

September 23, 2013

Taking Responsibility for Climate Change-Related Displacement: Article 8 of the European Convention on Human Rights and the Proportionality of Expelling 'Climate Refugees'

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**Workshop: Dealing with Climate Change and Natural Disasters: Loss, Damage,
Adaptation and Social justice
September 23, 2013**

Abstract

Climate change is already contributing to the displacement of millions of people worldwide by increasing the frequency and intensity of adverse weather events. Faced with a ‘protection gap’ in the international legal framework, proposals for responding to the phenomenon overwhelmingly rely on the State to act, with limited discussion of the potential to develop the scope of protection through litigation. Recognising the potential for litigation to address immediate protection needs whilst also developing the scope of protection more broadly, this discussion paper advances an interpretation of Article 8 of the European Convention on Human Rights that would require a ‘fair balance’ to be struck between the interests of the State and the right of the individual to his/her physical and moral integrity. The role of the host State in contributing to climate change-related harm through historical and current greenhouse gas emissions would be a relevant factor to weigh in the balance. However, a note of caution is struck owing to the significant challenges involved in establishing the role of climate change in specific weather events.

1 Introduction

More than 32 million people were displaced in the context of sudden-onset natural disasters in 2012.¹ An additional 42 million people were directly affected by drought in the same year.² Climate change is understood to play a role in some of these events.³

* Funding by the European Refugee Fund gratefully acknowledged

¹ Internal Displacement Monitoring Centre, *Global Estimates 2012: People Displaced by Disasters* (2013), 6 <[http://www.internal-displacement.org/8025708F004BE3B1/%28httpInfoFiles%29/99E6ED11BB84BB27C1257B6A0035FDC4/\\$file/global-estimates-2012-may2013.pdf](http://www.internal-displacement.org/8025708F004BE3B1/%28httpInfoFiles%29/99E6ED11BB84BB27C1257B6A0035FDC4/$file/global-estimates-2012-may2013.pdf)>

² EM-DAT: The OFDA/CRED International Disaster Database, Université Catholique de Louvain, Brussels (Belgium) <<http://www.emdat.be>>, accessed 15 July 2013

With weather-related natural disasters projected to increase in both frequency and intensity in many parts of the world as global average temperatures rise by an estimated 2-6°C by the end of the century,⁴ climate change-related displacement is becoming part of what UN Secretary General Ban Ki Moon recently described as ‘the new normal’.⁵

The paper does not purport to address the full range of scenarios relating to climate change and human movement.⁶ Rather, it considers only the narrow category of individuals who are in a European host State and resist expulsion owing to the environmental conditions in the receiving State as a result of a sudden onset adverse weather event such as a tropical cyclone. Consequently, the situation of the significant majority of individuals who are or will be internally displaced,⁷ as well as those who choose to migrate internationally through official schemes, is not considered here. For brevity in this discussion paper, I have also omitted discussion of slow-onset disasters such as drought and sea level rise.

The existing international protection framework does not explicitly address the circumstances of individuals internationally displaced in the context of a natural disaster. It is widely considered that the 1951 Convention on the Status of Refugees is an inappropriate instrument for these individuals to rely on, as it requires evidence of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.⁸ International and regional human rights instruments provide no explicit protection either. Consequently, a range of proposals have been advanced for filling the protection gap, including:

- A new Convention for protecting climate change migrants⁹

³ Intergovernmental Panel on Climate Change, *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation* (2012)

<http://ipcc.ch/publications_and_data/publications_and_data_reports.shtml#SREX>

⁴ Intergovernmental Panel on Climate Change, *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, (2007)

<http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_wg1_report_the_physical_science_basis.htm>, 13; World Bank. *Turn Down the Heat: Climate Extremes, Regional Impacts and the Case for Resilience* (2013) <http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2013/06/14/000445729_20130614145941/Rendered/PDF/784240WP0Full00D0CONF0to0June19090L.pdf>

⁵ Barbara Lewis and Alister Doyle, ‘Extreme Weather is New Normal U.N.’s Ban Tells Climate Talks’ *Reuters* (4 December 2012) <<http://www.reuters.com/article/2012/12/04/us-climate-talks-idUSBRE8B217F20121204>>

⁶ See Walter Kälin and Nina Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*, UNHCR Legal and Protection Policy Research Series (2012) <<http://www.unhcr.org/4f33f1729.pdf>> for a typology of climate change-related displacement scenarios

⁷ *ibid*

⁸ cf. UNHCR. 2009. Climate change, natural disasters and human displacement: a UNHCR perspective. UNHCR. Available at: <http://www.unhcr.org/4901e81a4.pdf>

⁹ David Hodgkinson and Lucy Young, *In the Face of Looming Catastrophe: A Convention for Climate Change Displaced Persons* (2012) <[http://www.ccdpconvention.com/documents/A%20Convention%20for%20Climate%20Change%20Displaced%20Persons%20\(January%202012\).pdf](http://www.ccdpconvention.com/documents/A%20Convention%20for%20Climate%20Change%20Displaced%20Persons%20(January%202012).pdf)>

- An amendment or additional protocol to the Geneva Convention relating to the Status of Refugees¹⁰
- An additional protocol to the European Convention on Human Rights¹¹
- An additional protocol to the UN Framework Convention on Climate Change 1992 (UNFCCC)¹²
- Better implementation of the Guiding Principles on Internal Displacement¹³
- Ad-hoc solutions by individual States in response to specific events¹⁴
- Managed migration¹⁵
- Strengthening local adaptive capacity¹⁶
- Gradual consensus-building around protection policy for victims of natural disasters (the Nansen Initiative)¹⁷

Within the European Union

- Use of the Temporary Protection Directive (2001/55/EC) in cases of mass influx¹⁸
- An amendment to Article 15(c) of the Qualification Directive (now 2011/95/EC) to include environmental disaster as a basis for the grant of subsidiary protection¹⁹
- Further development of the Joint EU Resettlement Programme²⁰

One feature that these approaches share is their dependence on the State to take proactive steps to respond to the phenomenon of climate change-related displacement. This paper takes a different approach by emphasizing the role that individuals can play in securing positive outcomes for themselves and developing the scope of international protection through litigation in courts and tribunals of Contracting States to the European Convention on Human Rights. Although arguments can also be advanced under Article 3

¹⁰ Minister of Environment for Bangladesh, Dr. Hasan Mahmud, quoted in 'Durban Climate Summit: Dhaka to Seek Amendment to Refugee Convention' *Jubilee South* (4 November 2011)

<<http://www.apmdd.org/10-news/69-durban-climate-summit-dhaka-to-seek-amendment-to-refugee-convention>>

¹¹ Parliamentary Assembly of the Council of Europe, *Recommendation 1862(2009): Environmentally-Induced Migration and Displacement: a 21st Century Challenge* (2009)

<<http://assembly.coe.int/Documents/AdoptedText/ta09/EREC1862.htm>>

¹² Frank Bierman and Ingrid Boas, 'Protecting Climate Refugees: The Case for a Global Protocol' (2008) *Environment* 50 (6) 8–16 <<http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/Biermann-Boas-full.html>>

¹³ Jane McAdam *Climate Change Displacement and International Law: Complementary Protection Standards*, UNHCR Legal and Protection Policy Research Series (2011)

<<http://www.unhcr.org/4dff16e99.pdf>>

¹⁴ McAdam, *Complementary Protection*, above n 13

¹⁵ McAdam, *Complementary Protection*, above n 13

¹⁶ McAdam, *Complementary Protection*, above n 13

¹⁷ Kälin and Schrepfer, above n 6

¹⁸ European Parliament, *"Climate Refugees": Legal and Policy Responses to Environmentally Induced Migration* (2011)

<<http://www.europarl.europa.eu/committees/de/studiesdownload.html?languageDocument=EN&file=60931>>

¹⁹ European Parliament, above n 18

²⁰ European Parliament, above n 18

ECHR²¹, for the purpose of the workshop, this paper considers specifically whether Article 8 of the European Convention on Human Rights ('ECHR') can be relied upon by climate change 'refugees' to resist expulsion from the host State. It argues that Article 8 can be engaged both on existing interpretations of its scope as well as when the responsibility of host States for contributing to climate change is taken into account.

The paper has the following structure. Section 2 briefly discusses the interrelated phenomena of natural disasters and displacement. In Section 3, a hypothetical scenario involving an individual resisting expulsion at least in part owing to the adverse environmental conditions in the receiving State is constructed. The paper then goes on in Section 4 to outline relevant jurisprudence on Articles 8 ECHR and then to apply the law to the hypothetical scenario. Section 5 considers whether the role of anthropogenic climate change in an adverse weather event could extend the scope of Article 8 ECHR in the context of climate change-related displacement. One possible argument is considered and this argument is then applied to the hypothetical scenario in Section 6. The paper concludes that whereas Article 8 as currently interpreted by the Court extends protection to some people who would resist expulsion to countries affected by natural disasters, it does so in very narrow circumstances. Where a connection can be made between climate change and the adverse weather event, arguments pointing to the role of host States in contributing to climate change may assist a wider group of people resisting expulsion. However, as the scenario and subsequent discussion illustrates, climate scientists struggle to establish the role of climate change in particular weather events, presenting a serious, though not necessarily insurmountable, challenge to litigation.

2 Natural disasters and displacement

Most natural disasters can be categorized within a typology of *weather-related disasters*, *geophysical disasters* and *biological disasters*. Some disasters are described as 'sudden-onset' and others are described as 'slow-onset'. Table 1 provides a snapshot of the typology:

Table 1: Typology of natural disasters²²

Weather-related disasters			
	Meteorological	Hydrological	Climatological
Sudden onset	Tropical storms, winter storms, tornados, snow and sand storms	Floods (flash, coastal/storm surges, riverine), wet mass movements (landslides, avalanches, sudden subsidence)	Extreme winter conditions, heat waves, wild fires
Slow onset		Long-lasting	Drought

²¹ The right not to be subjected to torture or inhuman or degrading treatment or punishment

²² Adapted from Internal Displacement Monitoring Centre, *Global Estimates 2011: People Displaced by Natural Hazard-Induced Disasters* (2012) Available at: <[http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/1280B6A95F452E9BC1257A22002DAC12/\\$file/global-estimates-2011-natural-disasters-jun2012.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/1280B6A95F452E9BC1257A22002DAC12/$file/global-estimates-2011-natural-disasters-jun2012.pdf)> 8

		subsidence	
Geophysical and biological disasters			
	Geophysical	Biological	
Sudden onset	Earthquakes, volcanic eruptions, dry mass movements (rockfalls, snow and debris avalanches, landslides, sudden subsidence)	Epidemics, insect infestations, animal stampedes	
Slow onset	Long-lasting subsidence	Epidemics, insect infestations	

Events such as those identified in the Table 1 are described as ‘disasters’ when they result in:

[A] serious disruption of the functioning of a community or a society causing widespread human, material, economic or environmental losses which exceed the ability of the affected community or society to cope using its own resources [...] It results from the combination of hazards, conditions of vulnerability and insufficient capacity or measures to reduce the potential negative consequences of risk. (UN Office for Disaster Risk Reduction, UNISDR)²³

The definition recognizes that multiple factors contribute to making an event a ‘disaster’. Thus, poor countries with less robust infrastructure will be more vulnerable to these events than wealthier countries, and vulnerability and exposure will vary across the country. Some of the vulnerability and exposure will result from a failure by national and local authorities to adopt and/or implement adequate regulations. For example, buildings may not be built to withstand cyclones, floods or earthquakes, or sea wall defences may not be constructed or maintained. However, vulnerability and exposure are influenced by a complex interplay of factors, including settlement patterns, urbanization, changes in socio-economic conditions, as well as broader economic, social, geographic, demographic, cultural, institutional, governance, and environmental factors.²⁴

Importantly, whilst ‘the community’ may recover following the aftermath of a natural disaster, or may adapt to challenges associated with climate change, some individuals may have particular vulnerabilities that make them unable or unwilling to return.²⁵

Individual responses to natural disasters will vary considerably owing to a range of factors, such as their health and mobility as well as the health and mobility of dependants, personal and family resources, the response of State and civil society actors and so forth. Many will remain in the general vicinity of the disaster, for example at

²³ Quoted in IDMC, *Global Estimates 2011*, above n 20, 8

²⁴ IPCC, *Disasters*, above n 3, 7

²⁵ For more on how community cannot be considered as a homogeneous entity, see Irene Gujit and Meera Kaul Shah (eds), *The Myth of Community: Gender Issues in Participatory Development* (Intermediate Technology Publications, 1998)

home, with friends or relatives, or in shelters or camps. Some may move short distances, for example from affected rural areas to more resilient or less affected rural or urban areas. Others will move greater distances, including to large urban centres within the same country. It is widely understood that most displacement associated with natural disasters follows these patterns of internal displacement, and that only a minority of those affected will migrate internationally.²⁶

Among those who do cross international borders, it will be a still smaller minority who move beyond immediately neighbouring countries.²⁷ In all scenarios, there may be individuals who are permanently displaced, although many will return home if/as conditions improve

2.1 Internal relocation

It would be rare for a natural disaster to affect the entire territory of a country. An important consideration in any claim to resist expulsion in the aftermath of a natural disaster will therefore be the question whether the individual can reasonably be expected to relocate within her home country.²⁸ The existence of an internal relocation alternative could, provided such an alternative is not unduly harsh,²⁹ displace host State Convention obligations in a substantial number of natural disaster-related displacement claims.

2.2 Causation

Environmental pressures, let alone climate change, cannot be considered to be *the* cause of displacement, whether internal or international, owing to the range of factors that are at play in individual displacement scenarios. This recognition is significant for the wider discussion about climate change-related displacement. However, from the perspective of an individual resisting expulsion to a home country that has been adversely affected by climate change, the question of causation of movement is immaterial. The relevant perspective is forward-looking, to the conditions the individual can expect to find on return.

3 Maria

²⁶ Frank Laczko and Christine Aghazarm, 'Introduction and Overview: Enhancing the Knowledge Base' in International Organization for Migration, *Migration, Environment and Climate Change: Assessing the Evidence* (2009) <<http://www.ccema-portal.org/file/get/5757>>; Jane McAdam, 'Climate Change Displacement and International Law: Complementary Protection Standards', UNHCR Legal and Protection Policy Research Series (2011) <http://www.unhcr.org/4dff16e99.pdf>, IDMC, *Disasters*, above n 1, 9.

²⁷ Laczko and Aghazarm, *Enhancing the Knowledge Base*, above n 22

²⁸ The internal relocation/flight alternative is a well-established element of refugee status determination, and is also recognized as being a relevant consideration in determining the extent of Contracting States' obligations in relation to extraterritorial Article 3 claims - see for example *Sufi & Elmi v United Kingdom* 8319/07 [2011] ECHR 1045 (28 June 2011) [294]

²⁹ The 'unduly harsh' threshold was established by the House of Lords in the refugee case *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, cited as a 'relevant principle' by the Court in *Sufi & Elmi* at [36]

Maria is a 60-year-old shopkeeper from the southern Philippine island of Mindinao. Her husband Pablo was among the 1,000 people killed during Typhoon Bopha in December 2012. Her home and shop were destroyed. Until February 2013 she took shelter in a makeshift shelter at an evacuation centre in Compostela Valley. According to the 15 January OCHA situation report, the following conditions prevail:

- Power and electricity supply disruptions persist
- 1 million people are in need of food assistance, of which 400,000 are in critical need. There are challenges to delivering sufficient food aid
- Reports of suspected measles, acute watery diarrhoea and suspected leptospirosis continue to be verified.
- Persistent inclement weather has further affected access to health services for affected people.³⁰

Concerned for her welfare, Maria's son Gustavo, a settled migrant in Sweden, invites her for a family visit. Within a week of her arrival Maria makes an application for a residence permit as she cannot bear the thought of returning to the Philippines, where she has lost everything.

4 Relevant jurisprudence under Article 8 ECHR

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In immigration cases, Article 8 can protect individuals who have established private and family life ties in the host Contracting State.

When the Court considers whether the (proposed) action by the State is 'necessary in a democratic society' and therefore permissible under Article 8(2), it is engaging in an analysis of the proportionality of the action. The balance of individual and State interests is at the heart of the proportionality assessment.

The Court's first treatment of Article 8 in an expulsions context was *Berrehab v. the Netherlands*,³¹ where it held at Paragraph 28 that for expulsion to be 'necessary' it

³⁰ Office for the Coordination of Humanitarian Affairs (OCHA), *Philippines: Typhoon Bopha - Situation Report 15 January 2013* <http://reliefweb.int/sites/reliefweb.int/files/resources/full%20report_186.pdf>

³¹ 10730/84 [1988] ECHR 14 (21 June 1988)

must ‘correspond to a pressing social need’ and be ‘proportionate’.

In *C. v. Belgium*,³² the Court characterized the proportionality assessment as an attempt to strike a ‘fair balance’.

The Court has developed jurisprudence that guides decision makers towards striking a ‘fair balance’ between the interests of the State and the rights of the individual. It is settled law that the impact of expulsion on a claimant’s spouse and minor children are relevant considerations in the proportionality exercise, including ‘the seriousness of the difficulties’ which the spouse or minor children are ‘likely to encounter in the country to which the applicant is to be expelled’.³³ Claimants resisting expulsion owing in part to the adverse environmental conditions in the receiving State who have settled close family members can therefore rely heavily on this settled case law.³⁴

However, when conducting the balancing exercise under Article 8, the Court places far less weight on the seriousness of the difficulties that the claimant herself will face on return. In *Bensaid v United Kingdom*³⁵ the Court considered the obligations of Contracting States in the context of the expulsion of a non-citizen with serious mental health problems. Mr Bensaid was an Algerian national suffering from schizophrenia. His condition was managed by the National Health Service in the United Kingdom. He argued that he would not be able to access the necessary level of treatment in Algeria, and that his condition would deteriorate.

After dismissing his claim under Article 3 ECHR, the Court then turned to consider whether Article 8 ECHR would be breached by the proposed expulsion. Recognizing at paragraph 46 that the private life aspect (identified here as the right to ‘physical and moral integrity’) could be engaged in circumstances where the impact on the individual of some form of harm was not sufficient to engage Article 3, the Court nonetheless went on to conclude that Article 8 would not be breached in this context because the necessary threshold had not been met. The finding was based on the Court’s view that the evidence adduced was not sufficient to establish that Mr Bensaid ran more than a hypothetical risk of suffering the deterioration in his mental State that he feared.

Bensaid is an important judgment for claimants resisting expulsion owing in part to their fear of adverse environmental conditions in the receiving State as it establishes that the impact of expulsion to the receiving State on the claimant’s physical and moral integrity is a relevant consideration for Article 8³⁶. Although the judgment concerns in

³² 21794/93 [1996] ECHR 28 (7 August 1996)

³³ see *Boultif v Switzerland* - 54273/00 [2001] ECHR 497 (2 August 2001) and *Üner v the Netherlands* - 46410/99 [2006] ECHR 873 (18 October 2006)

³⁴ Claimants with minor children can further rely very heavily on the rights of the child under the Convention on the Rights of the Child, particularly in light of the interpretation by the Committee on the Rights of the Child of States’ *non-refoulement* obligations in this connection. See Committee on the Rights of the Child, *General Comment No. 6 Treatment of Unaccompanied and Separated Children outside Their Country of Origin* (Final Unedited Version, 2005) <<http://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>>. See also Jane McAdam, ‘Seeking Asylum under the Convention on the Rights of the Child: A Case for Complementary Protection’, *International Journal Of Children's Rights* (2006) 14 (3), 251-74

³⁵ 44599/98 [2001] ECHR 82 (6 February 2001)

³⁶ For brevity in this paper I have not discussed the issue of the extraterritorial application of Article 8 ECHR. In brief, my reading of *Bensaid* alongside *F v United Kingdom* is that, whereas the Court is clearly unwilling to require States to protect Article 8 rights extraterritorially to the same extent as those rights

particular the impact on the claimant's mental health, the concept of physical and moral integrity is inherently broad and would extend at least to the physical health impacts related to natural disasters (such as increased disease incidence in the aftermath) as well as to the psychological impacts of living in the aftermath of a natural disaster.³⁷

4.1 Article 8 in Maria's case

As Maria has neither a spouse nor dependent children in the host State, she would be unable to rely on the settled case law establishing the seriousness of the difficulties the spouse or minor children are likely to encounter in the receiving State as a relevant factor in the proportionality assessment. Instead, she would need to rely on the impact of expulsion on their physical and moral integrity.

Without doubt the conditions on return to Mindinao are extremely challenging. The Court would clearly have regard to more specific facts than have been provided in the hypothetical case summary, but in general she faces inconsistent access to food and fresh water and communicable diseases are prevalent.

However, as the OCHA report demonstrates, there is some prospect of access to food and fresh water through government and NGO humanitarian intervention. Treatment is available should she fall ill, although there are problems with access. There could possibly be differing first-instance judicial opinions about whether concerns about the physical and mental strain of displacement in unsanitary and unsafe conditions on a sixty-year-old widow could tip the balance under Article 8 in her favour, but the Court, in light of its judgment in *Bensaid*, may be unwilling to recognize this kind of strain as necessarily engaging States' Convention obligations³⁸. The viability of internal relocation would also fall to be considered.

Maria may have some success relying on Article 8 on conventional family life arguments relating to her ties to her son, and the adverse environmental conditions appertaining on Mindinao would in that context weigh in her favour, but perhaps not as a stand-alone claim based exclusively on the physical and moral integrity aspect of Article 8.

On current authorities therefore, Maria may struggle to rely on Article 8 in the context of the natural disaster.

must be protected within Europe, the interpretation of Article 8 that requires a 'flagrant breach' to be established before host State obligations are engaged (as held by the UK House of Lords in *Ullah and Do*) appears to set the threshold too high.

³⁷ The Court is developing jurisprudence in relation to how environmental factors can impact on Article 8 rights. Starting with the case of *López Ostra v Spain* [1994] ECHR 46 (09 December 1994), the Court has recognized as positive obligation on States to ensure that industrial and other nuisances do not disproportionately interfere with an individual's health or enjoyment of her home. This line of jurisprudence may initially appear helpful in the context of climate change-related displacement claims. However, there is a real risk that any benefit gained by pointing to the 'right to a healthy environment' could be outweighed by the risks of the Court reading such an argument as an attempt to extend a positive obligation for environmental protection beyond the territory of the Contracting States, in a similar way as was rejected in *Z & T v United Kingdom* 27034/05 [2006] ECHR 1177 (28 February 2006)

³⁸ Particularly in light of its very restrictive approach to naturally-occurring illness claims under Article 3 – see *N v United Kingdom* 26565/05 [2008] ECHR 453 (27 May 2008)

5 Application of Article 8 in the context of climate change-related natural disasters: The proportionality of expulsion in light of the host State's responsibility for climate change

Would Maria's case fall to be considered differently if Typhoon Bopha was recognised as a climate change-related natural disaster? The Article 8 argument would focus on the proportionality of expelling a person whose physical and moral integrity would be adversely affected on return to a natural disaster or its aftermath where climate change can be seen to have increased the intensity of the event, or significantly increased the probability of its occurrence.

The claimant could argue that her expulsion to face conditions sufficiently severe as to affect her physical and moral integrity would fail to strike a fair balance between her rights and the interests of the State. The argument consists of the following claims:

1. That the host State has gained substantial socio-economic benefits from the disproportionate emission of greenhouse gases from its territory (as well as from its agents abroad and of foreign actors producing goods for domestic consumption).
2. That these emissions represent a roughly measurable 'share' of the overall global contribution to the current concentration of greenhouse gases in the atmosphere.
3. That the emission of greenhouse gases by human societies has caused the climate to change.
4. That climate change is increasing the frequency and intensity of some adverse weather events.
5. That where climate change is implicated in a natural disaster, the host State is amongst those States that carry the greatest responsibility for having contributed to the occurrence of that disaster and the associated harms (in terms of damage to property, physical and mental health, livelihoods, family life etc).
6. That in light of the benefits gained by the host State and the climate change-related harm associated with the process of gaining those benefits, less weight should be placed on the economic interests of the community (the interests of the State) and more weight should be placed on the impact of expulsion on the individual.³⁹

Any argument attributing responsibility to 'developed' host States would need to address at least the following three arguments:

1. That climate change will never be the sole cause of a particular weather event
2. That multiple States share responsibility for climate change and its impacts

³⁹ Although 'immigration control' is not included in the list, the Court in *Bensaid* has identified 'the prevention of disorder and crime' and 'protection of the economic well-being of the country' as being relevant in decisions to expel non-citizens.

and it would therefore be unfair to require the host State to take responsibility for the individual claimant's plight

3. That the home State shares some responsibility for turning an adverse weather event into a natural disaster

5.1 Climate change will never be the sole cause of a particular weather event

In relation to this first challenge, the following observation can be made: Where climate change has demonstrably increased the probability of an adverse weather event occurring (as has been demonstrated by Hansen et. al.⁴⁰ in the case of heat waves in Russia and the United States) or is directly implicated in changing weather patterns (as has been demonstrated by Funk et. al.⁴¹ in the case of the 2011 drought in East Africa), it can be considered a significant cause. Clearly the greater the role of climate change in a particular event, the more that weighs against the host State in the proportionality exercise.

5.2 Multiple States share responsibility for climate change and its impacts and it would therefore be unfair to require the host State to take responsibility for the individual claimant's plight

In order to address this second challenge, the following observations can be made. First, it is recognised in international law that some States are more responsible for the current concentrations of atmospheric greenhouse gases than others. Specifically, the States identified in Annexes I and II of the UNFCCC, elsewhere identified as the 'Developed Country Parties', are recognised in the Preamble of that instrument as having emitted the 'largest share of historical and current global emissions of greenhouse gases'. Accepting the IPCC's near certainty that anthropogenic greenhouse gases are responsible for the observed warming of the global climate, these countries share responsibility for climate change. Some will have more responsibility than others owing to differing historical and current emissions, but all are responsible.

Second, the principle of 'joint and several liability' that is often found in tort law systems in many countries could be used to justify imposing the burden of hosting a climate 'refugee' on a single country notwithstanding the fact that multiple States contributed to her displacement. However, Article 8 claims in this context are not about establishing liability for climate change-related harm. Rather, they are concerned with striking a 'fair balance' between State interests and individual rights. That fair balance must consider the extent to which the host State has contributed to the harm the

⁴⁰ James Hansen, Makiko Sato and Reto Ruedy, *Perception of Climate Change*, Proceedings of the National Academy of Sciences (2012)

<<http://www.pnas.org/content/early/2012/07/30/1205276109.abstract> >

⁴¹ Chris Funk et al, 'Warming of the Indian Ocean Threatens Eastern and Southern African Food Security but Could be Mitigated by Agricultural Development' (2008) PNAS 105 (32) 11081, 11085

<<http://earlywarning.usgs.gov/fews/pubs/WarmingInTheIndianOceanThreatensEasternAndSouthernAfrica.pdf>>; See also UK Met Office, *Human Influence on East Africa Drought* (20 February 2013)

<<http://www.metoffice.gov.uk/news/releases/archive/2013/east-africa-drought>>

individual fears if forced to return home. Where a host State has contributed only modestly to the overall concentration of greenhouse gases in the atmosphere, the claimant's Article 8 argument would be weaker. Thus, claims against Iceland, which in 2008 contributed 608 thousand metric tonnes of carbon to the atmosphere, would be considerably weaker than claims against the United Kingdom or Germany, both with considerably higher historical as well as current emissions⁴². In practice a range of considerations regarding a particular host State's 'carbon footprint' would need to be addressed in the proportionality assessment, including also having regard to per capita emissions levels.

5.3 The home State shares some responsibility for turning an adverse weather event into a natural disaster

In relation to this third challenge, claimants may argue that the individual should not suffer as a consequence of her home State's failings. By way of analogy, a refugee does not lose entitlement to refugee status owing to the failure of her home State to provide her with protection. Indeed, the law requires the refugee to establish the failure of home State protection before refugee status is recognised.⁴³ It would therefore be inconsistent for a host State to on the one hand require evidence of a failure of State protection before accepting an obligation to protect an individual in accordance with refugee law whilst simultaneously insisting that a failure of State protection in the case of climate change-related harm absolves the host State of responsibility.

Additionally, to borrow again from UK tort law, it may also be possible to argue that the failure of the home State to take all necessary steps to avoid harm befalling its citizens would not constitute an intervening act that breaks the chain of causation between the act of the host State (here greenhouse gas emissions) and the impact on the individual (climate change-related harm).

If host State responsibility for climate change was acknowledged as a relevant consideration in the balancing exercise under Article 8, courts and tribunals would still need to consider how to strike a 'fair balance' on a case by case basis.

6 Application of new arguments to Maria's case

Between 1980-2010 the Philippines experienced 363 natural disasters.⁴⁴ The country is affected by drought, earthquake, epidemics, extreme temperatures, floods, insect infestations, dry and wet mass movements (i.e. landslides, subsidence etc), volcano eruptions, storms and wildfires. Storms are responsible for the significant majority of fatalities and damage.⁴⁵ Natural disasters are thus a common feature of life in the Philippines.

⁴² Source: Carbon Dioxide Information Analysis Center, http://cdiac.ornl.gov/trends/emis/meth_reg.html

⁴³ see for example the case of *Horvath v Secretary of State for the Home Department* [2000] UKHL 37 (6 July 2000)

⁴⁴ PreventionWeb, *Philippines – Disaster Statistics*,
<<http://www.preventionweb.net/english/countries/statistics/?cid=135>>

⁴⁵ *ibid*

However, some have seen a connection between climate change and Typhoon Bopha.

Philippine government officials interviewed by the New York Times in the aftermath of Typhoon Bopha saw several factors contributing to its impact:

Government officials said this week that storm patterns related to climate change had put communities unaccustomed to strong typhoons in Bopha's path. But they also said the destruction had been exacerbated by deforestation from illegal logging and small-scale mining, as well as poor planning and confusion created by maps supposed of vulnerable areas.⁴⁶

According to the Financial Times, the Philippines' lead negotiator at the Doha climate talks (COP 18), which was taking place at the time the typhoon struck the Philippines, told delegates: 'As we sit here in these negotiations, even as we vacillate and procrastinate here, the death toll is rising. I appeal to leaders from all over the world to open our eyes to the stark reality that we face'.⁴⁷

Mary Ann Lucille Sering, head of the Philippine government's climate change commission, speaking in the aftermath of Typhoon Bopha, told the Guardian: 'Extreme weather is becoming more frequent, you could even call it the new normal...'⁴⁸

Indeed, the EM-DAT database shows that typhoons are becoming more frequent in the Philippines. Records from 1900 to 2013 reveal a significant increase in actual and average numbers of typhoons in recent years. Table 1 reveals the increasing frequency of typhoons to hit the Philippines

Table 1: Change in typhoon frequency 1900-2013⁴⁹

Time period	Average number of typhoons
1900-2013	2.4
1950-2013	4.19
1960-2013	4.83
1970-2013	5.58
1980-2013	5.84
1990-2013	6
2000-2013	7.3
2003-2013	8.2

⁴⁶ Floyd Whaley, 'Death Toll from Typhoon Exceeds 450 in Philippines' *New York Times* (7 December 2012) <<http://www.nytimes.com/2012/12/08/world/asia/death-toll-from-typhoon-exceeds-450-in-philippines.html>>

⁴⁷ David Pilling and Roel, 'Manila Links Typhoon to Climate Change' *Financial Times* (7 December 2012) <<http://www.ft.com/cms/s/0/6c9bb500-405f-11e2-8e04-00144feabdc0.html#axzz2EORlqDa1>>

⁴⁸ Simon Tisdall 'Filipino Super-Typhoon an Ominous Warning of Climate Change Impact' *The Guardian* (17 February 2013) <<http://www.guardian.co.uk/world/2013/feb/17/filipino-super-typhoon-climate-change>>

⁴⁹ EM-DAT, above n 2 <

http://cred01.epid.ucl.ac.be:5317/?after=&before=&iso%5B%5D=PHL&dis_subtype%5B%5D=Tropical+cyclone&agg1=year&agg2=>

Even allowing for poorer quality data collection earlier in the twentieth century, there is a very clear trend showing an increasing frequency of typhoons to hit the Philippines over the course of the century. The three years with the greatest number of typhoons on record were 2008, 2009 and 2011, with eleven, thirteen and twelve typhoons recorded respectively.

However, the UN Economic and Social Commission for Asia and the Pacific (ESCAP) together with the World Meteorological Organization (WMO) concluded in their *Second Assessment Report on the Influence of Climate Change on Tropical Cyclones in the Typhoon Committee Region*⁵⁰ that ‘... it remains uncertain whether there has been any detectable human influence on tropical cyclone frequency, intensity, precipitation, track, or related aggregated storm activity metrics in the WNP [Western North Pacific] basin’.

According to the ESCAP/WMO report, patterns in tropical cyclone⁵¹ frequency and intensity vary and there is insufficient historical data to identify any long-term trend:

Trends in intense typhoon frequencies, such as Category 4 to 5, are particularly divergent in recent decades, and remain uncertain. Satellite-based intensity trends since 1981 show only modest evidence for significant trends and their utility is limited by the relatively short record length together with uncertainty about natural variability levels... key uncertainties remain about both data homogeneity and the potential role of natural variability. In general, uncertainties in observed TC datasets, as reflected for example in the differences between records from different centers in the basin, as well as uncertainties about the potential role of natural variability on TC trends and other changes in the basin, limit our ability to make a confident attribution of the observed changes in these TC metrics to human influences.⁵²

This conclusion mirrors that reached by the IPCC in relation to the influence of climate change on tropical cyclone frequency and intensity in general.⁵³ Thus, two authoritative reports addressing the impact of climate change are unable to draw a significant connection between climate change and typhoons at present.

In light of the current State of scientific evidence, and particularly considering the recent and authoritative position of UNESCAP/WMO and the similar findings of the IPCC, it is unlikely that Maria would be able to establish that climate change contributed to the intensity of Typhoon Bopha. She would therefore struggle to draw any compelling connection between Sweden’s greenhouse gas emissions and the impact of the typhoon on her home, livelihood and family.

On current evidence, therefore, Maria may be best advised to present her claim in

⁵⁰ ESCAP/WMO Typhoon Committee, *The Second Assessment Report on the Influence of Climate Change on Tropical Cyclones in the Typhoon Committee Region* (2012)

<http://www.typhooncommittee.org/45th/Docs/item%2011/2assessment_FINAL.pdf>

⁵¹ A typhoon is the term given to tropical cyclones in the Western North Pacific – EM-DAT Glossary.

<<http://www.emdat.be/glossary/9#lettert>>

⁵² ESCAP/WMO, above n 89, xv

⁵³ IPCC, *Disasters*, above n 3, 9

line with conventional Article 8 arguments linked to her relationship with her son. As part of her Article 8 claim she could also point to the impact that return in the aftermath of the disaster would have on her physical and moral integrity.

If scientific consensus were to be established, or at least a compelling argument linking the typhoon to climate change had been advanced by a section of the scientific community, then she could potentially rely on the Article 8 argument that points to the responsibility of the host State for climate change. As a sixty-year-old widow, she faces return to an environment that is severely degraded, as described in the OCHA situation report referred to in Section 3. There is inconsistent access to food, water and medicine. Communicable diseases are prevalent owing to a lack of adequate sanitation. Maria was living in a makeshift shelter before travelling to the Sweden. Although questions may be raised about the ability of Maria's son to support her in another part of the Philippines, there are potentially strong grounds for Maria to argue that her expulsion to face such conditions on return would be disproportionate, in particular having regard to the historical and ongoing responsibility of Sweden for the warmer climate that contributed to the disaster.

Having now taken up residence with her son in Sweden, and considering the fact that she has lost her home, her business and her husband as a consequence of climate change for which Sweden carries partial responsibility, the Court might still be persuaded that expulsion would be disproportionate even if conditions improved through repairs to infrastructure and housing.

7 Conclusion

The emission of greenhouse gases into the atmosphere, primarily by developed countries, has led to a situation where some weather events are more frequent and more intense, increasing the vulnerability and exposure of millions of people to loss of life, serious harm or illness, and/or severe deprivation in the aftermath of a sudden-onset disaster or as a consequence of slow onset disasters such as drought or sea level rise. These threats do not result from the normal vicissitudes of life for which host States cannot reasonably be held responsible. That responsibility should be reflected in the way the courts and tribunals approach the protection of Convention rights in climate change-related displacement claims, including by reducing of the weight to be given to the interests of the State in the proportionality exercise under Article 8.

However, as this paper has highlighted, any claim that seeks to rely on the impact of climate change as a way of resisting expulsion will have to overcome substantial challenges, in particular the challenge of establishing a connection between climate change and the particular weather event. The challenge is made clear by the case of the Philippines, a country that is exceptionally vulnerable to adverse weather events of many kinds. Perceptions of individuals on the ground are clear that climate change is having significant adverse impacts, yet climate scientists are unable to identify the role of global warming in any observed changes.

Although this conclusion therefore suggests that the prospects of success of climate change-related harm claims are for the time being limited, there is some indication that a lower standard of proof may be required in cases where individuals cannot hope to prove their case 'beyond reasonable doubt'. In this connection, the dictum

of the European Court of Human Rights in *Fadeyeva v Russia*⁵⁴ is instructive:

79. The Court reiterates at the outset that, in assessing evidence, the general principle has been to apply the standard of proof “beyond reasonable doubt”. Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. It should also be noted that it has been the Court's practice to allow flexibility in this respect, taking into consideration the nature of the substantive right at stake and any evidentiary difficulties involved. In certain instances, only the respondent Government have access to information capable of corroborating or refuting the applicant's allegations; consequently, a rigorous application of the principle *affirmanti, non neganti, incumbit probatio* is impossible (see *Aktaş v. Turkey*, no. 24351/94, § 272, ECHR 2003-V).

However, it is one thing for the Court to be prepared to accept that claimants had suffered adverse health affects as a consequence of pollution from a nearby steel plant (this is what the *Fadeyeva* case was about), and something considerably different to accept that Sweden bears responsibility for the impact of Typhoon Bopha in the Philippines.

Progress on establishing causal connections between climate change in the context of heat waves and drought suggests that the evidence establishing the role of climate change in other types of disaster situations will become more compelling in years to come.

It has not been the purpose of this paper to prove that Maria should not be expelled from Sweden because she is a climate change refugee and Sweden carries responsibility for the harm that she fears on return. Rather, I have set out to explain the way Article 8 of the European Convention on Human Rights currently applies in cases where individuals express a fear of harm on return to their home countries, and to consider how the role that climate change plays in contributing to the existence of that harm would affect the balancing exercise that is conducted when determining the lawfulness of expulsion in an individual case. Maria's case highlights the practical challenges that would need to be overcome before the principled application of the law could be realised in an individual case.

⁵⁴ 55723/00 [2005] ECHR 376 (9 June 2005)