Europe with a much needed work force. Developing immigration channels/agreements with third countries that are most likely to be negatively affected by climate change must be done in partnership to avoid brain drain and other negative effects. The President of Kiribati, Anote Tong, recently expressed the need to start a process of orderly migration now which would be a win-win situation for all instead of having a displaced people who risk becoming a football to be kicked around in the near future.

### THE HUMAN

Some solution to the cross-border displacement protection gap may be found in the broader human rights law where “human” is the operative category. In human rights law *non-refoulement* is an absolute and general ban on returning a person, independent of conduct or status, to places where they risk certain ill-treatment. *Non-refoulement* has a prominent place in human rights law. According to case-law, the 1950 European Convention of Human Rights and Fundamental Freedoms article 3, the ban on torture and inhuman and degrading treatment, implies a duty not to expel a person to a place where they risk

exposure to the prohibited treatment.<sup>4</sup> There is similar case-law on an international level. Most agree that the prohibition on torture is a peremptory norm, but there is disagreement regarding the extent to which one is protected by customary law against lesser ill-treatment. At some point we have purely humanitarian considerations rather than hard legal obligations.

In some climate change scenarios people simply *cannot* return:

- 1) The place they came from no longer exists as in the case of submerged island states. The question of statelessness may be partly addressed here.
- 2) The place they came from can no longer sustain its population leading to the expulsion of certain groups. In such cases one could also consider whether it is persecution to which the 1951 definition would apply.
- 3) The place they came from can no longer sustain its population leading to a prohibition to return once one has left.

Even in less extreme situations, livelihood and quality of life considerations may dictate that people cannot *reasonably* be expected to return to the place they came from. A case in point of interest is “D. v. the United Kingdom”, where the European Court of Human Rights considered that returning an HIV-infected person to St. Kitts would amount to “inhuman treatment”, inter alia due to the lack of sufficient medical treatment, social net-

work, a home or any prospect of income.<sup>5</sup> During and after the hurricane Mitch in Central-America and the more recent cyclone Nargis in Burma, homes and vital infrastructure was destroyed or damaged hindering the provision of basic services such as clean water, electricity and food.

One reason refugees are still considered a category apart is the protection aspect. If others choose to return home they will presumably continue to receive the protection of their government. Contemporary climate change scenarios envisage disasters and degradation which in some areas may reach a critical point making it virtually impossible to return or unreasonable to expect anyone to return.

Cross-border forced migrants could be granted humanitarian asylum, complementary or temporary protection status. Complementary forms of protection have been granted to persons who do not fit so well in the refugee definition, but nonetheless are considered to be in need of international protection. In the aftermath of the hurricane Mitch in 1999, the US Immigration and Naturalization Services took an unprecedented decision to grant Temporary Protection Status to Hondurans and Nicaraguans. A recent US extension is commendable, but it does not change the fact that the individuals in question are still residing in the country on a temporary basis almost ten years after the disaster struck. At some point humanitarian and compassionate considerations require more permanent residence status. Finland and Sweden are examples of countries that recognise and extend complementary protection with permanent residence to

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<sup>4</sup> See the landmark judgments *Soering v. the United Kingdom*, application no. 14038/88, 7 July 1989, and *Chahal v. the United Kingdom*, application no. 22414/93, 15 November 1996.

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<sup>5</sup> Case, 30240/96 2007

those who cannot return due to natural disasters.<sup>6</sup>

The human rights approach differs from general forced migration law by focusing on needs rather than cause. Rather than getting caught in the eternal debate about how forced or voluntary movement is, one could in the context of climate change and displacement focus more on the possibility and reasonability of return. If return is neither possible nor reasonable due to circumstances in the place of origin and personal conditions, including particular vulnerabilities, a person can be considered displaced regardless of the initial cause of movement. In cases of gradual degradation it would not be so much a question of why someone left initially, but rather whether the gradual degradation has reached a critical point where they cannot possibly or reasonably be expected to return *now*. To a certain degree this line of thinking is also acknowledged in traditional refugee law with the recognition of “sur place” refugees who were not refugees when they left their country, but who become refugees at a later date due to circumstances arising in the country of origin or as a result of their own actions, such as expressing their political views in the country of residence. Naturally, it is the present and future risk of persecution or rights violations, rather than the past, which is crucial in determining protection need. Where this need is acknowledged, a

clear protection status should also be granted.

An important rationale for international protection is that some of the most exposed and vulnerable states to climate change impacts may be unwilling or unable to protect the forced migrants. Moreover, climate change is mostly the fault of the rich and developed countries, and climate change impacts can contribute to displacement. Albeit in a more indirect way, and even if one does not define it as persecution, these countries also have a responsibility. Since most of the affected will be in developing countries and most displaced will never reach the rich countries, this responsibility must also manifest itself through investments in adaptation in developing countries and other support for the most affected, including humanitarian response.

### **POLICY RECOMMENDATIONS**

- 1) The terms “climate refugee” and “environmental refugee” should not be employed.
- 2) Many displaced persons are already included in existing categories of protected persons, such as IDPs, and they must be made more visible and recognised within the categories.
- 3) There is a need to clarify or even develop the normative framework applicable to environmental displacement.
- 4) The 1951 Refugee Convention should not be amended to address environmental displacement as such.
- 5) If refugee status is deemed inapplicable in situations of cross-border displacement, states must still ensure that migration management systems provide for the entry and protection of those in need. Persons who cannot re-

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<sup>6</sup> The Finnish Aliens Act is available at:

<http://www.migri.fi/netcomm/content.asp?article=1950> (Last visited: 31 July 2008).

The English version of the Swedish law is available at:

<http://www.sweden.gov.se/content/1/c6/06/61/22/fd7b123d.pdf> (Last visited: 31 July 2008).

turn because of extreme situations of disaster and degradation must receive temporary or complementary/subsidiary protection.

- 6) When it comes to the island states that risk becoming submerged, states must agree on regulation or agreement on a regional or international level and develop specific measures to prevent and reduce statelessness.
- 7) Legal labour migration agreements should be expanded to accommodate for pre-emptive migration.
- 8) Climate change adaptation must be a priority. It can reduce the impacts of climate change and thereby the risk of displacement.
- 9) The parties to the United Nations Framework Convention on Climate

Change (UNFCCC) should take account of and address the humanitarian consequences of climate change, including displacement. The adaptation regime must favour those most vulnerable and exposed to climate change impacts, including the displaced and those at risk of displacement. Some adaptation funding must be allocated for disaster risk reduction and humanitarian response. The parties must build on existing frameworks and tools, and the capacity and experience of humanitarian actors in the design of this regime. The UNFCCC parties should include mechanisms and provisions to support and follow up research and action to identify and fill existing and foreseeable legal, operational and capacity gaps associated with climate change and displacement.

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