CLIMATE CHANGE DISPLACEMENT AND INTERNATIONAL LAW

Side Event to the High Commissioner’s Dialogue on Protection Challenges
8 December 2010, Palais des Nations, Geneva

Jane McAdam*

Movement in response to environmental and climate change is a normal human adaptation strategy. The difficulty today is that people cannot simply migrate as and when they choose: national immigration laws restrict the entry of non-citizens into other countries. International law only recognizes a very small class of forced migrants as people whom other countries have an obligation to protect: ‘refugees’, ‘stateless persons’, and those eligible for complementary protection, discussed below. This means that unless people fall within one of those groups, or can lawfully migrate for reasons such as employment, family and education, then they run the risk of interdiction, expulsion and detention if they attempt to cross an international border and have no legal entitlement to stay in that other country.

1 Are people climate change ‘refugees’?

The term ‘refugee’ is a legal term of art. The legal definition of a ‘refugee’, and the rights and entitlements which a refugee is owed, are set out in the 1951 Refugee Convention relating to the Status of Refugees, read in conjunction with its 1967 Protocol. A ‘refugee’ is defined as someone who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, 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 nationality and being outside 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.1

First, the refugee definition only applies to people who have already crossed an international border. As noted above, much of the anticipated movement in response to climate change will be internal, and thus will not meet this preliminary requirement.

Secondly, there are difficulties in characterizing ‘climate change’ as ‘persecution’. ‘Persecution’ entails violations of human rights that are sufficiently serious, either

---

* BA (Hons) LLB (Hons) (Syd), DPhil (Oxon); Associate Professor, Faculty of Law, University of New South Wales; Research Associate, Refugee Studies Centre, University of Oxford.

because of their inherent nature, or because of their repetition (for example, an accumulation of breaches which, individually, would not be so serious but which together constitute a severe violation). It remains very much a question of degree and proportion. Whether something amounts to ‘persecution’ is assessed according to the nature of the right at risk, the nature and severity of the restriction, and the likelihood of the restriction eventuating in the individual case.

Although adverse climate impacts such as rising sea-levels, salination, and increases in the frequency and severity of extreme weather events (eg storms, cyclones, floods) are harmful, they do not meet the threshold of ‘persecution’ as this is currently understood in law. Part of the problem in the climate change context is identifying a ‘persecutor’. For example, the governments of Kiribati and Tuvalu are not responsible for climate change as a whole, nor are they developing policies which increase its negative impacts on particular sectors of the population. One might argue that the ‘persecutor’ in such a case is the ‘international community’, and industrialized countries in particular, whose failure to cut greenhouse gas emissions has led to the predicament now being faced. These are the very countries to which movement might be sought if the land becomes unsustainable. This is a complete reversal of the traditional refugee paradigm: whereas Convention refugees flee their own government (or private actors that the government is unable or unwilling to protect them from), a person fleeing the effects of climate change is not escaping his or her government, but rather is seeking refuge from—yet within—countries that have contributed to climate change. This presents yet another problem in terms of the legal definition of ‘refugee’: in the case of Tuvalu and Kiribati, the government remains able and willing to protect its citizens.

Finally, even if the impacts of climate change could be characterized as ‘persecution’, the Refugee Convention requires such persecution to be on account of an individual’s race, religion, nationality, political opinion, or membership of a particular social group. Persecution alone is not enough. The difficulty here is that the impacts of climate change are largely indiscriminate, rather than tied to particular characteristics such as a person’s background or beliefs. Although climate change more adversely affects some countries, by virtue of their geography and resources, the reason it does is not premised on the nationality or race of their inhabitants. An argument that people affected by its impacts could constitute a ‘particular social group’ would be difficult to establish, because the law

---

2 See also Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12, art 9. It may include a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: Migration Act 1958 (Cth), s 91R(2) (Australia).


requires that the group must be connected by a fundamental, immutable characteristic other than the risk of persecution itself.\(^5\)

So far, there have been a small number of cases in Australia and New Zealand where people from Tuvalu and Kiribati have sought to argue they should receive refugee protection from climate change impacts.\(^6\) They have all failed.

Two case examples illustrate the reasoning. In New Zealand, the Refugee Status Appeals authority explained:

> This is not a case where the appellants can be said to be differentially at risk of harm amounting to persecution due to any one of these five grounds. All Tuvalu citizens face the same environmental problems and economic difficulties living in Tuvalu. Rather, the appellants are unfortunate victims, like all other Tuvaluan citizens, of the forces of nature leading to the erosion of coastland and the family property being partially submerged at high tide.\(^7\)

In Australia, the Refugee Review Tribunal stated:

> In this case, the Tribunal does not believe that the element of an attitude or motivation can be identified, such that the conduct feared can be properly considered persecution for reasons of a Convention characteristic as required. … There is simply no basis for concluding that countries which can be said to have been historically high emitters of carbon dioxide or other greenhouse gases, have any element of motivation to have any impact on residents of low lying countries such as Kiribati, either for their race, religion, nationality, membership of any particular social group or political opinion.\(^8\)

Nonetheless, there remain limited exceptions where exposure to climate impacts or environmental degradation might amount to persecution for a Convention reason. One example would be where government policies target particular groups reliant on

---

\(^5\) Goodwin-Gill and McAdam, *op cit*, 79–80; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 341 (Dawson J). Note also the UNHRC discussion of ‘hunger refugees’ (First session of the Human Rights Advisory Council). Even if this test could be met by certain people displaced by climate change, the difficulty would remain in establishing ‘persecution’ in the context of climate-induced displacement.


\(^8\) *0907346 [2009]* RRTA 1168 (10 Dec 2009) para 51 (Australian Refugee Review Tribunal).
agriculture for survival, where climate change is already hampering their subsistence. Another example would be if a government induced famine by destroying crops or poisoning water, or contributed to environmental destruction by polluting the land and/or water. However, in most cases people displaced by climate change are unlikely to gain protection as refugees.

2 How does human rights law apply?

Climate change may impact on a number of human rights:

<table>
<thead>
<tr>
<th>Effects</th>
<th>Examples of rights affected</th>
</tr>
</thead>
<tbody>
<tr>
<td>Extreme weather events</td>
<td>Right to life</td>
</tr>
<tr>
<td>Increased food insecurity and risk of</td>
<td>Right to adequate food, right to be free from hunger</td>
</tr>
<tr>
<td>hunger</td>
<td></td>
</tr>
<tr>
<td>Increased water stress</td>
<td>Right to safe drinking water</td>
</tr>
<tr>
<td>Stress on health status</td>
<td>Right to the highest attainable standard of health</td>
</tr>
<tr>
<td>Sea-level rise and flooding</td>
<td>Right to adequate housing</td>
</tr>
</tbody>
</table>

However, only a handful of human rights principles are presently recognized as giving rise to a protection obligation on the part of a receiving country. Human rights law has expanded countries’ protection obligations beyond the ‘refugee’ category, to include people at risk of arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment. This is known in international law as ‘complementary

---


12 ICESCR, arts 11,12; Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) GA Res 34/180, 34 UN GAOR Supp (No 46) at 193, UN Doc A/34/46 (‘CEDAW’), art 14(2)(h); CRPD, art 28(2)(a); CRC, art 24(2)(c).


14 ICESCR, art 11; CERD, art 5(e)(iii); CEDAW, art 14(2)(h); CRC, art 27(3); Migrant Workers Convention, art 43(1)(d); CRPD, arts 9(1)(a), 28(1), 28(2)(d); UDHR, art 25(1).
protection’, because it describes human rights-based protection that is complementary to that provided by the 1951 Refugee Convention.

Although, in theory, any human rights violation could give rise to a non-refoulement obligation, in most cases ‘it will be virtually impossible for an applicant to establish that control on immigration was disproportionate to any breach’ of a human right. This is because unlike the absolute prohibition on returning someone to inhuman or degrading treatment, most other human rights provisions permit a balancing test between the interests of the individual and the State, thus placing protection from refoulement out of reach in all but the most exceptional cases.

While it may be therefore attempted to re-characterize the violated human right—for example, violation of the right to an adequate standard of living—as a form of inhuman treatment, which is a right giving rise to international protection, it is doubtful whether such violations which are not inflicted by the State being fled will be seen as giving rise to protection, or be regarded as constituting the kind of ill-treatment recognized to date as giving rise to a protection obligation on the part of a third State. Courts have carefully circumscribed the meaning of ‘inhuman or degrading treatment’ so that it cannot be used as a remedy for general poverty, unemployment, or lack of resources or medical care except in the most exceptional circumstances.

Although existing jurisprudence does not preclude climate impacts from being recognized as a source of inhuman treatment (for example), it would need to be substantially developed before such harms would fall clearly within the scope of this concept. Furthermore, for policy reasons (such as to prevent ‘floodgates’ opening) some domestic complementary protection schemes deliberately ‘carve out’ protection exceptions where the risk is faced generally by the population as a whole, requiring the applicant to show an individual risk.

Further, the traditional western approach of individualized decision-making about protection on technical legal grounds seems highly inappropriate to the situation of climate-induced displacement, in which the responsibility for displacement is highly diffuse (attributable to a large number of polluting States over many years, rather than to direct ill-treatment of a particular person by a certain government) and the numbers of

---

those displaced may require group-based rather than individualized solutions. Additionally, unlike traditional protection, which responds to flight from harm that is inflicted or sanctioned by the home State, protection sought for climate-induced displacement is the inverse: people may demand protection in industrialized States precisely because they are seen to have a responsibility to assist those who have suffered as a result of their emissions over time.\(^\text{20}\)

3 Will people be ‘stateless’?\(^\text{21}\)

There has been considerable media attention given to the so-called ‘disappearing States’ or ‘sinking islands’ phenomenon—whole countries that could be submerged by rising sea levels.\(^\text{22}\) The science on rising sea levels was discussed in chapter one. The question arises whether inhabitants of such countries would be recognized as ‘stateless persons’ under international law if they had not acquired any other nationality (for example by moving to and becoming citizens of another country).

In international law, a ‘State’ exists if a defined territory has a permanent population, an effective government, and the capacity to enter into relations with other countries. The ‘disappearing islands’ rhetoric assumes that the loss of territory through submergence of land will signal the end of the country. Small island countries are, however, likely to become uninhabitable well before they physically disappear. This means that the absence of population, and with it, the loss of effective government, are likely to be the first signs that a country has started to ‘disappear’ as a legal entity.

However, the international law rules on the extinction of countries have never been tested in this way before. International law contemplates the formal dissolution of a country in cases of absorption (by another country), merger (with another country) and dissolution (with the emergence of successor countries).\(^\text{23}\) It has never had to deal with the potential extinction of a country because of physical disappearance.

---


\(^{21}\) For a detailed analysis of this issue, see J McAdam, “‘Disappearing States’, Statelessness and the Boundaries of International Law” in J McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing, Oxford, 2010).


\(^{23}\) Succession can be described as a ‘change in sovereignty over territory’: MCR Craven, ‘The Problem of State Succession and the Identity of States under International Law’ (1998) 9 *European Journal of International Law* 142, 145.
The legal definition of a ‘stateless person’ in article 1 of the 1954 Convention relating to the Status of Stateless Persons is deliberately restricted to people who are ‘not considered as a national by any State under the operation of its law’. In other words, this relates to a country that has actually denied or deprived someone of nationality.

As the 1954 statelessness treaty stands, it would not protect people whose country is at risk of disappearing, unless the country formally withdrew nationality from those people (which, as a matter of human rights law, it is obliged not to do). But if a country is no longer recognized as existing, then its former population would fall within the ‘stateless person’ definition, provided they had not acquired a new nationality in the meantime. This would oblige signatory countries to provide to such people within their territory the rights contained in that treaty, including ‘as far as possible facilitat[ing] the[ir] assimilation and naturalization’.

The practical benefits of this remedy are limited, however. First, it remains unclear in international law when countries would be prepared to regard a pre-existing country as having ‘disappeared’. This is because history shows that the international community tends to presume the continuity of existing countries, even when some of the formal criteria of statehood start to wane. Secondly, relying on the statelessness treaty is reactive rather than proactive, because it is only ‘triggered’ once a person is physically present in the territory of another country. This means that people have to leave their homes and get to a signatory country before being able to claim its benefits. Finally, the treaty is very poorly ratified, and most countries do not have any formal procedures for determining the legal status of stateless persons. Thus, there is no clear means by which the treaty’s benefits could be accessed.

However, the advantage of the statelessness paradigm is that UNHCR has a mandate to prevent and reduce statelessness. This means it is empowered to advocate on behalf of affected populations and talk to States about preventing statelessness and assisting

---

24 Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 (1954 Convention), art 1(1): ‘For the purpose of this Convention, the term “stateless person” means a person who is not considered as a national by any State under the operation of its law.’
25 1954 Convention, art 32.
stateless people. By contrast, it has no mandate with respect to people displaced by climate change in other contexts, since they are not ‘refugees’.

4 Conclusion

Legal and policy responses must involve a combination of strategies, rather than an either/or approach. Physical adaptation needs to be financed and developed, and migration options, including opportunities for economic, family and educational migration, need to be accepted as a rational and normal adaptation strategy, rather than as a sign that adaptation has failed. While movement can be a sign of vulnerability, it can also be a means to achieve security and attain human rights, especially when it is able to be planned.

27 Though poorly ratified and implemented, the 1961 Convention on Reduction of Statelessness obliges States to ensure that any transfer of territory does not render people stateless: 1961 Convention, art 10. See also the ILC’s Draft Articles on Nationality, above n 91, art 1 of which contains a ‘right to nationality’; art 4 requires States to take measures to prevent statelessness as a consequence of succession.