Climate change, natural disasters and non-refoulement: What scope for resisting expulsion under Articles 3 & 8 ECHR?

Matthew Scott
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Presentation prepared for workshop

Climate Change-related Displacement: What scope for Protection under Refugee and Human Rights Law?

University of London, School of Advanced Study
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Structure

• Concepts of environmentally-related harm and climate change-related harm
• Hypothetical examples from real world events
• How existing ECHR jurisprudence applies
• Interpretations of jurisprudence when the role of climate change is taken into account
• Challenges
• Discussion points
Preliminary observations

• 31 million people were displaced by floods, storms and wildfires in 2012 (Internal Displacement Monitoring Centre)

• 1 billion people have been ‘affected’ by natural disasters since 2008 (EM-DAT) [affected = requiring immediate assistance during a period of emergency]

• When people move, they tend to move short distances within their own countries or across immediate borders – however, consider sur place

• Movement tends to be short-term

• There are connections between some weather extremes and climate change, but it is very difficult to pinpoint the role of climate change in any specific event, although progress is being made

• “It is extremely likely that human influence has been the dominant cause of the observed warming since the mid-20th century.” – IPCC Fifth Assessment Report (27 September 2013)
Multiple factors involved in ‘environmentally-related harm’

- Natural Variability
- Climate Change
- Exposure
- Infrastructure
- Population Pressures
- Governance
- Individual Vulnerability
Potential clients?
Typhoon Haiyan

http://www.bbc.co.uk/news/world-asia-24894529
Environmentally-related harm and climate change-related harm

• Environmentally-related harm includes
  – Death
  – Malnutrition, Dehydration, Starvation
  – Increased disease incidence
  – Conflict
  – Homelessness
  – Lack of access to essential services (i.e. medical)
  – Loss of livelihoods

• Climate change-related harm can be identified where adverse environmental factors that cause harm have been exacerbated by climate change – i.e. more intense typhoons, more frequent droughts
Role of climate change in typhoons and droughts

- Typhoons – theoretically significant, but lack of empirical evidence – World Meteorological Organization report – but note Myles Allen’s recent call for more attribution studies

  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

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

- Drought – more evidence - UK Met Office ‘attribution’ study

  We found that the particularly dry short rains in 2010 were most likely caused by natural variability. However, the chances of long rains as dry, or drier, as those of 2011 were found to have increased due to human influence

Can the European Convention assist individuals fearing environmentally-related harm?
Article 3 typology

- **Direct and intentional infliction of harm cases**: where the receiving state or non-state actors directly and intentionally inflict serious harm (exemplified by Soering v United Kingdom)

- **Purely naturally occurring harm cases**: where the receiving state is not considered to be responsible for harm that results from ‘purely’ naturally occurring phenomena such as HIV (exemplified by the cases of D v United Kingdom and N v United Kingdom)

- **Predominate cause cases**: where actors in the receiving state are seen as being the predominate cause of a humanitarian crisis (exemplified by Sufi & Elmi v United Kingdom)
Article 3 and environmentally-related harm

- Where the harm is ‘purely naturally-occurring’, the case must be both ‘very exceptional’ and the ‘humanitarian considerations’ must be ‘compelling’ (N v UK para 42)

- Perhaps the father on dialysis in the Philippines clip?
Article 3 and climate change-related harm

• “If the dire humanitarian conditions in Somalia were solely or even predominantly attributable to poverty or to the state’s lack of resources to deal with a naturally occurring phenomenon, such as a drought, the test in N. v. the United Kingdom may well have been considered to be the appropriate one. However, it is clear that while drought has contributed to the humanitarian crisis, that crisis is predominantly due to the direct and indirect actions of the parties to the conflict. (Sufi & Elmi v UK, [282])”

• A lower threshold test is indicated, having regard to 3 factors [283] (basic needs, vulnerability to ill treatment, prospect of improvement)

• What if a humanitarian crisis is predominantly caused by anthropogenic climate in some future scenario?

• Alternatively, climate change-related harm is sui generis as host State is implicated in causing the harm (and a still lower threshold should therefore apply)
Article 8 and environmentally-related harm

• Fair balance - C v Belgium 21794/93 [1996] ECHR 28

• Impact on spouse and minor children - Üner v the Netherlands 46410/99 [2006] ECHR 873

• Applicant’s physical and moral integrity – Bensaid v UK 44599/98 [2001] ECHR 82

• Extraterritoriality and flagrant breach – R (Ullah) v Special Adjudicator [2004] UKHL 26 and F v United Kingdom App no 17341/03 ECHR

• Poor prospects of success
Article 8 and climate change-related harm

- Fair balance

- Historical and ongoing responsibility for significant and measurable proportion of global greenhouse gas concentrations

- Annex II ‘developed country parties’ to the UNFCCC and the 3rd recital in the preamble

- Host State benefits derived from disproportionate emissions of greenhouse gases, combined with shared responsibility for adverse impacts on applicant’s home country must be a factor falling to be considered – could tip the balance

- Similar reasoning as in ‘loss and damage’ debate in UNFCCC COP 19
Fair? Disproportionate contribution to climate change: Per capita CO₂ emissions (thousand metric tonnes of carbon)

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Challenges
Overarching challenges

• Internal relocation

• Multiple agents share responsibility for climate change and its adverse impacts

• Attribution of the role of climate change in a particular event

• The threshold for both Article 3 and Article 8 remains high – are things really so bad?

• Public policy – ‘floodgates’
Disaster-specific challenges

• Sudden-onset disasters
  – Tend to be cleaned up within the period it would take for a case to reach the Upper Tribunal (but could there be a role for JR to challenge removal in these cases?)

• Slow-onset disasters
  – Claimants may be regarded as economic migrants, given gradual deterioration in living conditions

• In both cases, focus must be on risk of harm on return
What scope for protection?

- No environmentally-related or climate change-related harm cases brought in Europe (please let me know if you are aware of any!)

- No knowledge of the number of individuals with potential environmentally-related or climate change-related harm claims [though consider those 1 billion affected – some must have moved internationally – even 1% is 10,000,000]

- Are we failing to identify protection needs amongst clients? (parallels with days before awareness of gender-based persecution?)

- Is this something human rights lawyers should be concerned about?
Questions for discussion
Litigation as a way to develop protection

• Risks?

• Better to just try out arguments in any case where ‘arguable’ or wait for a ideal fact pattern?

• Better to start trying to argue ‘environmentally-related harm’ cases more consistently (i.e. the dialysis patient in the Philippines example) rather than try climate change arguments now?

• How to identify fear of environmentally-related harm? Who is asking? Should we ask? How to avoid prompting?
If not litigation, then what?

• And what will you tell your clients?