Side Event at the 25th Session of the UN Human Rights Council

THE HUMAN RIGHTS IMPLICATIONS OF CROSS-BORDER DISPLACEMENT IN THE CONTEXT OF DISASTERS

WHAT ARE THE PROTECTION GAPS AND WHAT IS THE ROLE OF THE HUMAN RIGHTS COUNCIL?

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Introduction

The most drastic impacts of climate change are likely to be felt in the poorest parts of the world where human rights protection is often weak. Starting from a place of disadvantage hampers responsive capacity: poor levels of education, technical capacity, resource availability, and institutional support make lobbying for assistance and adaptation difficult.

There are three main reasons why international human rights law is of importance in this context. First, it sets out minimum standards of treatment that States must afford to individuals within their territory or jurisdiction, and provides a means of assessing which rights are compromised by climate change and natural disasters and which national authorities have primary responsibility for responding to those rights at risk. Secondly, if those rights are at risk, human rights law may provide a legal basis on which protection may be sought (and granted) in another State (known as ‘complementary protection’). Thirdly, if relocation occurs, human rights law requires minimum standards of treatment to be observed in the host State, and is thus relevant to the legal status afforded to those displaced.

At the outset it is important to appreciate that most movement related to disasters and climate change will occur within countries rather than across international borders, and States retain responsibility for the rights and needs of those within their territory. There are also soft law instruments, such as the Guiding Principles on Internal Displacement, which provide targeted guidance during the different phases of displacement.

With respect to those displaced across an international border, international law recognizes only a very small class as people whom other countries have an obligation to protect: ‘refugees’, ‘stateless persons’, and those eligible for complementary protection. This means that unless people fall within one of those categories, or can migrate lawfully for reasons such as employment, family, or education, they run the risk of interdiction, detention, and expulsion if they attempt to cross an international border and do not have a legal entitlement to stay in that other country.

Refugee law

There are a number of difficulties in applying refugee law in the present context. First, the refugee definition only applies to people who have already crossed an international border. Much of the anticipated movement in response to climate change will be internal, and thus will not meet this preliminary requirement.
Secondly, refugees must show that they fear persecution. This entails violations of human rights that are particularly egregious owing to their inherent nature or cumulative impact, and which derive from human actions. While the adverse impacts of climate change and disasters are harmful, they do not satisfy the concept of ‘persecution’ as this is currently understood in international and domestic law – even if those impacts are conceived of as breaches of socio-economic rights, which can amount to ‘persecution’ in certain circumstances.

Thirdly, even if it were possible to establish that the impacts of climate change and natural disasters amounted to persecution, the Refugee Convention poses an additional hurdle: persecution must be for reasons of an individual’s race, religion, nationality, political opinion, or membership of a particular social group. The impacts of climate change and natural disasters are largely indiscriminate, rather than tied to particular characteristics.

**Human rights law**

States’ non-refoulement obligations under international human rights law extend further than refugee law’s prohibition on return to persecution. Human rights law precludes States from removing people to a place where they would face a risk of torture or cruel, inhuman or degrading treatment, or arbitrary deprivation of life.

Could the impacts of climate change and natural disasters create such conditions, especially when they amplify underlying environmental fragility and/or socio-economic problems (such as resource scarcity)? For instance, if someone from a low-lying island is facing an increased risk of natural disasters, extreme water shortages, an inability to grow crops, and a heightened risk of illness, could they be protected from return?

Socio-economic harms can amount to inhuman or degrading treatment, especially cumulatively. Courts have recognized that ‘destitution’ or ‘dire humanitarian conditions’ can amount to inhuman or degrading treatment. However, they have carefully circumscribed the meaning of ‘inhuman or degrading treatment’ so that it cannot be used as a remedy for general poverty, unemployment, or a lack of resources or medical care except in exceptional circumstances. They have been especially reluctant to find that a person needs international protection unless a State deliberately withholds resources or actively occasions harm. It is therefore unlikely that a lack of basic services alone would substantiate a complementary protection claim unless this were to render survival on return impossible. Something else – a distinguishing feature making the lack of such services particularly deleterious to the applicant – would appear to be necessary.

Finally, the timing of a claim matters. It would seem that for protection to be forthcoming, harm needs to be relatively imminent. For example, in a case involving a man from Kiribati, the New Zealand decision maker held that there was no evidence to establish that the environmental conditions faced by the man on return to Kiribati would be ‘so parlous that his life [would] be placed in jeopardy, or that he and his family [would] not be able to resume their prior subsistence life with dignity.’ It was emphasized that the man was unable to show that there was a sufficient risk to his life ‘at the present time.’

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1 *AF (Kiribati)* [2013] NZIPT 800413, para 74.
2 Ibid, para 89.
Without considerable jurisprudential development, current complementary protection mechanisms do not offer assistance to people seeking to escape the future impacts of climate change. Like refugee law, complementary protection is essentially remedial and does not readily accommodate pre-emptive movement where conditions are anticipated to become dire. For this reason, complementary protection is not a viable solution for people trying to move before the situation becomes intolerable.

**Solutions**

While there are clearly protection gaps, we need to think about proactive interventions that can be put in place now, rather than just focusing on reactive approaches once displacement occurs.

First, communities that are given the resources for adaptation, including disaster risk reduction and management policies and sustainable development practices, may have less need to move permanently if disaster strikes. Similarly, the extent to which relief and rehabilitation is available to those displaced by a sudden-onset disaster, for example, will affect whether and how quickly they can return home and rebuild.

Indeed, evidence from the Nansen Initiative's Pacific Consultation last year showed that while Pacific islands are some of the most vulnerable to natural disasters and the impacts of climate change, especially in the longer-term, they embrace ‘self-help’: the need to strengthen community resilience, raise awareness and increase preparedness. Their goal is to develop initiatives to facilitate adaptation and enable people to remain in their homes for as long as possible, while also developing strategies to enhance mobility for those who wish to move.

So, secondly, planned migration can be an effective way to build long-term resilience. With in-built human rights safeguards, it may enable people to move away from the impacts of climate change without artificially treating them as being in need of international ‘protection’ (from a persecutory or abusive State).

Again in the Pacific, participants identified the need to educate at-risk and potential host communities about the prospect of population movements, and to ensure that communities could participate fully in consultations about possible migration strategies. They stressed the importance of training and education within their countries to equip people with the skills to work abroad, as well as to contribute to their own society while they remained there. In this regard, they encouraged States to review their admission and immigration policies and examine their citizenship laws to ensure that dual nationality was permitted, to help safeguard the cultural identity of those who migrate on a permanent basis.

Of course, the extent to which migration can function as a positive form of adaptation, rather than as a sign of vulnerability, will depend on people’s socio-economic status and the extent of government and other assistance available to them. This is why the legal structures that States put in place will ‘play a leading role in determining the degree to which migration is a form of adaptation, or an indicator of a failure to adapt’.\(^3\) Well-planned migration can lessen the likelihood of later humanitarian emergencies and displacement.

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\(^3\) Koko Warner, ‘Assessing Institutional and Governance Needs Related to Environmental Change and Human Migration’ (Study Team on Climate-Induced Migration, German Marshall Fund of the United States, June 2010) 8.
What is the Role of the UN Human Rights Council?

In recent years, the UN Human Rights Council has been extremely active in addressing the interface between global warming, environmental harm and the enjoyment of human rights, and the related issue of disaster-induced displacement.

In their respective roles as the Secretary-General’s Representative and the UN Special Rapporteur on the human rights of internally displaced persons, Walter Kälin and Chaloka Beyani have helped to frame our understanding about the impacts of climate change on displacement, and have called on countries to adopt human rights-based policies and frameworks on disaster preparedness and disaster risk reduction.

The Special Rapporteur on the human rights of migrants has produced detailed thematic reports on climate change and migration.

The Human Rights Council itself, in the context of its panel debate on human rights and climate change, and the OHCHR in the context of its report on human rights and climate change, have also considered the human rights implications of population movements triggered by climate change.

The question therefore is what the Human Rights Council might do to address the human rights implications of cross-border displacement in the context of sudden and slow-onset disasters. In addition to Special Rapporteurs mentioned already, the Independent Expert on human rights and environment would also make an important contribution. The priority is to identify the best ways in which the Council and its mechanisms can complement and support existing work, such as that being undertaken by the Nansen Initiative on disaster-induced cross-border displacement, UNHCR, IOM, the UNFCCC and others, rather than reinventing the wheel. As in so many other areas, human rights principles and norms have a vital role to play in strengthening international policy, but that does not mean the issue will be solved by the Council alone.

Perhaps a useful starting point in terms of assessing the current situation and informing potential next steps would be a Panel Debate in the Human Rights Council involving relevant Special Procedures and the other international organizations already mentioned.