

Climate change, natural disasters and displacement: a multi-track approach to filling the protection gaps

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Abstract

Millions are displaced by climate-related disasters each year, and this trend is set to increase as climate change accelerates. It raises important questions about how well existing instruments actually protect people driven from their homes by climate change and natural disasters. This article first examines current protection instruments and points out gaps in them. There follows an exploration of various proposals for filling those protection gaps, with the focus on cross-border natural-disaster-induced displacement. A multi-track approach is recommended, including context-oriented and dynamic interpretation of existing law, and creation of new law. Adhering to the principle of non-refoulement, and focusing on whether return is possible, permissible,

or reasonable, could be a realistic way to begin developing protection regimes for victims of natural-disaster-induced displacement.



In its fourth assessment report, published in 2007, the Intergovernmental Panel on Climate Change (IPCC) established that human-induced climate change is accelerating and is already having a severe impact, including an increase in certain natural hazards.¹ Furthermore, a study by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) and the Internal Displacement Monitoring Centre of the Norwegian Refugee Council (NRC) indicates that millions are already being displaced by climate-related natural disasters each year.²

This development raises important questions about how well existing law, as well as national, regional, and international regimes, protects people displaced by climate-related disasters in particular and natural disasters in general. In this article, we identify the gaps in these protection regimes and discuss a range of options for filling them. We conclude that a multi-track approach to exploring those options and in particular to building on the concept of return may prove the most effective solution.

While recognizing that a continuum exists between voluntary and forced migration and that much of the human mobility in the context of climate change may be considered voluntary (or at least in a grey zone between voluntary and forced), we choose to focus on displacement and forced migration. All migrants have certain protection needs, but forced migrants have been considered a category apart in international law and in practical humanitarian work.³ Nonetheless, the continuum between voluntary and forced raises challenges such as how to determine when a migrant's leaving his or her home must be considered a forced action.

A focus on climate-change-related displacement can be justified in order to establish climate change as a major cause of displacement, to identify the broader responsibility for displacement, to mitigate its effects, and to fund the work needed for this mitigation. From a perspective of practical security and human rights, however, there is normally no compelling reason to distinguish between climate-related and other natural disasters. We have therefore shifted

- 1 Intergovernmental Panel on Climate Change, *Climate Change 2007: The Synthesis Report*, p. 30, available at: http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_synthesis_report.htm (last visited 20 September 2010).
- 2 Office for the Coordination of Humanitarian Affairs (OCHA) and the Internal Displacement Monitoring Centre (IDMC)/Norwegian Refugee Council, *Monitoring Disaster Displacement in the Context of Climate Change*, Geneva, 2009, p. 15.
- 3 See, for example, the definition of an internally displaced person as someone 'forced or obliged to flee or to leave their homes or places of habitual residence', in *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39, Addendum: Guiding Principles on Internal Displacement*, 11 February 1998, UN Doc. E/CN.4/1998/53/Add.2 (hereafter 1998 UN Guiding Principles on Internal Displacement), Introduction: Scope and Purpose, para. 2.

between discussing climate change in particular and natural disasters more broadly.

Linking climate change and displacement

There are major methodological challenges involved in establishing the link between climate change and displacement. People leave their homes for a complex set of reasons,⁴ and there is ‘multi-causality’ even in forced migration. Nevertheless, while examining some of the current and predicted effects of climate change, a number of researchers and international institutions have arrived at the conclusion that climate change will probably contribute to ‘major forced displacements’ over time.⁵

One major impact of climate change is the increased frequency and severity of certain hazards, as well as changes in their time-frame and location.⁶ Hazards can combine with human vulnerability to produce disasters, such as floods and droughts. In other words, there is a crucial human element involved in the occurrence of ‘natural’ disasters. We can call them climate-related disasters since climate change can influence their frequency, severity, time, and location; storms, floods, and droughts all belong to this category. All natural disasters can potentially result in forced displacement. The number of recorded natural disasters has doubled from approximately 200 to over 400 per year over the past two decades.⁷ The majority are climate-related disasters. According to the UN Emergency Relief Coordinator, this situation of more frequent and severe disasters may be ‘the new normal’.⁸

Although there is broad acceptance that voluntary and forced migration is likely to increase as a consequence of climate change, it is difficult to estimate the scale. In 2009, OCHA worked with the Internal Displacement Monitoring Centre of the NRC in a first attempt to assess the degree of displacement due to sudden-onset natural disasters. They found that as many as thirty-six million people had been displaced by such disasters in 2008, over twenty million by climate-related sudden-onset disasters alone.⁹ Estimating displacement due to slow-onset disasters such as drought and sea-level rise is much more challenging because it has a more

4 The concept of ‘environmental refugees’ or ‘climate refugees’ has been criticized by migration academics. This is mainly because climate change, migration, and displacement are not phenomena with only one cause. Moreover, the refugee concept has a restricted definition, focusing on persecution as the main grounds for fleeing, and is limited to individuals who have crossed an internationally recognized border. The limited nature of the refugee concept in itself makes the term ‘climate refugee’ somewhat unsuitable.

5 David Hodgkinson, Tess Burton, Heather Anderson, and Lucy Young, ‘Copenhagen, climate change “refugees” and the need for a global agreement’, in *Public Policy*, Vol. 4, No. 2, 2009, p. 159.

6 IPCC, above note 1, p. 30.

7 See Emergency Event Database, available at: <http://www.emdat.be/natural-disasters-trends> (last visited 20 September 2010).

8 OCHA, *Opening remarks by Sir John Holmes, Under-Secretary General for Humanitarian Affairs and Emergency Relief Coordinator at the DIHAD 2008 Conference*, 8 April 2008, available at: <http://www.reliefweb.int/rw/rwb.nsf/db900sid/YSAR-7DHL88?OpenDocument> (last visited 20 September 2010).

9 OCHA and IDMC/NRC, above note 2, p. 15.

complex set of causes and because there is a continuum between voluntary and forced migration.¹⁰ Nevertheless, the numbers quoted above give an indication of the scale of displacement caused by climate-related disasters today. While offering its own estimate, the Stern Review points out that the number of displaced people will ‘depend on the level of investment, planning and resources’.¹¹

In the near future at least, displacement is likely to go on being mostly internal, and in some cases regional.¹² All countries will eventually be affected by climate change, but some are more immediately and directly exposed than others. In its report, the IPCC highlights dangers associated with the Arctic, Africa, small islands, and the Asian and African mega-deltas, while recognizing that ‘within other areas, even those with high incomes, some people (such as the poor, young children and the elderly) can be particularly at risk, and also some areas and some activities’.¹³ Much sudden-onset, natural-disaster-induced displacement is temporary if there is effective rehabilitation and recovery, but some displacement becomes permanent.¹⁴

This research on climate change, disasters, and displacement raises central questions about the need to protect displaced individuals and entire populations. The protection needs of people displaced by natural disasters have not yet been fully explored and understood. However, one of the main ideas behind the 1998 UN Guiding Principles on Internal Displacement was that, regardless of the reason for displacement, the people concerned often have a particular set of needs.¹⁵ While recognizing that much work is needed to identify protection needs, we therefore feel justified in examining more generally the current protection regime, identifying gaps and looking at possible solutions for filling those gaps in the context of climate change.

Gaps in protection for people displaced in connection with climate change and natural disasters

Typology of climate-change effects, displacement, and protection

Setting out the various types of climate change, the main effects, and the displacement that results from them is a useful starting point for an overview of possible protection regimes, as well as the gaps associated with climate change and

10 When is the land so degraded that we consider the small-scale farmer to have been forced to leave it – and not merely to have ‘chosen’ to leave it – for a better life elsewhere? Is the degradation mainly due to climate factors or to land use, poor irrigation, economics, and governance?

11 UK Treasury, *Stern Review on the Economics of Climate Change*, Cambridge University Press, Cambridge, 2005, p. 112.

12 See, for example, Inter-Agency Standing Committee (IASC), *Climate Change, Migration and Displacement: Who will be affected?*, Working paper submitted by the informal group on Migration/Displacement and Climate Change of the IASC, 31 October 2008, p. 1.

13 IPCC, above note 1, p. 52.

14 See, for example, IASC, above note 12, p. 1.

15 See *1998 UN Guiding Principles on Internal Displacement*, above note 3.

natural disaster.¹⁶ The situations described may have more than one cause, and there are situations in which several of these scenarios may overlap.

Scenario 1: Climate change increases the frequency and/or severity of sudden-onset natural disasters and perhaps their time-frame and location

In this scenario, it is assumed that displacement will mostly be internal and temporary, depending on the effectiveness of humanitarian response and the speed of recovery. The 1998 UN Guiding Principles on Internal Displacement (a soft-law instrument) should therefore be examined to see whether they offer protection. Since the Guidance Principles recognize disaster-induced displacement, protection and assistance should be provided in accordance with these principles.¹⁷

The situation differs for those who cross a border. Article 1A of the 1951 Convention relating to the Status of Refugees, as modified by the 1967 Protocol, does not clearly apply to people driven from their homes by natural disasters, since refugee status is linked to a well-founded fear of persecution for certain specific reasons. However, contextual and dynamic interpretations explored later in this article show that some of those who are displaced across borders could qualify for refugee status and protection.

Scenario 2: Climate change increases the frequency and/or severity of slow-onset natural disasters and perhaps changes their time-frame and location

In this scenario, part of the population may decide to migrate to other parts of the same country. Some may also migrate abroad. Later, conditions may deteriorate to a point where it becomes impossible for people to remain in their homes and they are actually displaced.

The 1998 UN Guiding Principles on Internal Displacement could be applied in some cases where it is established that a drought or similar event has displaced people. However, it has been argued that the Guidance Principles were never meant to meet, and cannot really meet, the particular needs of people displaced by slow-onset disasters such as droughts.¹⁸ Furthermore, it is difficult to

16 The typology is based on that presented in IASC, above note 12, pp. 2–3; and Vikram Kolmannskog, ‘The point of no return: exploring law on cross-border displacement in the context of climate change’, in *Refugee Watch*, Vol. 34, December 2009, pp. 27–42.

17 See 1998 UN Guiding Principles on Internal Displacement, above note 3, Principle 2.

18 One case study indicated that the protection challenges are more similar to those faced by migrants than displaced persons. For example, drought is often characterized by family separation, with the male head of the household leaving in search of work, while in conflicts and sudden-onset disasters, entire families are often forced to move. A senior staff member of an international humanitarian agency has suggested that the term ‘distress migration’ is more appropriate than ‘displacement’. Perhaps the tipping point is when the entire family leaves, i.e. when there is no longer any possibility of survival at home. Then we can speak of forced displacement. See Vikram Kolmannskog, *Climate Change, Disaster, Displacement and*

establish the link between drought and displacement, as the movement is likely to be slow and in phases; it may be seen as voluntary, and the decision to finally leave the place of origin will be based on a number of factors. The distinction between voluntary migration and forced displacement is blurred in this scenario, and it is hard to determine whether people fall into the category of internally displaced persons or that of migrants. However, many migrants are similar to internally displaced persons: they are citizens of the state in which they are living and as such have certain rights and are entitled to certain treatment. But their needs and the response to those needs are not so clearly addressed in existing international law and policy.

People who are displaced or migrate across internationally recognized borders face the same situation regarding international refugee law as discussed in Scenario 1. Some may be admitted to a foreign country through legal migration, but for many this may not be an option, and assistance and protection may be required.

The case of the small island states, where a whole population could potentially be forced to leave its country, is clearly relevant to the discussion above. Sea-level rise is a gradual process, and it is difficult to draw a line here between migration and displacement. Thus, this is a case for which we find no clear solution in international law today. It remains unclear whether people who lose their state owing to climate change would be considered stateless. According to Article 1 of the 1954 Convention Relating to the Status of Stateless Persons, a stateless person is 'not considered as a national by any State under the operation of its law'.¹⁹ According to McAdam and Saul, however, the island citizens would not be protected because the definition of statelessness is premised on the denial of nationality through the operation of the law of a particular state, rather than through the disappearance of a state altogether.²⁰ Furthermore, current legal regimes are hardly sufficient to address the very specific needs of such islanders, including relocation.

Scenario 3: Climate change could cause an increase in environmental conflicts

It has been argued that the effects of climate change, such as sudden-onset and slow-onset natural disasters, can trigger conflict, through competition over scarce resources, for example.²¹ In this scenario, the 1998 UN Guiding Principles on Internal Displacement should be applied to people who are internally displaced.

Migration: Initial Evidence from Africa, New Issues in Refugee Research, Research Paper No. 180, Office of the United Nations High Commissioner for Refugees (UNHCR), December 2009, p. 11.

19 Convention relating to the Status of Stateless Persons, adopted on 28 September 1954 by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 526 A (XVII) of 26 April 1954, Art. 1.

20 Jane McAdam and Ben Saul, *An Insecure Climate for Human Security? Climate-induced Displacement and International Law*, Sydney Centre Working Paper No. 4, University of Sydney, 2008, available at: http://sydney.edu.au/law/scil/documents/2009/SCILWP4_Final.pdf (last visited 28 September 2010).

21 See, for example, Nils Petter Gleditsch, 'Environmental conflict: Neomalthusians vs. Cornucopians', in Hans Günter Brauch *et al.* (eds), *Security and the Environment in the Mediterranean: Conceptualising Security and Environmental Conflicts*, Springer Verlag, Berlin, 2003, p. 478.

Conflict is explicitly mentioned in the descriptive definition of internally displaced persons,²² and the conflict's cause is not crucial when it comes to protection in relevant law.

People in this scenario who are displaced across internationally recognized borders can, in some cases, gain refugee status or complementary, possibly temporary, protection status.²³ Regional instruments such as the Organization of African Unity (OAU) Convention and the 1984 Cartagena Declaration on Refugees include as refugees those fleeing from 'generalised violence'.²⁴ The European Union (EU)'s Temporary Protection Directive provides temporary protection in the event of a mass influx of persons fleeing armed conflict,²⁵ and the EU Qualification Directive extends subsidiary protection if there is a 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'.²⁶ However, apart from those countries that have adopted the OAU Convention and the EU directives, many states do not yet recognize people fleeing generalized violence as refugees or persons qualifying for complementary protection.

Scenario 4: Climate-change-related measures such as adaptation and mitigation efforts result in displacement

Measures to mitigate the effects of climate change and adapt to them can result in displacement. One trend that needs attention is that of authorities seeking to move people and using climate change and natural disasters either as a legitimate reason or simply as a pretext.²⁷ For example, in some of the countries affected by the 2004 Asian tsunami, there were reports that buffer zones were established in a discriminatory manner to allowing construction of tourism facilities, while local residents were not allowed to return and rebuild their homes.²⁸

22 See 1998 *UN Guiding Principles on Internal Displacement*, above note 3, Introduction: Scope and Purpose, para. 2.

23 V. Kolmannskog, above note 16, p. 32.

24 Cartagena Declaration on Refugees of 22 November 1984, reproduced in Annual Report of the Inter-American Commission on Human Rights, 1984–1985, OEA/Ser.L/V/II.66, doc. 10, rev. 1, pp 190–193, Art. III(3); OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Addis Ababa, Ethiopia, 10 September 1969, Art. 1(2).

25 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Art. 2(c)(i).

26 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, Art. 15(c) in combination with Art. 2(e).

27 Vikram Kolmannskog, *Dignity in Disasters and Displacement: Exploring Law, Policy and Practice on Relocation and Return in the Context of Climate Change*, paper prepared for the Global Environmental Change and Human Security Synthesis (GECHS) Conference, 'Human Security in an Era of Global Change', University of Oslo, 22–24 June 2009, available at: <http://www.nrc.no/?aid=9411918> (last visited 20 September 2010).

28 Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin, *Protection of Internally Displaced Persons in Situations of Natural Disasters*, A/HRC/10/13/Add.1, 5 March 2009, para. 58.

In this scenario, relevant protection standards for internally displaced persons can be found in the 1998 UN Guiding Principles on Internal Displacement. These include provisions to ensure participatory, rights-based planning and non-discrimination.²⁹ If people are permanently relocated, certain development principles could also apply. Of particular relevance is the World Bank's Operational Policy 4.12 on Involuntary Resettlement of January 2002.

The area of climate measures and displacement needs further scrutiny for clarification of law and policy. As for people who cross a border owing to climate-related measures, their situation and needs are even less adequately accounted for.

Summary of protection gaps

In summary, we find no protection gaps in two of the scenarios set out above: internal displacement as a result of sudden-onset natural disasters and internal displacement as a result of conflict. Both scenarios are clearly covered by the 1998 UN Guiding Principles on Internal Displacement. In the following search for ways to fill the protection gaps, the focus is on cross-border displacement caused by natural disaster and excludes the particularities of statelessness. It includes both slow- and sudden-onset disasters.

Filling the gap in cross-border displacement caused by natural disaster

Amending the 1951 Convention relating to the Status of Refugees

Since many of the people displaced across borders do not seem to qualify as either stateless persons or refugees, some advocates for their protection have suggested amending the 1951 Convention relating to the Status of Refugees. This might seem like the most straightforward way of dealing with the cross-border protection gaps and a solution that would have the advantage of securing rights within a well-recognized and established legal instrument. However, critics – including the UN High Commissioner for Refugees (UNHCR) and the NRC – have pointed out that any initiative to amend the refugee definition, as agreed in the 1951 Convention, would involve the risk of a full renegotiation of the Convention. In the current political climate, any renegotiations could undermine the international refugee protection regime altogether.³⁰ Seeking to expand the definition of a refugee, no matter how pure the expanders' intentions, could result in less protection for those who find refuge through today's Convention. Any such weakening should be avoided; therefore, other options must be explored. Moreover, concepts and

29 1998 UN Guiding Principles on Internal Displacement, above note 3, Principles 6(2)(d), 7(1), 15(d), 28, and 29, and elsewhere.

30 See, for example, UNHCR, *Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective*, Geneva, 2009, p. 9.

mechanisms set out in the 1951 Convention relating to the Status of Refugees, such as the persecution concept and the idea that refugee status substitutes for protection from the home states, may not be suitable in the context of climate change and natural disaster.

Inclusion in the United Nations Framework Convention on Climate Change or other climate agreement

The 1992 UN Framework Convention on Climate Change (UNFCCC) provides the common international framework within which to address the causes and consequences of climate change. The current 1997 Kyoto Protocol commitments run until 2012 and the states are still negotiating what should come after that. While the Kyoto Protocol focuses on reducing greenhouse gas emissions (climate-change mitigation), a successor agreement is also supposed to address the consequences of climate change that can no longer be avoided (climate-change adaptation).³¹

Clearly, a climate-change agreement could be crucial to preventing disasters and displacement, including displacement resulting from climate measures. In terms of protection during displacement, the UNFCCC process has less to offer. Historically, it has had little focus on remedies and there has been a reluctance to incorporate human rights issues. However, a climate-change agreement could also play a certain role in protecting people who are migrating or have been displaced.³² Activities related to migration and displacement qualify for funding in the latest draft texts. Nevertheless, while it is important to recognize migration and displacement and to ensure funding and co-operation, it is unlikely that we will find a full solution here.

Creating a new convention

Several authors argue that the protection gaps would be best filled by creating a new international convention. Hodgkinson, Burton, Young, and Anderson argue that neither the UNFCCC nor current human rights and refugee-protection instruments are appropriate for dealing with the issue.³³ For the operation and application of a new climate-change-displacement convention, the authors stress the need to prove that climate change causes the displacement in question. They emphasize that, although the new treaty should include people displaced by a sudden-onset climatic event, current science is unable to attribute a sudden climatic event directly to climate change and that applying complex analysis to sudden-onset disasters could hamper relief operations and programmes. A new instrument would therefore, according to the authors, more readily apply to slow-onset disasters than to sudden-onset disasters. However, displacement caused by

31 See Bali Action Plan, Decision 1/CP.13 FCCC/CP/2007/6/Add.1, 14 March 2008, para. 1(c).

32 Vikram Kolmannskog, 'Towards a humanitarian climate change agreement', in *Forced Migration Review*, Vol. 33, September 2009, p. 72.

33 D. Hodgkinson *et al.*, above note 5, p. 159.

slow-onset disasters is often more complex than that of sudden-onset disasters, thereby further complicating causality. The possible lengthiness of determining the cause means that there would be a risk of the people displaced spending long periods with their protection needs unaddressed.

Bonnie Docherty and Tyler Giannini have suggested a similar comprehensive instrument that would stipulate guarantees of assistance, shared responsibilities between host and home state, and the right to protection and humanitarian aid.³⁴ The definition of ‘climate change refugee’ applied by Docherty and Giannini encompasses both slow- and sudden-onset disasters. The instrument would allow the determination of refugee status on a group basis, while still allowing individual claims. This is because climate change affects entire communities and group determination is cost-efficient, ensures equal application, and avoids repeated debate over the cause of an event.³⁵

In addition to establishing causality (discussed above), a major challenge is the probable lack of political will today to establish a comprehensive framework with strong and clear rights for the displaced. Moreover, the way that the existing international architecture is currently functioning raises questions about how effective it would be to add new institutions to it. Securing protection for just those displaced by climate-related disasters while excluding people displaced by other natural disasters also seems hard to justify. As pointed out above, there may be little difference in practical terms for a person fleeing a climate-related flood and a person fleeing a non-climate-related earthquake, though responsibility, funding, and other overarching issues may differ greatly.

Creating or amending regional conventions

There is a trend in law to create more and stronger regional treaties and treaty-based bodies. Developing regional treaties could be one way to fill protection gaps in the context of climate change and natural disasters. Climate change will certainly affect different parts of the world in different ways, and there may be more political will at the regional level to deal with impact. For example, Justice Susan Glazebrook argues that a regional approach in the Asia-Pacific area is essential for adaptation measures and for planning disaster recovery and relief, including the responsibility for relocating displaced people in the region and ensuring that their rights are promoted and protected.³⁶

A recent and relevant addition is the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) adopted in October 2009, which builds on the 1998 UN Guiding Principles on Internal Displacement and explicitly mentions climate

34 Bonnie Docherty and Tyler Giannini, ‘Confronting a rising tide: a proposal for a convention on climate change refugees’, in *Harvard Environmental Law Review*, Vol. 33, No. 2, 2009, p. 349.

35 *Ibid.*, pp. 374–375.

36 Susan Glazebrook, ‘Human rights and the environment’, in *Victoria University of Wellington Law Review*, Vol. 40, 2009, p. 293.

change.³⁷ There are also regional instruments with broader definitions of refugees. The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa includes as refugees persons forced to flee ‘events seriously disturbing public order’.³⁸ Although there have been examples in practice of permitting people displaced by disasters across borders to remain temporarily, it seems that in most cases, however, African governments have not characterized this as an obligation arising under the OAU Convention.³⁹ In Latin America, the 1984 Cartagena Declaration on Refugees, which has inspired the legislation of many states in the region, also includes as refugees (in Article 3) persons forced to flee ‘other circumstances which have seriously disturbed public order’. However, the International Conference on Central American Refugees does not understand the ‘other circumstances’ to include natural disasters.⁴⁰ Jurisprudence based on these regional definitions is scarce and there is a need to develop doctrine and guidance to help states interpret these criteria. We may also see a change in practice and interpretation, as climate change influences the occurrence of disasters and the resulting displacement. The regional conventions could also be amended. Similarly, Kolmannskog and Myrstad argue for inclusion of natural-disaster-related displacement in the directives being developed as part of the Common European Asylum System.⁴¹

Context-oriented and dynamic interpretation of existing refugee law

Kolmannskog has argued elsewhere for dynamic and context-oriented interpretations of existing law to address climate-change-induced displacement.⁴² For example, it may be too hasty to say that people displaced in the context of climate change and natural disaster are never covered by the refugee definition. Serious or systematic human rights violations are normally considered to amount to persecution,⁴³ and experience shows that both natural disasters and conflict are situations prone to human rights violations. For example, the recognition that

37 Kampala Convention, Art. 5(4).

38 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, above note 24, Art. 1(2).

39 Alice Edwards, ‘Refugee status determination in Africa’, in *African Journal of International and Comparative Law*, Vol. 14, 2006, pp. 204–233.

40 Hector Gros Espiell, Sonia Picado, and Leo Valladares Lanza, *Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America*, prepared by the Group of Experts for the International Conference on Central American Refugees pursuant to specific objective (a) in paragraph 3 of the San Salvador Communiqué on Central American Refugees of 9 September 1988, p. 11, available at: www.acnur.org/biblioteca/pdf/3668.pdf (last visited 20 September 2010).

41 Vikram Kolmannskog and Finn Myrstad, ‘Environmental displacement in European asylum law’, in *European Journal of Migration and Law*, Vol. 11, No. 4, 2009, pp. 313–326.

42 See, for example, Vikram Kolmannskog, ‘Climates of displacement’, in *Nordic Journal of Human Rights*, Vol. 26, No. 4, 2008, pp. 302–320; V. Kolmannskog, above note 16; and V. Kolmannskog and F. Myrstad, above note 41.

43 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva, 1992, paras. 51–53.

there is scope for human rights violations, discrimination, and persecution in the wake of disaster, as exemplified by the aftermath of the 2004 Asian tsunami, led to the IASC Operational Guidelines on Human Rights and Natural Disasters. Where the victims of natural disasters flee because their government has consciously withheld or obstructed aid in order to punish or marginalize them on one of the five grounds, at least the 1951 Convention and the UNHCR's mandate will be applicable. This has also been confirmed by the UNHCR.⁴⁴

In addition, there are often several, separate reasons why a person moves, and 1951 Convention refugees may flee in the context of disaster while the well-founded fear of persecution exists independently. Disasters seldom come alone. Some Somalis in refugee camps in Kenya reported having fled both drought and conflict, and the local UNHCR staff stated that they would not 'split hairs' when drought and conflict coincides.⁴⁵

However, in cases of natural-disaster-induced displacement where a 'well-founded fear of persecution' is less obvious, or even completely lacking, the need for protection may still be unmet in many cases. Furthermore, the main challenge for a context-oriented and dynamic interpretation of existing refugee law comes from the general political climate for refugees today. There is no global refugee court, and even if there are increasingly effective regional mechanisms, countries retain much discretion in interpreting refugee law. Today, countries are defining in an ever narrower manner whom they are prepared to recognize as a refugee.

The principle of non-refoulement set out in the 1951 Convention relating to the Status of Refugees prohibits the expulsion or return ('*refoulement*') of a refugee 'in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.⁴⁶ This fundamental principle is widely regarded as part of customary international law and has counterparts in human rights law. However, it is also being challenged through interception and rejection at borders.

Context-oriented and dynamic interpretation of existing human rights law

A partial solution to the normative protection gap may be found in broader human rights law pondering the possibility, permissibility, and reasonableness of return.⁴⁷

44 UNHCR, above note 30, p. 7.

45 V. Kolmannskog, above note 18, p. 9.

46 Convention Relating to the Status of Refugees, 28 July 1951, Art. 33(1).

47 V. Kolmannskog, above note 42, pp. 312–316; V. Kolmannskog, above note 16, pp. 32–35. For an interesting and challenging perspective on the relevance of human rights law to migration, see Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law*, Cambridge University Press, Cambridge, 2008. Dauvergne argues that the realm of immigration law has become an important theatre in terms of reaffirming state sovereignty in a globalizing world, and that we should not expect human rights norms to be of much use to illegal immigrants, who are the main targets of these reassertions of sovereignty. She suggests that a more promising alternative is to couch legal arguments on

We may see cases where a person's return to his or her place of origin at some point becomes impossible owing to climate change and/or disaster. The island states may be an extreme example. In other cases, disasters are likely to affect infrastructure, which may be necessary for a return. Forced return may also not be allowable because it is considered to breach a fundamental right.

In human rights law, non-refoulement is an absolute and general ban on sending a person, independent of conduct or status, to places where they risk certain rights violations. Most agree that the prohibition of torture is a peremptory norm, but there is disagreement regarding the extent to which one is protected by customary law against ill-treatment and other human rights violations.⁴⁸

No matter the degree to which a disaster has been created by humans, it is doubtful (to say the least) that it can meet the international definition of torture as the infliction of severe pain or other suffering by a public official for one of the purposes listed in the torture conventions, such as punishment or obtaining a confession. It could also seem far-fetched to call a disaster cruel, inhuman, or degrading treatment. In some cases, rather than claiming that an asylum-seeker forced to return to his or her country of origin is being returned to the infliction of ill-treatment, the return *itself* could arguably constitute ill-treatment, perhaps even torture.⁴⁹ Let us illustrate this with an example: How should we consider a case where a public official leaves a person to fend for himself with hardly any means in the middle of a desert?

Generally, courts have carefully circumscribed the meaning of 'inhuman or degrading treatment', but there are cases where the concept of 'inhuman treatment' has been interpreted rather progressively. In the case of *D. v. the United Kingdom*, the European Court of Human Rights considered that returning an HIV-infected person to St Kitts would amount to 'inhuman treatment' owing, among other things, to the lack of sufficient medical treatment, a social network, a home, or any prospect of making a living.⁵⁰ During and after disasters such as Hurricane Mitch (Central America, 1998) and Cyclone Nargis (Myanmar, 2008), both people's homes and vital infrastructure were destroyed or damaged, which hindered the provision of basic essentials such as clean water, electricity, and food. One could consider that people with particular vulnerabilities are protected against having to return to such circumstances. Clearly, law relating to the permissibility of return is relevant in the climate-change context.

behalf of illegal immigrants not in terms of human rights norms but rather in terms of the rule of law. While we believe that human rights may be built on for a solution in the specific context of climate change and natural disasters, we conclude that the risk of an overly broad scope for interpretation emerging means that an explicit mention of natural disasters, or something similar, in law governing return better ensures effective protection.

48 See, for example, International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment (Trial Chamber), 10 December 1998, paras. 144, 153–157. The ICTY stated that there is a *jus cogens* for the prohibition against torture, that there is no allowance for states to make reservations, and that is considered to bind all states.

49 V. Kolmannskog, above note 16, p. 33.

50 European Court of Human Rights, *D. v. the United Kingdom*, Judgment of 2 May 1997, Application No. 30240/96, paras. 46–54.

Climate change and natural disasters negatively affect the enjoyment of several human rights.⁵¹ In theory, any human rights violation under systems such as the 1950 European Convention on Human Rights could give rise to a non-refoulement obligation.⁵² Importantly, the right to life is non-derogable, with very few exceptions.⁵³ Hence, a person should not be sent back to her country of origin if there is a danger to her life. In addition, one could apply the law stipulating non-refoulement of refugees (law that, among other things, stipulates the duty to protect life) by analogy. Climate change and disasters also affect other human rights such as the right to food, the right to water, the right to health, and the right to adequate housing. Except for absolute rights – such as the right to life and the ban on torture and certain ill-treatment – most human rights provisions permit a balancing test between the interests of the individual and the state. Thus, the ‘new normal’ of climate change with more frequent and severe disasters must weigh heavily.

It should also be considered that, in some cases, forcing someone to return is unreasonable. Not only strict permissibility but also greater latitude for the criterion of reasonableness (how reasonable it is to expect someone to go back?) should be exercised by states in the context of climate change. Referring to ‘survival criteria’, Denmark has for some time allowed particularly vulnerable groups of Afghans to stay there on humanitarian grounds, because of the drought in Afghanistan.⁵⁴

It is the risk of rights being violated in the present and future, rather than the past, that is crucial in determining protection needs. Where this need is acknowledged, a clear protection status should also be granted. Existing human rights law, including the non-refoulement principle, neither provides a right to stay nor dictates the content of any protection, but it must include non-rejection at the border to be effective and can provide a basis for some form of complementary, possibly temporary, protection.

This human rights approach, which focuses on return, offers some solution to the challenges in slow-onset disasters and displacement. It is not so much a question of why someone left initially, but rather whether the gradual deterioration has reached a critical point where they cannot be expected to return now.

Bringing wider human rights such as the ban on torture, inhuman and degrading treatment, and the right to life into play regarding return has the advantage that the linkage is open to dynamic interpretation while still allowing the authorities a degree of discretion. An explicit reference in law to natural disasters, or something similar, could create a new category that potentially excludes others

51 United Nations, *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, UN Doc. A/HRC/10/61, New York, 2009, paras. 16–41.

52 United Kingdom House of Lords, *Regina v. Special Adjudicator ex parte Ullah*, 17 June 2004, [2004] UKHL 26, paras. 24–25.

53 See European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, Rome, 4 November 1950, Arts. 2(2) and 15(2).

54 V. Kolmannskog and F. Myrstad, above note 41.

but would at least permit less discretionary latitude. In the discussion about complementary and temporary protection at regional and national levels, we find both vague and more precise protection terminology.

A weakness of the focus on return is that the person affected first has to be able to reach another country, though the practice of interception is making this ever harder. Other solutions – such as labour-migration programmes – could also be discussed for those who might not otherwise be able to flee, but that is beyond the scope of this article.

Complementary and temporary protection at regional and national levels

Developing complementary, possibly temporary, protection regimes may be a solution. There are already some national and regional temporary protection regimes that could apply. According to the United States Immigration and Nationality Act, the nationals of a foreign state can be designated for Temporary Protected Status if three conditions are met: (1) there has been an environmental disaster in the foreign state resulting in a substantial, but temporary, disruption of living conditions; (2) the foreign state is unable, temporarily, to handle adequately the return of its own nationals; and (3) the foreign state has officially requested such designation.⁵⁵ However, Temporary Protected Status is not a strong, legal obligation to protect the individual.⁵⁶ It is optional: the nationals of a certain state *can* receive such status. Furthermore, it is an agreement between the US and another *state*, not first and foremost a duty to the individual.

Another model is the temporary protection accorded by the EU, in accordance with the Temporary Protection Directive, during ‘mass influxes’ of certain displaced persons.⁵⁷ Arguably, temporary protection can be applicable to some cases of natural-disaster-related displacement.⁵⁸ Article 2(c) of the Temporary Protection Directive specifies those persons who ‘in particular’ qualify for temporary protection, though it does not provide an exhaustive list. It should also be noted that ‘generalized violations’ of human rights often occur in, during, or after a natural disaster, and in such cases the displaced fall within an explicitly recognized category. Importantly, if a qualified majority decides that a natural disaster calls for invoking the Temporary Protection Directive mechanisms, it is free to do so. Mobilizing the political consent and will to do so would, however, be challenging. Moreover, linking temporary protection to ‘mass influx’ can also be a weakness if the goal is protection for displaced *individuals*. An individual may be in need of protection even though he or she does not arrive as part of a ‘mass influx’. Furthermore, temporary protection may more generally provide some protection

55 See United States, Immigration and Nationality Act, Act 244 – Temporary Protected Status, Sec. 244.1/[8U.S.C. 1254], sub-para. (b).

56 See V. Kolmannskog, above note 16, pp. 36–37.

57 See Council Directive 2001/55/EC, above note 25.

58 V. Kolmannskog and F. Myrstad, above note 41.

for certain groups but does not meet the needs of people who may need to stay longer or permanently.

So far, Finland is the only EU country that explicitly grants temporary protection, in Section 109(1) of the Aliens Act, to persons who cannot return safely to their home country or country of permanent residence because of an environmental disaster. Under Section 88a, there is also the possibility of permanent protection status. The Finnish legislation could serve as a model for filling the protection gap at national levels.

A ‘soft-law approach’

Kolmannskog has argued elsewhere that one could follow a ‘soft-law approach’ similar to that taken in the case of internally displaced persons: that is, to investigate the protection gaps more closely and, if possible, create a synthesis (and analogy) of existing international law in the form of principles.⁵⁹ The 1998 UN Guiding Principles on Internal Displacement were established in order to deal with a phenomenon requiring additional protection measures at a time when there was little political will for a new convention and some questioned the need for new law. The drafters therefore built on existing human rights law, humanitarian law, and refugee law. The legal basis for similar guiding principles on displacement due to climate change and natural disaster could include all the previously mentioned areas of law – refugee law, environmental law, and human rights law – and go even further by highlighting best practices from different countries and regions.

On the other hand, the non-binding nature of such established principles may also be a significant weakness. Some states have not been willing to provide protection to internally displaced persons as outlined in the Guiding Principles. However, the Secretary-General’s representative on the human rights of internally displaced persons, Professor Walter Kälin – a supporter of the ‘soft-law’ approach – has stated the following:

One should, however, not overestimate this weakness as it is always possible to invoke the hard law that lies behind the Guiding Principles where necessary. Overall, the non-binding character of the document has been an advantage, and where the Guiding Principles were met with resistance, it was not because of their content but because of a suspicion that they might be binding regardless of all assertions to the contrary. The Representative’s experience has shown that it is much easier to negotiate with governments if the questions of violations does not loom in the background but, instead, problems can be approached by looking at what kind of guidance is provided by international standards.⁶⁰

59 See V. Kolmannskog, above note 42, p. 320.

60 Walter Kälin, *How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework*, Presentation at Roundtable Meeting, Ralph Bunche Institute for International

A multi-track approach

Choosing a combination of the solutions explored above may prove the most effective way of filling the protection gaps. This complex issue needs to be dealt with in several forums and at several levels. Climate change is a global process that is influencing the occurrence of natural disasters. The resulting international responsibility needs to be reflected in the financing of protection for the people affected by that change. This can be dealt with most appropriately in a new global climate-change agreement based on the principle of common but differentiated responsibilities and other principles of environmental law. Funding would enable countries to deal better with displacement, most of which is likely to go on being internal and regional in the developing countries. It is also important to encourage further international and regional co-operation, particularly regarding cross-border displacement. It is therefore crucial to keep the reference to migration and displacement in the adaptation text being negotiated under the UNFCCC. From a human security and protection perspective, however, there is no basic, compelling reason to distinguish between climate-related and other natural disasters. Specific law and protection should apply to all those displaced by natural disaster.

It is important to interpret law with a view to the ever-changing environment in which it must be applied. This calls for context-oriented and dynamic interpretation. For example, some of the people displaced in the context of climate change and natural disaster can be considered refugees according to the 1951 Convention relating to the Status of Refugees. But there is also a risk with unclear law and discretionary latitude for the authorities: that we are, to an excessive degree, at the mercy of the few whose task it is to interpret and apply that law. This is a particular challenge in the field of immigration law because of the volatile political situation and shifting feelings toward refugees and immigrants. There is therefore also a need to clarify or even create new law.

The human rights regime, the non-refoulement principle, and complementary protection mechanisms can provide building blocks for new ways of affording protection, particularly regarding the concept of return: if return is not possible, permissible, or reasonable owing to circumstances in the place of origin and to personal conditions, a person should receive protection and a clear status. Linking return to wider human rights has the advantage of being open to dynamic interpretation, but it also allows for discretion. An explicit reference to natural disasters or similar phenomena, such as in Finnish law, may be necessary, particularly considering the ever-shifting sentiments toward migrants and asylum-seekers. The focus on return rather than the cause and impact of the initial movement may get us around some of the challenges of slow-onset disasters, including the 'voluntary–forced' continuum. A more permanent protection status would be necessary in some cases, in addition to temporary protection.

Creation of new law can start at several levels and in a number of forums. States should already start adapting their national laws so that they can better respond to natural-disaster-induced displacement. The Finnish legislation may serve as a model. Since many of the domestic approaches are discretionary, and vary greatly, there is also a need to address this issue at a regional and global level. It can be raised in connection with existing regional processes, such as the creation of the Common European Asylum System, and in more established refugee frameworks and associated judicial and legislative institutions such as the African and Latin American instruments. Finally, it may also eventually be raised at a global level, but it is still unclear exactly where and how this would happen. A natural host for such an international process could be UNHCR.

It may help with all the initiatives mentioned above to draft a soft-law document. This document could outline existing law (as interpreted in a context-oriented and dynamic fashion) and list examples of best practice and national legislation.

No matter which mode (or modes) is chosen, there is a more fundamental challenge, already pointed out above: implementation and access to protection in the current political climate. For example, Europe already has elaborate asylum legislation, but many potential asylum-seekers are stopped from ever arriving to file an application by strict visa regimes, security forces at sea or on land, and agreements with European and North African countries on the Mediterranean. Access may become even harder if the potential numbers of legitimate asylum-seekers increase. This is a problem beyond law. It is a hot topic in politics, especially during economic downturns. It is also basically a matter of how people perceive their moral duty. What is needed is public communication and awareness-raising about climate change and displacement. Hopefully, climate change will remind us of how we are all connected and this will give rise to a new solidarity.