

Thursday October 16, 2008

Displacement Caused by the Effects of Climate Change: Who Will Be Affected and What Are the Gaps in the Normative Framework for Their Protection?

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United Nations Inter-Agency Standing Committee Group on Climate Change

October 10, 2008 —

This background paper analyzes the nexus between climate change and displacement and identifies normative gaps in the protection framework for those displaced by the effects of climate change. A more extensive version of this paper was submitted to the IASC informal working group on climate change and migration/displacement on 15 September 2008.

I. The Climate Change – Displacement Nexus

Key findings relevant for the issue of displacement by the Intergovernmental Panel on Climate Change include^[1]:

(i) A key impact of climate change will be reduced availability of water, particularly in parts of the tropics, the Mediterranean and Middle Eastern regions and the Southern tips of Africa and Latin America. In contrast, water availability will increase in parts of Eastern Africa, the Indian sub-continent, China, and the Northern Latitudes. Hundreds of millions of people will be exposed to water stress (i.e. droughts and lack of water or flooding, mudslides etc).

(ii) A decrease in crop yields is projected which increases the likelihood that additional tens of millions of people will be at risk of hunger. The most affected region is likely to be Africa.

(iii) Due to rising sea-levels, the densely populated “mega-deltas” especially in Asia and Africa and small islands are most at risk from floods, storms and coastal flooding and eventual submerging, with a potential impact on tens of millions of people.

(iv) The overall impact on health will be negative, especially for the poor, elderly, young and other marginalized sectors of society.

(v) Overall, the areas that will be most affected by climate change are Africa, Asian mega-deltas and small islands.

Climate change is usually referred to as “global warming” and as such does not displace people. Rather climate change produces environmental effects which may make it difficult or even impossible for people to survive where they are. Most causes of displacement triggered by climate change, such as flooding, hurricanes,

desertification or even the “sinking” of stretches of land[2], are not new. However, their frequency and magnitude are likely to increase.

The challenge is to better analyze these causes of displacement, to identify the areas where the effects of climate change are most likely to occur and to examine the character of forced displacement and other population movements they could trigger. In this context, it might be required to review existing international legal instruments and to explore ways of filling potential protection gaps.

In this regard, the following (tentative and hypothetical) typology may be helpful[3].

(i) The increase of *hydro-meteorological disasters*, such as flooding, hurricanes/typhoons/cyclones or mudslides, will occur in most regions, but the African and Asian mega deltas are likely to be most affected. Such disasters can cause large-scale displacement and huge economic costs, but depending on recovery efforts the ensuing displacement need not be long-term and return in principle remains possible as durable solution.

One should not forget that many hydro-meteorological disasters will occur regardless of climate change and other disasters such as volcanoes or earthquakes presumably have no linkage to such change. Nevertheless, they too may cause movement of persons and such persons should not be treated differently from those affected by the effects of climate change.

(ii) *Environmental degradation and slow onset disasters* (e.g. reduction of water availability, desertification, long-term effects of recurrent flooding, sinking coastal zones, increased salinisation of ground-water and soil etc.): With the dramatic decrease of water availability in some regions and recurrent flooding in others, economic opportunities and conditions of life will deteriorate in affected areas. Such deterioration may not necessarily cause forced displacement in the strict sense of the word but, among other reasons, will incite people to move to regions with better income opportunities and living conditions. However, if the areas become uninhabitable because of complete desertification or sinking coastal zones, then population movements amount to forced displacement and become permanent.

(iii) The case of “*sinking*” *small island states* caused by rising sea levels constitutes a particular challenge. As a consequence, such areas become uninhabitable and in extreme cases the remaining territory of affected states can no longer accommodate the whole population or such states disappear as a whole. When this happens, the population cannot return and becomes permanently displaced to other countries.

(iv) Disasters will increase the need for governments to *designate areas as high-risk zones* too dangerous for human habitation. This means that people may have to be (forcibly) evacuated and displaced from their homes and prohibited from returning there and relocated to safe areas. This could occur, for example, because of increased risk of flooding or mudslides due to the thaw of the permafrost in mountain regions, but also along rivers and coastal plains prone to flooding. The difference between this situation and the previous typology of disaster-induced displacement is that return may not be possible, thus becoming a permanent form of displacement until other durable solutions are found for those affected.

(v) A decrease in essential resources due to climate change (water; food production) most likely will trigger *armed conflict and violence*: This is most likely to affect regions that have reduced water availability and that cannot easily adapt (e.g. by switching to economic activities requiring less water) due to poverty. These armed conflicts may last for as long as resource scarcity continues. This in turn would impede the chances of reaching peace agreements which provide for the equitable sharing of the limited resources and thus prolong the conflicts, leading to more situations of protracted displacement.

II. The Nature of Movements, Affected Persons and Protection Frameworks

These five scenarios can help to identify the character of the movement, i.e. whether it is forced or voluntary, to qualify those who move (migrants[4]; IDPs,[5] refugees,[6] stateless persons, other categories?) and to assess whether and to what extent present international law is equipped and provides adequate normative frameworks to address the protection and assistance needs of such persons.

(i) *Hydro-meteorological disasters* can trigger forced displacement. Two situations should be distinguished:

- Most of the displaced remain inside their country and as internally displaced persons receive protection and assistance under human rights law and in accordance with the 1998 Guiding Principles on Internal Displacement. For these internally displaced persons, the existing normative framework is sufficient.
- Some of the displaced may cross an internationally recognized state border, e.g. because the only escape route leads there, because the protection and assistance capacities of their country are exhausted or because they hope for better protection and assistance outside their own country. They have no particular protected (legal) status, as they do not qualify as refugees, nor are they migrants. In the past, host governments have in some cases allowed such persons to stay temporarily for humanitarian reasons until they could return to their countries in safety and dignity[7], but practice has not been uniform. The status of these persons remains unclear and despite the applicability of human rights law, including in particular provisions applicable to migrant workers, there is a risk that these persons end up in a legal and operational limbo.

(ii) *Situations of environmental degradation and slow onset disasters* create several types of movements of persons:

- General deterioration of conditions of life and economic opportunities as a consequence of climate change may motivate persons looking for better opportunities and living conditions to move to other parts of the country or abroad before the areas they live in become uninhabitable. These persons are protected by human rights law, including, if they move to a foreign country, guarantees specifically protecting migrant workers.
- If areas start to become uninhabitable, because of complete desertification, salination of soil and groundwater or sinking of coastal zones, people may, during a first phase, leave voluntarily to find better (economic) opportunities elsewhere within or outside their country, but later movements may amount to forced displacement and become permanent as inhabitants of such regions no longer have a choice but to leave permanently. If the people stay within their country, they are *internally displaced persons* and fall under the ambit of the Guiding Principles on Internal Displacement. If they go abroad, they have no protection other than that afforded by international human rights law including provisions on economic migrants; in particular, they have no right under international law to enter another country and stay there and thus depend on the generosity of other countries. This scenario poses two particular challenges: 1. there is a lack of criteria to determine where to draw the line between voluntary movement and forced displacement; 2. those forcibly displaced to other countries remain without specific protection as they do not qualify for refugee status and as their movement is forced they cannot be qualified as migrants either.

(iii) The *“sinking” of small islands states will be gradual*:

- In the initial phases, this slow-onset disaster will incite persons to migrate to other islands belonging to the same country or abroad in search of better opportunities. If they migrate to another country, these persons are protected by human rights law including guarantees specifically protecting economic migrants.

· Later, such movements can turn into forced displacement because areas of origin could become uninhabitable and in extreme cases the remaining territory of affected states could no longer accommodate the whole population or would disappear entirely, rendering return impossible. When this occurs, the population would become permanently displaced to other parts of their country or to other countries. In this case, besides human rights law in general, the Guiding Principles become applicable in the case of internal displacement. However, there are normative gaps for those who move abroad, leaving them in a legal limbo as they are neither migrants nor refugees. It is also unclear as to whether provisions on statelessness would apply as it remains to be seen whether those affected become stateless persons under international law. These persons do not become stateless as long as there is some remaining part of the territory of their State, and even where a whole country disappears it is not certain that they become stateless in the legal sense. Statelessness means to be without nationality, not without state. It cannot be excluded that such small island states will continue to exist as a legal entity at least for some time even if their territory has disappeared as nobody will be ready to formally terminate statehood. Even if these persons end up without a nationality, international law on statelessness does not provide adequate protection for them. Obviously, such persons will be in need of some form of international protection. Their rights need to be identified and it remains to be determined whether these people require a specific legal status. The question of the responsibility of the international community, in particular regarding relocation, needs clarification as well.

(iv) *The designation of high risk zones too dangerous for human habitation may trigger (forced) evacuations and displacement:*

· Affected persons are internally displaced persons. In terms of durable solutions they cannot return but must be relocated to safe areas or locally integrated in the evacuation area. Sustainability of the solution chosen is important to avoid permanent and protracted displacement situations or even return to high risk zones exposing the lives of returnees to a high risk incompatibly with human rights standards. International human rights law, the Guiding Principles and the analogous application of norms and guidelines on relocation in the context of development projects provide a sufficient normative framework for addressing these situations^[8].

· Should people decide to leave their country because they reject relocation sites offered to them or because they are not offered sustainable solutions in accordance with relevant human rights standards by their own government, protection is limited to that offered by general human rights law, including in particular provisions applicable to migrant workers but their status remains unclear and they may not have a right to enter and remain in the country of refuge.

(v) *“Climate change-induced” armed conflict and violence trigger forced displacement.* Those fleeing abroad may qualify as refugees protected by the 1951 Convention on the Status of Refugees and similar instruments or are persons in need of subsidiary forms of protection or temporary protection available for persons fleeing armed conflict; those remaining inside their own country are internally displaced persons. The available normative frameworks are international humanitarian law, human rights law, refugee law and the Guiding Principles. They provide a sufficient normative framework for addressing these situations since affected persons are fleeing armed conflict, rather than the changes brought about by climate change.

This analysis allows drawing the following conclusions:

First: Existing human rights norms and the Guiding Principles on Internal Displacement provide sufficient protection for those *forcibly displaced inside their own country by sudden-onset disasters* (scenario i) or because their *place of origin has become uninhabitable* or been declared too dangerous for human habitation (scenario iv).

Second: Existing international law (international humanitarian law, human rights norms, Guiding Principles on Internal Displacement, refugee law) is sufficient to protect *persons displaced by armed conflict triggered by the effects of climate change* whether or not they cross an internationally recognized state border (scenario v).

Third: There is a need to clarify or even develop the normative framework applicable to other situations, namely

- (a). Persons moving across internationally recognized state borders in the wake of sudden-onset disasters (scenario i);
- (b). Persons moving inside or outside their country as a consequence of slow-onset disasters (scenario ii); and
- (c). Persons leaving “sinking island States” and moving across international recognized state borders (scenario iii).
- (d). Persons moving across internationally recognized state borders in the wake of designation of their place of origin as high risk zone too dangerous for human habitation (scenario iv).

Questions to be addressed include three sets of issues:

1. Should those moving voluntarily and those being forcibly displaced be treated differently not only as regards assistance and protection while away from their homes but also as regards their possibility to be admitted to other countries and remain there temporarily?
2. If yes, what should be the criteria to distinguish between those who voluntarily leave their homes or places of habitual residence because of the effects of climate change and those who are forced to leave by the effects of climate change?
3. What would be the respective entitlements to assistance and protection of those leaving voluntarily and those forcibly displaced?

Present international law, while recognizing that all human beings are entitled to the full enjoyment of human rights, does differentiate between persons who move voluntarily and those forcibly displaced for whom special normative regimes (refugee law; Guiding Principles on Internal Displacement) have been developed at least in some cases. The remainder of this paper focuses on criteria to distinguish between forced and voluntary movements.

III. Filling the Normative Gaps: Criteria for Defining the Different Categories of Affected Persons

There are different ways to develop criteria to determine when a movement is no longer voluntary, but happens under compulsion. One option would be based on a vulnerability analysis to assess when vulnerabilities have reached a degree that a person was forced to leave his or her home. It is obviously extremely complex to develop generic criteria on this basis and to apply them individually, in particular in situations of slow onset disasters.

This paper suggests a different approach. The point of departure should not be the subjective motives of individuals or communities for their decision to move, but rather the question *as to whether in light of the prevailing circumstances and the particular vulnerabilities of the persons concerned it would be appropriate to require them to go back to their original homes.*

This should be analyzed on the basis of three elements: permissibility, factual possibility and reasonableness of return.

Permissibility

Human rights law (and refugee law by analogy) sets out cases in which return is *impermissible per se* in all scenarios. This is first the prohibition to send people back to a situation where their life or limb is at risk^[9], e.g. if the conditions at the only place they can return to is exposing them to high risks; and second the prohibition of collective expulsion, i.e. of decisions to collectively send affected persons back, without assessing their individual situation^[10].

Possibility

Return may temporarily not be possible due to technical or administrative impediments, e.g. roads are cut off or destroyed or loss of documentation. Return is also impossible if the country of origin refuses readmission for technical or legal reasons. For example during an emergency a country might not have the capacity to absorb large return flows or it might prevent readmission of persons who cannot prove that they are its citizens because their documents were destroyed, lost or simply left behind when they left.

Citizens of sinking small island states may experience a very special factual situation that makes return impossible, if the territory has shrunk in a way or resources necessary for survival (e.g. drinking water) are destroyed to a degree that doesn't allow the return of persons or if the island as such has disappeared.

Reasonableness

Return cannot be reasonably expected from the persons concerned, e.g. if the country of origin does not provide any assistance or protection at all or far below international standards as long as the displacement lasts. The same is true where it does not provide any kind of durable solutions according to international standards, in particular when zones have become or were declared uninhabitable and return to their homes therefore is no longer an option for the displaced.

If the answer to one of the following question: Is return *permissible*? Is return *possible*? Can return *reasonably be required*? is "no", then individuals concerned should be regarded as victims of forced displacement in need of specific protection and assistance either within their own country (internal displacement) or in another State (external displacement). In the latter case, they should be granted at least a temporary stay in the country where they have found refuge until the conditions for their return are fulfilled. For citizens of sinking island states permanent solutions on the territory of other states must be found.

A next step would consist of identifying for each of the four categories of persons outlined above more detailed criteria to determine under what circumstances return to the country of origin (or in the case of internally displaced persons to their place of former habitual residence) would be *impossible* or could *not be reasonably expected* from them and to develop proposals for temporary protection regimes applicable to those who were forced to cross an international border due to the effects of climate change, which regulates their status. What is also needed is to further determine their entitlements to assistance and protection as well as their obligations.

IV. CONCLUSION:

1. Persons affected by the effects of natural disasters and other effects of climate change should be considered as being forcibly displaced and thus, in principle, of special concern of the international community if:

- As persons displaced inside their country, they cannot return to their homes for factual or legal reasons or cannot reasonably be expected to do so because of a lack of security or sustainable livelihoods there. They are persons internally displaced as a consequence of the effects of climate change or other environmentally related reasons. They should be assisted and protected within the framework of the Guiding Principles on Internal Displacement.
- As persons displaced across internationally recognized state borders, they cannot return to their country of origin for factual or legal reasons or cannot reasonably be expected to do so because of a lack of security or sustainable livelihoods there. They are persons displaced across internationally recognized borders as a consequence of the effects of climate change or other environmentally related reasons. They should be granted admission to and temporary – and in some cases (e.g. sinking island states) even permanent – stay in the country concerned. The exact scope of their entitlements to assistance and protection needs to be further determined.

2. Persons affected by the effects of natural disasters and other effects of climate change but not falling into any of these categories are not victims of forced movement and thus should not, in principle, be of concern to the international community *as a special category* even if their movement is triggered by such effects. Nevertheless, they may profit from protection and assistance available under general human rights law, including in particular provisions addressing the specific needs of migrants, and the exact scope of these entitlements needs to be further determined.

3. Persons displaced inside or across internationally recognized state borders by armed conflicts over resources becoming scarce as a consequence of climate change, are internally displaced persons, refugees or persons under temporary protection regimes and their entitlements to assistance and protection are determined by the respective normative regimes (Guiding Principles on Internal Displacement; refugee law; etc.).

V. Summary: Nature of movement, affected persons and protection framework

Cause of movement	Nature of movement and persons affected	Existing protection framework
1. Hydro-meteorological disasters	<ul style="list-style-type: none"> • Forced displacement <ul style="list-style-type: none"> ○ IDPs ○ Forced cross-border movements 	<ul style="list-style-type: none"> • All: International human rights law • IDPs: Guiding Principles • Protection gap for those forcibly displaced across borders (GAP)
2. Environmental Degradation and Slow Onset Disasters	<p>Mixed, i.e. slow process starting with voluntary movement (in- and outside the country) and ending with forced displacement (in- and outside the country)</p> <ul style="list-style-type: none"> • Voluntary movement <ul style="list-style-type: none"> ○ Inside the country ○ Across internationally recognized borders 	<ul style="list-style-type: none"> • All: International human rights law • IDPs: Guiding Principles • Protection gap for those forcibly displaced across borders (GAP) • Lack of criteria to draw line between voluntary and forced movements (GAP)
3. Sinking Small Island States	<p>Mixed, i.e. slow process with voluntary movement (in- and outside the country) and ending with forced displacement (outside the country)</p> <ul style="list-style-type: none"> • Voluntary movement <ul style="list-style-type: none"> ○ inside the country (to safe parts of country) ○ across internationally recognized borders • Forced displacement <ul style="list-style-type: none"> ○ IDPs ○ Forced cross-border movements (GAP) ○ Stateless persons? (GAP) 	<ul style="list-style-type: none"> • All: International human rights law • IDPs: Guiding Principles • Protection gap for those forcibly displaced across borders (GAP) • Protection gap for citizens of countries that no longer continue to exist as a state (and nation) (GAP) • Applicability and adequacy of international law and on statelessness? (GAP)
4. High risk areas being prohibited for habitation by authorities	<ul style="list-style-type: none"> • Forced displacement <ul style="list-style-type: none"> ○ IDPs ○ Forced cross-border movements 	<ul style="list-style-type: none"> • All: International human rights law • IDPs: Guiding Principles • Protection gap for those forcibly displaced across borders (GAP)
5. Armed conflict/violence over shrinking resources	<ul style="list-style-type: none"> • Forced displacement <ul style="list-style-type: none"> ○ IDPs • Refugees/subsidiary forms of protection/persons under temporary 	<ul style="list-style-type: none"> • All: International humanitarian law • All: International human rights law • IDPs: Guiding Principles • Refugees: International refugee law

[1] The following is based on Martin Parry, Humanitarian Implications of Climate Change, ppt-presentation to the IASC Principals Meeting (30 April 2008)

[2] See e.g. the submerged ancient Roman cities in the Mediterranean Sea.

[3] These scenarios are a typology. In reality, they may coincide and overlap.

[4] For the purpose of this paper, the term ‘migrant’ refers to the definition of migrant worker in Art. 2 (1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, i.e, “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”

[5] The term ‘internally displaced persons’ refers to persons covered by the Guiding Principles on Internal Displacement: “Internally displaced persons are 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.”

[6] The term ‘refugee’ refers to the legal definition of the 1951 Convention on the Status of Refugees, the 1969 African Convention governing the specific aspects of Refugee problems in Africa as well as the 1984 Cartagena Declaration on Refugees. The 1951 Refugee Convention defines the term ‘refugee’ in art. 1A(2) as a person 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.” The African Convention expands this notion to include “every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.” The Cartagena Declaration on Refugees adds the criterion “massive violation of human rights”.

[7] This has been the practice e.g. for persons affected by flooding in different parts of the SADC region or for victims of Hurricane Mitch in the USA who were granted „temporary protection status“ in accordance with US migration law that provides for temporary protection not only for persons fleeing armed conflict and situations of generalized violence but also for those who cannot return to their country of origin in the aftermath of a natural disaster. The notion of “temporary protection” has to be distinguished from the concept of temporary protection as used particularly in Europe to handle a situation of mass influx of people fleeing armed conflict or generalized violence (see European Community, 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).

[8] See for example, World Bank Operational Policy 4.12 of 2001.

[9] This principle was derived by the European Court of Human Rights and the UN Human Rights Committee from the prohibition of torture, cruel and inhuman treatment (Art. 3 ECHR; Art. 7 ICCPR). The principle of non-refoulement is also a corner-stone principle of international refugee law (Art. 33 1951 Convention) that has gained the quality of international customary law and arguably even *ius cogens*.

[10] Art. 4 Protocol 4/ECHR: Prohibition of collective expulsion of aliens.

☐ Voluntary cross-border movements

☐ Forced displacement

- IDPs

☐ Forced cross-border movements (GAP)

☐ Voluntary cross-border movements