Observations from the pilot study on the practice and perspectives of lawyers in the United Kingdom and Sweden regarding protection from environmentally related harm in an era of climate change

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1. Methodology .................................................................................................................................................. 2
   1.1 Research Ethics ......................................................................................................................................... 3
2. Observations from the pilot study .................................................................................................................. 3
   2.1 On the current state of practice regarding protection from environmentally related harm .......................................................... 4
       2.1.1 Why do environmentally related harm fact patterns arise so infrequently in practice? ...................................................................... 7
       2.1.2 Why are lawyers not advancing arguments regarding host state legal obligations in relation to environmentally related harm in international protection claims? ........................................................................ 10
       2.1.3 The Swedish context .......................................................................................................................... 13
   2.2 On the current scope of protection from environmentally related harm ..................................................... 15
       2.2.1 Refugee Convention .......................................................................................................................... 16
       2.2.2 Article 3 ECHR ................................................................................................................................... 19
       2.2.3 Article 8 ECHR .................................................................................................................................. 23
   2.3 On determining and developing the scope of international protection through strategic litigation ................................................................................................................................. 26
       2.3.1 General challenges to developing the law on protection from environmentally related harm .......................................................................................................................... 26
       2.3.2 The ‘incrementalist’ approach to strategic litigation ............................................................................ 28
       2.3.3 The ‘climate change’ approach to strategic litigation ........................................................................ 31
3. Conclusions .................................................................................................................................................. 39

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1. Methodology

A total of nine semi-structured interviews were carried out between November 2013 and April 2014 with senior lawyers specialising in asylum and immigration law in the United Kingdom and Sweden. Eight lawyers from the United Kingdom and one lawyer from Sweden were interviewed. Three UK-based lawyers were employed by organisations and were self-described strategic litigators. One lawyer was the legal director of a membership organisation. Two participants were client-facing lawyers, one was a retired barrister and another was a practicing lawyer and part-time judge. The Swedish lawyer is currently senior legal advisor at an international organisation. Some of the participants have been involved in some of the seminal refugee and human rights cases.

I selected lawyers with at least ten years of practical experience, or who are otherwise recognised as being leading practitioners in the field of asylum and immigration law, for example by being listed in the Legal 500 or Chambers guide. I identified the nine interview participants based on my own knowledge of each lawyer’s profile in the practice of asylum and immigration law. I had worked with many of the UK participants during my own practice as an asylum lawyer, and was acquainted with others through my wider professional network as both a solicitor and doctoral candidate.

A qualitative research method was preferred over a quantitative method as the former provides greater opportunities for inductively exploring a phenomenon. Seeking to obtain measurable, quantitative data, for example regarding the number of lawyers who have advanced environmentally related harm claims in court, would not assist in answering the research questions.

The semi-structured interview method was chosen in favour of a more rigid qualitative questionnaire format or less structured open interview method. I preferred the semi-structured interview method over the questionnaire format because the latter relies too heavily on the expectations of the person designing the questionnaire and leaves limited room for discovery based on spontaneous connections made in the course of more ‘conversational’ approach allowed for by the semi-structured interview method. The semi-structured interview method was preferred over an open interview method because I was interested in being able to compare the responses of participants with a degree of systematocity.

Consequently, I prepared a checklist of 26 prompt questions that I could use to steer the interview. In part because of time pressure, but primarily because I was interested in exploring the perspectives of practitioners rather than collecting quantifiable data, I did not always address each of the 26 questions on the checklist. The checklist also developed somewhat over the course of the pilot. The final checklist can be found at Annex 1.

I made initial contact with potential participants by email. I personalised each email. With some I had a long-standing professional relationship, whereas for others I pointed to
an individual we knew in common or a case we had been involved in together. The personal connection was, I believe, helpful in securing at least some of the interviews. I approached about fifteen practitioners in total, and almost all of those with whom I had some kind of personal connection agreed to be interviewed. Those who did not participate in the pilot either declined due to time constraints or with no explanation, or failed to respond to the initial or follow up emails. In the emails I provided some background to the research that I was carrying out as a doctoral candidate and explained that I was interested in discussing the issue of climate change-related displacement and international protection.

I attached a draft version of my article *Climate change, natural disasters and non-refoulement: what scope for resisting expulsion under Articles 3 & 8 ECHR?*, confirming that it had been accepted for publication in the International Journal of Refugee Law. I considered that the article would offer some further insight to potential interview participants into the nature of the work I was carrying out, and would provide a frame of reference for some interview questions. I also considered that the fact that the article had been accepted for publication in a leading refugee law journal lent me some credibility as an academic researcher in the field of international protection. I felt that the advantages of providing an advance copy of the article outweighed any possible adverse implications associated with ‘tainting’ the otherwise ‘pure’ responses that I would have received from practitioners had they not had the advantage of considering the article in advance. As it turned out, having reference to the article and the arguments considered therein provided a very valuable platform for discussion, and allowed for a degree of consistency in discussion around possible scenarios that could engage host state protection obligations.

The interviews took place either at the office of the participant or in a café. One interview took place over the telephone. Interviews lasted between one hour and two and a half hours. All interviews were tape recorded with the consent of the participant. Interview transcripts were then typed up and cross-cutting themes were systematically identified. In what follows I discuss the insights gained from the pilot study and develop questions that will guide the research moving forward.

1.1 Research Ethics

As part of the thesis involves collecting qualitative data through semi-structured interviews, ethical considerations need to be addressed.

As the interview participants are lawyers and as questions focus on their professional practice and opinions, considerations applicable to vulnerable interview participants do not apply. Private personal data is not collected. Transcripts of the recorded interviews have been provided to all participants.

2. Observations from the pilot study

This section is divided into three subsections.
In subsection 2.1 I present and discuss observations from interview participants regarding the current state of practice regarding protection from environmentally related harm. The subsection concludes that lawyers in both Sweden and the United Kingdom are not focused on securing protection from environmentally harm, but that practitioners in both jurisdictions have identified instances of environmentally related harm and advanced arguments pointing to host state protection obligations in that connection, albeit such cases are very rare.

In subsection 2.2. I present and discuss the perspectives of practitioners on the current scope of protection from environmentally related harm. The Swedish practitioner identified Paragraph 4:2a of the Swedish Aliens Act as an express protection provision for individuals fearing harm in the context of an environmental disaster. The lack of implementation of this provision in practice made it difficult for her to provide insight into its scope. Lawyers in the UK were able to point to domestic and international case law that would establish the scope of protection from environmentally related harm. The key finding reflected in this section, which is mirrored in the doctrinal study entitled *Refuge from climate change-related harm...*, is that whilst pathways to protection can be identified, most individuals fearing environmentally related harm will not be able to secure international protection under existing interpretations of the law.

In subsection 2.3 I present and discuss the insights that practitioners provided into possible approaches to determining and developing the scope of international protection from environmentally related harm. Two distinct approaches are discernible: one which makes explicit reference to the role of climate change in an international protection claim, and the other which seeks to incrementally develop the scope of protection with minimal emphasis on the factual role of climate change in the displacement scenario and initially no reliance on its legal implications. I conclude this section by recognising that further exploration of the two approaches is warranted, both by way of additional interviews but also through more abstract consideration of the implications of the two approaches.

### 2.1 On the current state of practice regarding protection from environmentally related harm

When explaining my reasons for wanting to conduct interviews with lawyers on the topic of climate change-related displacement and international protection, I often identified an interest in ‘taking the pulse’ or taking a snapshot of practice when the adverse effects of climate change are only starting to be felt on a measurable scale. The pilot interviews confirm that lawyers in the United Kingdom and Sweden are not actively engaged in litigation seeking to secure protection for clients from climate change-related harm. Although several interview participants recalled having made reference to environmentally related harm in legal submissions in asylum and immigration claims, lawyers do not appear to be actively considering environmental conditions when advising and representing clients seeking international protection, and the role of climate change in any protection scenario is not explored in practice. In this section I consider practitioner perspectives on the current state of affairs.
Notwithstanding the overall conclusion that protection from climate change-related harm is not actively being sought by practitioners in the United Kingdom or Sweden, three of the nine interview participants confirmed that they had included reference to adverse environmental conditions as part of overall submissions regarding risk on return.

Informant 8 relied in part on the impact of Typhoon Haiyan when representing a couple in an appeal against a decision to refuse to grant a spouse visa to a Filipina national:

    Well, we just said he couldn’t be expected to go back and live in the Philippines in the house that he was buying, because there’s no work there, it’s all devastated. We said that in a totally unscientific evidence-free way, including an article about the typhoon in the appellant’s bundle, and the judges were “oh my god!” And they didn’t ask, ‘oh well was that street…, and could…’ – you know. They didn’t ask those detailed questions.

Informant 2 anticipated the approach taken by Informant 8:

    You may have cases where people make this point but where the case was then allowed on other grounds but where the point really helped to persuade the judge to find in favour… I think it may have been presented as fact, but not legal argument.

However, another practitioner recalled invoking domestic legal precedent when making reference to adverse environmental conditions in Zimbabwe and Somalia.

    I think I might have included it in a statement, but I don’t think, I’ve always had other things to go on… I could only at the moment, not having thought a great deal about widening the scope, [try] to fit it into a sort of AA (Uganda)\(^1\) type context…I must have run those arguments where they were obviously available, such as the Somali or Zimbabwe context\(^2\).

\( AA \text{ (Uganda)} \), which recognised that the individual vulnerability of a young Ugandan would make internal relocation from Northern Uganda to Kampala ‘unduly harsh’ will be considered in further detail when the doctrinal and empirical parts of the thesis are interwoven.

Informant 7 had advanced legal arguments based explicitly on the right not to be exposed to environmentally related harm, in particular in the context of children being expelled with their parents to countries with poor water quality:

\(^1\) \textit{AA (Uganda) v Secretary of State for the Home Department} [2008] EWCA Civ 579 (22 May 2008). The UK Court of Appeal held in \textit{AA Uganda} that internal relocation from Northern Uganda to Kampala would be ‘unduly harsh’ for a young woman owing to her individual vulnerability.

\(^2\) Informant 4
It’s interesting actually, the *N v UK* problem, where they say this is not persecution, so the Refugee Convention doesn’t apply. It’s not deliberate harm caused by the state; it’s generally speaking harm which because the state doesn’t have the resources to combat it, whether it’s destitution or desperate living conditions or dirty water… I’ve used dirty water actually, in Zimbabwe, where – this was children – so the argument that children, particularly children born in the UK, being sent with their parents, who were refused asylum seekers, to Zimbabwe, when things were absolutely desperate. But I think it’s not only Zimbabwe actually, when I think about it. [There are] a number of African countries where the public health system is dreadful, where water tends to be infected, and where children are at risk of death from waterborne diseases and parasites and stuff like that. We don’t win these arguments, but there’s a sort of a cumulative… There might have been one. There’s a case called *CA* in the Court of Appeal…

The Court of Appeal held in *CA* that the non-refoulement obligation under Article 3 ECHR would be engaged in the case of an HIV positive mother potentially having to watch her infant child die either from having contracted the virus by drinking the mother’s breast milk, or by alternatively contracting typhoid or cholera by drinking powdered formula rehydrated with potentially contaminated water. Significantly, this case predated the European Court of Human Rights’ judgment in *N*, although the Court of Appeal in *CA* considered that the facts of the case were indeed arguably ‘extreme’ having regard to the threshold test it had articulated when *N* was in the Court of Appeal.

This significant case will be considered in further detail when the doctrinal and empirical parts of the thesis are interwoven.

Informant 1 had also advanced rights-based arguments in relation to El Salvadorean earthquake victims. I discuss her approach in more detail later in this sub-section.

Thus, environmentally related harm clearly features in some international protection claims, and there is evidence that some lawyers have sought (successfully) to secure protection for clients as a matter of legal right. However, all of the interview participants

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3 *N v United Kingdom* [2008] 47 EHRR 39. In that case the fact that the claimant was HIV positive, her access to appropriate medical care in her home country of Uganda was insufficient and she was consequently expected to die within two years of return there was insufficient to engage the protection of Article 3 ECHR.

4 *CA v Secretary of State for the Home Department* [2004] EWCA Civ 1165

5 Paragraph 40 of *N v Secretary of State for the Home Department* [2003] EWCA Civ 1369

I would hold that the application of Article 3 where the complaint in essence is of want of resources in the applicant’s home country (in contrast to what has been available to him in the country from which he is to be removed) is only justified where the humanitarian appeal of the case is so powerful that it could not in reason be resisted by the authorities of a civilised state. This does not, I acknowledge, amount to a sharp legal test; there are no sharp legal tests in this area. I intend only to emphasise that an Article 3 case of this kind must be based on facts which are not only exceptional, but extreme; extreme, that is, judged in the context of cases all or many of which (like this one) demand one’s sympathy on pressing grounds.
agreed that protection from environmentally related harm was not something that lawyers were focused on. None of the participants routinely enquired into environmental conditions in their clients’ countries of origin or habitual residence. Participants offered their perspectives on both why environmentally related harm fact patterns did not seem to appear much in practice, and why legal arguments relating to environmentally related harm were seldom advanced. I discuss these perspectives below.

2.1.1 Why do environmentally related harm fact patterns arise so infrequently in practice?

Practitioners identified several possible reasons why environmentally related harm fact patterns arise infrequently in practice. The following factors were prominent in discussions with interview participants:

- The possibility that people affected by environmentally related harm do not generally travel to Europe
- The possibility that people affected by environmentally related harm are in Europe, but present international protection claims that fall within the conventional scope of the refugee definition.
- The possibility that lawyers are failing to identify claimants who face a risk of being exposed to environmentally related harm on return to their countries of origin

First, Informant 5 identified one factor being perhaps the fact that serious environmentally related harm particularly affects people in poor, distant countries. There are thus potential economic, legal and logistical factors preventing individuals from seeking international protection in response to environmental pressures. Informant 5’s speculation is supported by evidence that the vast majority of individuals who are displaced in the context of environmental pressures remain within their own countries, or cross immediate borders into neighbouring countries. Consequently, Europe is unlikely, at present, to be receiving substantial numbers of people whose movement is related to environmental pressures.

However, individuals from all over the world seek asylum in European countries notwithstanding grinding poverty and significant legal and logistical obstacles designed to restrict their entry. Additionally, many individuals facing a risk of exposure to environmentally related harm on return, particularly in the aftermath of disasters, will already find themselves in a European host country. Some may have residence permits, but a number might find that their right to remain in a host country has expired at the time

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7 Reiko Obokata, Luisa Veronis, Robert McLeman, Empirical research on international environmental migration: a systematic review, Popul Environ (2014) 36:111–135 ‘...our review suggests that, at least for the present, international migration for obvious environmental reasons is not occurring in vast numbers.’
the disaster unfolds or in its aftermath. Others may be unlawfully present on the territory and face enforced removal. Of significance in this connection is the fact that more than one billion people have been adversely affected by disasters since 2008. Why have lawyers therefore not encountered such cases in practice? Does the international system already provide adequate protection to those individuals who, for one reason or another, are outside their country of origin and wish to avoid being returned in the aftermath, or is there a protection gap both in terms of the scope of legal protection as well as one originating in the practice and perspective of lawyers themselves?

Informant 2 addressed the possibility that practitioners may be failing to ask targeted follow-up questions when exploring international protection claims:

I think that the work that people do is very very complicated. So I think that you end up with protocols, either formal or informal, about how you deal with cases. You end up with questions that you ask. It seems to me the biggest challenge, and where things always go wrong with lawyers is not that lawyers didn’t apply their protocol correctly, it’s that they only applied their protocol. It’s that they did not step outside the protocol and ask the fundamental questions they ought to have asked… And they might say ‘My village is under water, but I thought that I get leave here to remain because I’m an Ahmadi.’ You know what I mean? So you get an Ahmadi, you don’t think to ask ‘are you a gay Ahmadi?’ or ‘Is your village under water?’… You see that all the time that people all the time really don’t get asked.

A related issue identified by practitioners was the possibility that claimants themselves present their protection claims under different categories that are more in line with existing understandings of the scope of international protection. For example, an individual fearing exposure to environmentally related harm on return in the aftermath of the 2010 floods in Pakistan might have made an asylum claim on the basis of being a persecuted religious minority, or on the basis of his sexual identity. According to Informant 6:

I am not aware of anybody making that claim [based on the risk of being exposed to environmentally related harm]. That is not to say that these claims have not been made, but I am not aware. And it is certainly the case that they do not form a major component of post-flood Pakistani claims, which then asks the question “why not?” And the answer I think is simple: because, not because the de facto refugees are not caused by an even as monumental as the floods, but because people know that once they have been caused, these de-facto refugees, they’ve got to really dress up their claims in some other way, and that claim may well be on the basis that they’re actually homosexuals or they’re Christian converts or whatever…

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Informant 8 saw a similar need for individuals facing adversity that is not expressly covered by the Refugee Convention to emphasize those aspects of their lives that may give them a greater chance of securing international protection:

But I was thinking [about] people coming across [from] Libya, and coming on the boats. Some of them are from Eritrea, and Eritrea, as you remember, is a little bit like North Korea, or Cambodia under Pol Pot. And there you’ve got a small, specific category of people who are self-evidently fleeing from political oppression, whether it is to avoid forced military service or some other aspect of it. But, so you could say, that in a boat where you might have ten from the Congo, ten from Darfur, ten from Ethiopia and ten from Eritrea, you’ve got ten Eritrean asylum seekers, and the rest, I think you’d probably have to fit their story into an asylum claim, really. Which isn’t to say that they’re lying; it’s just that they’d have to creatively package their life-history, orientating it towards, if a beam of light shone on it, it would show persecution, whereas... you could go there, I could go there, and it could orientate it towards, and they could tell a history, of, decreasing economic potential of the land, and how trying to grow crops for European supermarkets has denuded the soil, or any of those sort of things. And you could find well, their land has been laid waste to, and because of the low, kind of, social level of the country in general, they haven’t got the income support claim, or a food-parcel bank to go to; they can’t claim homeless at the local authority, they haven’t got any of that. And so they leave, and then they find they have to put their story into an asylum context...

That individuals may cast their international protection claims in terms that fit most effectively into established categories is clearly within the realm of possibility, although it would compromise the institution of international protection to adopt a general view that individuals from countries facing adverse environmental conditions who seek protection from persecution under the Refugee Convention are in fact disguised ‘environmental migrants’. The nuance of Informant 8’s observation is interesting because it does not suggest that individuals fabricate accounts (although this will also happen in practice), but rather choose to emphasize different aspects of their experience to conform to the narrative expectations of the international protection system. The role of lawyers in shaping that narrative, in terms of the way they explain the law, react to client accounts and ask follow up questions may help to explain the relative absence of environmentally related harm claims in Sweden and the United Kingdom.

Informant 8 explained that the first step in any strategic litigation initiative would be to raise awareness amongst practitioners about the potential for winning cases that include an element of environmentally related harm. In the first instance, lawyers with an authoritative command of asylum law would need to organize training courses for practitioners setting out how to identify claimants who may face environmentally related harm on return, and provide clear arguments that could improve a claimant’s prospects of succeeding in an application or before a tribunal or court. Providing practitioners with arguments that stand a chance of succeeding and providing them with training materials
to refer to afterwards is an effective way of bringing an emerging legal issue to the attention of practitioners and, consequently, the courts.

In contrast, Informant 9 did not consider training on protection from environmentally related harm to be of immediate interest practitioners. She had previously forwarded invitations to participate in externally-organized round table discussions on the subject to members, and none had been willing to attend. Of course there is a difference between attending a round table discussion and attending training on how to advance novel legal arguments on behalf of a client in court, but in Informant 9’s opinion, the issue is simply ‘not on the agenda’.

If there are no individuals fearing environmentally related harm in their countries of origin or habitual residence, then the protection gap in the international system is of no consequence except in terms of potential future scenarios where climate change-related harm intensifies and leads to significant long distance cross-border movement. However, given that some practitioners have already identified individuals facing environmentally related harm, and considering the statistic of one billion people affected by disasters since 2008, a combination of the content of claimants’ narratives and practitioner failure to ask relevant questions may result in an ‘extra legal’ protection gap that may be easier to address than the legal obstacles themselves. On this analysis, one additional ‘pathway to protection’ that could be developed would be the extra legal pathway of awareness raising and training within the profession.

2.1.2 Why are lawyers not advancing arguments regarding host state legal obligations in relation to environmentally related harm in international protection claims?

Although identification of environmentally related harm is a pre-requisite for any legal argument advanced on that basis, practitioners also identified extra legal constraints to the formulation and advancement of legal arguments regarding host state legal obligations in relation to environmentally related harm in international protection claims. These include:

- The fact that lawyers have no guidance that environmentally related harm arguments can be advanced in support of an international protection claim
- The possibility that lawyers choose not to advance arguments based on environmentally related harm for fear of making a case appear weak, or because there are no viable arguments that can be made on the facts
- The fact that significant cuts to the legal aid budget prevent lawyers devoting substantial time to identifying and developing possibly innovative grounds for seeking international protection

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10 I use the term ‘extra legal’ to refer to factors that, although not forming part of the positive law, nevertheless play a role in how the law operates in practice.
Informant 3 held the view that environmentally related harm is ‘not on the agenda’ because lawyers ‘don’t have references that show that this is a good thing to argue… because there’s never been a successful claim’. She also echoed to an extent the view of Informant 2 that lawyers may fail to see potential arguments owing to preconceptions about the scope of international protection. For Informant 3, many lawyers are preoccupied with trying to present claims within the framework of the 1951 Refugee Convention, notwithstanding the different forms of complementary protection that exist within the European Union.

Even if potential arguments were to be formulated, Informant 2 considered that some lawyers may avoid advancing them for fear of making the case look weaker.

And I think a sense that the arguments that people are running are already challenging enough. And that this would make your case look weaker, which I think has validity to it.

[Interviewer] Make the case look weaker by trying to advance this new argument?

Yeah. I think what you need is, I think that’s how this gets triggered like with D is when you have nothing else. A when it’s really strong, really obvious like ‘my island nation is actually under water and there is nowhere to go back to’ and when there’s nothing else.

This perspective invites recollection of Informant 4’s comment recounted earlier in the subsection, where he explained that he always had other arguments to advance and therefore never felt the need to seek to advance innovative legal arguments based on the risk of exposure to environmentally related harm. Informant 7 also observed that innovative legal arguments tend to arise when there is nothing else to argue.

Informant 4 also shared Informant 2’s view that advancing ‘specious’ arguments could undermine other arguments

If you have better argument, you don’t want to undermine them by specious or what might be seen to be specious arguments.

The protection gap in the context of environmentally related harm will not be narrowed without lawyers identifying cases and advancing legal arguments based on that kind of risk on return. However, as the foregoing section has demonstrated there is a reluctance in the profession to advance novel legal arguments in the context of environmentally related harm.

One additional factor preventing the development of the law in this connection is the substantial cuts to the legal aid budget that have been made in recent years. Many UK-based lawyers interviewed saw the legal aid cuts as being a significant impediment to the development of the law on international protection in general, and in the context of environmentally related harm in particular. There were general and specific aspects to
In general, it was observed that lawyers practicing under current legal aid contracts simply do not have time to consider novel legal arguments. They are paid fixed fee rates for cases, where the full cost of a lawyer’s time will be paid only in exceptional cases. In such a challenging business environment, where many legal aid law firms have closed down as a result of the cuts, lawyers are struggling to represent even more ‘conventional’ cases. According to Informant 9:

… you’re having to use your pro-bono time and your pro-bono energy to do the basics, to have a child turning 18 who has an OK refugee case, an Afghan boy, and a great Article 8 case, cause he’s been here since he was 14. You’re using your pro-bono efforts for that. So there’s none of it left to do the sparkly spanking cases, people are on their knees, there’s no question.

One specific aspect of the legal aid cuts potentially affecting litigation in cases of environmentally related harm is removal from the scope of work that will be funded of all but Refugee Convention and Article 3 ECHR arguments. Under previous legal aid contracts funding was available for investigation and representation regarding a claimant’s rights under Article 8 and other human rights grounds as well, and a rich body of jurisprudence on the scope and content of these rights developed in the UK in part as a consequence. Now that Article 8 claims are no longer eligible for legal aid, the scope for advancing novel legal arguments is reduced. Informant 9 described the implications of this funding restriction:

…in general, it’s gonna slow down the jurisprudence…There’s also a tremendous difficulty, and an ethical problem that leads to lawyers not taking on the case, but the mixed case. So let’s say I’ve got a barely tenable, but, OK, I think I can just squeeze through the merits test on some very creative legal arguments [like a] natural disasters Article 3 case, and I’ve got a really strong Article 8 case with all kinds of factors some of which has to do with disaster related stuff, some of which has to do with my seventeen children. What am I to do as a lawyer? The Article 3 is the only thing funded. The Legal Services Commission would be on me like a ton of bricks if I tried to do the Article 8 work. Can I ethically take the client on?

This observation is particularly significant when note is taken of recent advances under the ‘physical and moral integrity’ limb of Article 8 ECHR\(^{11}\), and when regard is had to the possibility of securing international protection from environmentally related harm under Article 8. Whereas cases will continue to be litigated by claimants who can afford private legal representation, individuals who are destitute, including non-citizens at risk of being exposed to environmentally related harm in their home countries, will not secure legal aid funding to advance novel arguments in court under Article 8. She continued:

Well I think some of these really exciting cases will still run, but they will find the pro-bono representation in the city firm, the barristers who want to go to the

\(^{11}\) Akhalu (health claim: ECHR Article 8) Nigeria [2013] UKUT 400 (IAC)
Supreme Court and argue, and there could be such a climate change, natural disaster case but it’s unlikely then to influence the general growth of cases, cause as you know, in the UK, you win the lead case and then you have to argue all the others. The Home Office don’t roll over and say ‘oh, we lost’, and that’s not going to happen. So the idea of changing and gradually developing the law, it’s desperate.

Another specific aspect to the role of legal aid cuts in explaining the lack of litigation of cases of environmentally related harm is the changes to the merits test that lawyers have to apply when determining whether legal aid can be granted in an individual case. Under previous versions of the civil legal aid contract, cases that were assessed as being ‘borderline’ could still be eligible for legal aid funding if there was arguably a public interest in litigating the case. Informant 7 explained that some of the ground breaking gender-related persecution cases would have been funded under that exception in previous years. Under the current legal aid contract, borderline cases are no longer funded, regardless of any wider public interest argument.

2.1.3 The Swedish context

Informant 1, the only Swedish lawyer interviewed under the pilot study, identified four factors that might help to explain the lack of litigation in the Swedish context, where 4 kap. 2a§ 2 of the Swedish Aliens Act 2005\(^\text{12}\) provides explicit protection for individuals ‘unable to return to the country of origin because of an environmental disaster’.

First, she observed that in general there is very limited discussion of the issue in Sweden, and lawyers do not have a frame of reference to know that they might need to be asking questions about environmentally related harm when representing an individual from a particular country. The issue, as in the UK, is not on the agenda.

Second, she considered that there may be a feeling amongst practitioners that protection from environmentally related harm fits more comfortably within the realm of the discretionary humanitarianism of the state, as opposed to being a legal entitlement. This notwithstanding explicit provision for subsidiary protection under the Aliens Act 2005.

A third point is that, in her view, whereas there are many lawyers working in the field of immigration and asylum, many do so only to a small degree. There are few specialist lawyers, and consequently few lawyers looking at how to apply the law in new circumstances.

Finally, in terms of addressing questions of protection for environmental migrants at the

\(^{12}\) In this Act, a ‘person otherwise in need of protection’ is an alien who in cases other than those referred to in Sections 1 and 2 is outside the country of the alien’s nationality, because he or she is unable to return to the country of origin because of an environmental disaster. Official translation available at <http://www.government.se/content/1/c6/06/61/22/94531dbc.pdf> accessed 10 September 2014
European level, Informant 1 saw an issue with the legal education in Sweden that does not promote creative legal practice. In this same connection she considered that too much emphasis is placed on the fact that Sweden operates a dualist system of law, and that some academics and judges consequently see little role for international law, including international refugee law, to play in the Swedish protection framework. In her view ‘you need to be a bit rebellious, at bit at least, in order to think differently’.

These extra legal factors that Informant 1 identified go some way towards explaining why, notwithstanding the explicit protection provided for under the Aliens Act, the provision is so conspicuously absent from Swedish legal practice.

Indeed, Informant 1 may have been the only Swedish lawyer to advance a protection argument under the Swedish provision.

In her recollection, the case concerned a number of claimants from El-Salvador (or some other very small Latin American country), who had travelled to Sweden in the aftermath of a disaster that devastated the country. They had actually been tricked into coming to Sweden in the expectation of employment, and when it became clear that they had been deceived (the details of the deception are not clear, but nor are they relevant), some of them became clients of Informant 1. She saw no protection ground under the Refugee Convention, but argued that her clients were unable to return home because of the environmental disaster. There was evidence, including from the Swedish Embassy in El Salvador, that the country had been totally devastated by the earthquake. However, the cases were refused by the Swedish Migration Board and appeals to the Aliens Appeals Board (Utlänningsnämnden) were dismissed. Informant 1 recalled a very brief decision with limited reasoning, but which concluded that the provision extending protection to individuals unable to return home in the aftermath of a natural disaster was not intended to cover the circumstances of her clients.

As far as she is aware, this case is the only one that has been argued under the ‘environmental disaster’ provision.

Notwithstanding her own past efforts to secure recognition under 4 kap. 2 § 2, Informant 1 confirmed that she did not routinely explore environmental questions when considering international protection claims. However, on consideration she recognised a potential administrative law obligation on the part of both the legal representative and the decision-maker to ask questions about environmental factors, given that an express protection provision exists that needs to be explored before it can be ruled out.

As a legal representative you have to argue all available grounds, from a purely administrative law perspective, all grounds that can be found that support a client’s claim to have a right of residence in Sweden. Consequently, it is the case that one has to pose the question, or explore whether the paragraph applies. If you don’t pose any questions you simply can’t know the answer. And equally, the Swedish Migration Board has a duty to investigate all grounds, and if no questions are posed and that paragraph is not considered, then it has been
excluded without being considered. It is the case that everyone thinks that the
paragraph is just there but there’s no point in thinking about it because it will
never be applied and there is nothing written about it, full stop. And of course that
is not acceptable. [Author’s translation]

Anecdotally, a former asylum case officer at the Swedish Migration Board recounted that
in training courses delivered to Migration Board case officers, trainers have difficulty
identifying a scenario where the provision would apply, but cite a disaster in a country
like Haiti, where the whole country is affected, as potentially fulfilling the requirements.
The availability of an internal relocation alternative will often preclude the availability of
protection under the environmental disaster provision.

One factor that appears to make the provision difficult to implement in the Swedish
context is the fact that the preparatory works ¹³ say very little about how to apply it, and
there is no judicial guidance and limited scope for judicial guidance to direct state
practice ¹⁴. Thus, whereas the presence of a specific, yet simultaneously vague protection
provision relating to an environmental disaster would likely generate substantial litigation
and subsequent judicial guidance in common law countries like the United Kingdom, the
provision remains essentially unused in Sweden’s civil law jurisdiction.

To sum up, lawyers in Sweden and the United Kingdom are not, in general, thinking
about the possibility of securing protection from environmentally related harm. In part,
there may be few individuals who are outside their country of origin or residence and
who are in need of international protection. However, there is also the possibility that
individuals who do need international protection from environmentally related harm are
not being identified. They may seek to enter or remain on the territory of the host state
under existing immigration channels, or may present international protection claims
based on narratives that fit more securely within the existing framework. At the same
time, lawyers are not looking for evidence of environmentally related harm and are not
considering the potential scope for arguing in that connection. Moreover, the reductions
in the legal aid budget in the United Kingdom, and the small number of specialist asylum
and immigration law practitioners in Sweden, are seen as factors limiting the ability of
lawyers to take time to consider novel legal arguments.

Although many individuals fearing environmentally related harm would not secure
protection under existing law, protection is available in some circumstances. In the
following subsection, I present some of the views expressed by lawyers about the current
scope of protection from environmentally related harm.

2.2 On the current scope of protection from environmentally related harm

In order to elicit the range of factors that lawyers would consider when asked to represent
a client facing environmentally related harm in their home country, most interview

¹³ Regeringens proposition 1996/97:25
¹⁴ The availability of an internal relocation alternative is likely to also significantly limit the scenarios
where the provision could be applied.
participants were asked how they would approach a hypothetical case involving a sixty year old widow who found herself displaced in the United Kingdom in the aftermath of Typhoon Haiyan, which struck the Philippines in November 2013. The example was taken from the article I had sent participants in advance of the interview. Their responses often opened numerous avenues for further discussion relating to the current scope of protection from environmentally related harm. In what follows, I discuss participant responses to the hypothetical scenario question as well as their observations on the wider question about the current scope of protection from environmentally related harm. The Refugee Convention is presented first, followed by Articles 3 and 8 of the European Convention on Human Rights.

2.2.1 Refugee Convention

Article 1A(2) of the Refugee Convention establishes that a person is a refugee if she is outside her country of nationality or habitual residence and is unable or, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is unwilling to avail herself of the protection of that country.

There is substantial judicial and academic authority rejecting, as a matter of general principle, the proposition that the Refugee Convention can be relied upon by individuals fearing environmentally related harm. Lord Brown of Eaton-under-Haywood expressed the position succinctly at paragraph 33 of the judgment in AH (Sudan): To secure these benefits, however, an asylum-seeker must fall strictly within the definition of “refugee” set out in article 1A(2) of the Refugee Convention. This is not a Convention designed to meet all humanitarian needs—far from it, perhaps understandably given the countless millions who would otherwise be entitled to its benefits. Consider the range of those excluded from its protection. As was observed in the Australian case of A v Minister for Immigration and Ethnic Affairs [1998] INLR 1, 18: "No matter how devastating may be epidemic, natural disaster or famine, a person fleeing them is not a refugee within the terms of the Convention."

Few practitioners spontaneously identified any protection as being forthcoming in a claim advanced under the Refugee Convention. Indeed, Informant 3 considered that the Teitiota case regarding protection from climate change-related harm under the Refugee Convention would not even have secured legal aid funding in the UK because it did not

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15 Secretary of State for the Home Department v. AH (Sudan) & Ors [2007] 3 WLR 832
16 In order to elicit spontaneous insight into the way practitioners conceive of the scope of protection from environmentally related harm, the prompt questions did not seek specific comment on any particular instrument. Moving forward, future interviews may follow up open-ended questions about the scope of protection with targeted questions regarding the protection available under specific instruments.
17 Teitiota v The Chief Executive of Business Innovation and Skills [2014] NZCA 173. I discuss this case, which concerns a claim under the Refugee Convention brought by a citizen of the Pacific island state of Kiribati, on the basis that the international community was indirectly persecuting him by emitting greenhouse gases.
have any merit. She said:

… if you're talking about strategic litigation, you ain't gonna get nowhere … [with] the sort of the New Zealand Kiribati case. I mean, that wouldn't have even gotten into a court in England! The Legal Aid Board would have bopped that one on the head…

Approaching the question from a different perspective, Informant 9 considered that scope for protection in the context of environmental pressures did exist under the Refugee Convention, but that those individuals facing environmentally related harm who were actually in need of international protection would tend to be those who would in any event qualify as refugees under the Convention. Although accepting that extreme weather events can cause significant temporary damage and harm, for Informant 9, the factors that make an individual or community vulnerable to environmentally related harm are more about ‘man’s inhumanity to man’ than the intensity of an extreme weather event.

For Informant 9, where individuals face adversity, it is first and foremost the result of political decisions, where authorities decide not to address the needs of certain individuals or groups for discriminatory reasons, whether it is gender, or political opinion or ethnicity or another reason. In her view ‘… if we lose that political dimension, we act as apologists for the persecutors’. She said:

The people who are going to have a problem because of factors environmental… are the people who have a political problem, the people who won’t get protected, the people who won’t get their share of the resources, the people the government will say “sh*t happens, sorry if you just lost your home”, well, I should move then – those are the people we’ve got to think about, and that is pure politics!... That’s the Refugee Convention as we’ve always known [it]. There’s nothing new there, that when fighting happens or something happens in the politics of a country, there will be people who get it in the neck, and they’re the ones who need international protection, and they will get it in the neck either because the state is unwilling to protect them because of their ethnicity, because of their religion, because of their gender, or because the state is unable to protect them, because there is something particularly demanding in their make-up, they’re particularly vulnerable to the type of harm that has happened… I think persecution as opposed to harm is going on in these cases where it is sufficiently bad.

She cited the situation in Darfur as one example of a scenario where the adversity suffered by certain groups resulted from government policies, albeit perhaps exacerbated by adverse environmental conditions.

[In Darfur] you had a shortage of water, you had a migration each year of the nomads, up through, over from Chad, up through the whole of Darfur, you know, a bit of pillaging went on, there was a bit of grabbing of pastoralists crops, but give or take some skirmishes there was about enough for coexistence, that involved a bit of agro. You then got shortages of water, which meant crops failed,
so you had a more desperate struggle, which the government then funded, and exploited, and turned into a civil war. … The idea that Darfur could be explained in terms of food security and water shortage would be laughable.

For Informant 9, then, political factors lie at the heart of international protection scenarios even where they take place in the context of adverse environmental conditions. This approach is supported by judicial determinations in several jurisdictions. In a detailed determination regarding protection from climate change-related harm, the New Zealand Immigration and Protection Tribunal identified several ‘pathways to protection’ that, whilst taking place within the context of environmentally related adversity, were nevertheless scenarios involving discriminatory infliction of harm for one of the five reasons covered by the Refugee Convention\(^\text{18}\). The determination identifies the following circumstances:

- Discriminatory distribution of post-disaster humanitarian relief\(^\text{19}\)
- Use of environmental degradation as a direct weapon against a population, such as occurred with the Iraqi Marsh Arabs following the first Gulf War\(^\text{20}\)

However, whilst Informant 9’s approach is supported by judicial authority as well as mainstream disaster epidemiology that highlights the social factors that make certain individuals and groups more vulnerable to environmentally related harm (including conflict)\(^\text{21}\), some scenarios where individuals face serious environmentally related harm will fall outside the scope of the Refugee Convention. For example, the fictional Maria who seeks protection in the United Kingdom in the aftermath of typhoon Haiyan would not be entitled to refugee status. As a sixty year old widow whose husband was killed in the typhoon and whose property was destroyed, she would be unable to point to any risk of persecutory ill-treatment on return. Although gender and age are characteristics that can bring an individual into the ‘particular social group’ category\(^\text{22}\), it would be difficult to establish that the harm to which she would be exposed on return (increased disease incidence, limited access to food and medical facilities, homelessness, social unrest and so forth) arise ‘for reasons of’ her age or gender. The state and the international community can clearly be seen to have been taking steps to respond to the disaster in the face of unprecedented adversity and there is no indication of discriminatory ill treatment

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\(^{18}\) AF (Kiribati) [2013] NZIPT 800413

\(^{19}\) para 58. For references to case law from Canada, the USA, Australia and the UK regarding persecution in relation to food aid, see James Hathaway, Food Deprivation: A Basis for Refugee Status? (2014) 81 Soc. Res. 327, 336 [http://repository.law.umich.edu/articles/1076/] accessed 30 July 2014

\(^{20}\) para 59.


by state or non-state actors\textsuperscript{23}.

Although they fail to engage the protection of the Refugee Convention, the conditions of existence on return, either to Maria’s home town of Tacloban city or on relocation within the Philippines, would potentially be so severe as to engage host state obligations under Article 3 and/or 8 ECHR. These forms of complementary protection are considered below.

\textbf{2.2.2 Article 3 ECHR}

Following the case of \textit{Soering v United Kingdom}\textsuperscript{24}, Article 3 ECHR protects individuals from being returned to countries where they will be exposed to torture or inhuman or degrading treatment or punishment. The Article is relied upon heavily by individuals seeking international protection who, for example, fear serious harm that cannot be connected to one of the five reasons under the Refugee Convention.

When determining whether a host state will breach its obligations under Article 3 ECHR, regard is had to the intensity of the harm that the individual risks being exposed to on return. For expressly public policy reasons\textsuperscript{25}, the European Court of Human Rights in \textit{N v United Kingdom}\textsuperscript{26} established that for a breach to be established, the circumstances would have to be both ‘very exceptional’ and the ‘humanitarian considerations’ would have to be ‘compelling’\textsuperscript{27}.

Most lawyers interviewed about the current scope of protection from environmentally related harm instinctively applied this test when considering scenarios where international protection obligations might be engaged. In addition, many lawyers identified the internal relocation alternative as presenting an often insurmountable obstacle for all but the most vulnerable of claimants. I discuss practitioner perspectives on the harm threshold and internal relocation alternative below.

\textit{Harm threshold}

When discussing Article 3 ECHR, some of the scenarios imagined by lawyers to attain the harm threshold were quite severe indeed. For example, Informant 5 asked:

\begin{quote}
Are you returning to Khan’s dead planet on Star Trek or are you returning to an area that is under siege? Are you returning to a landmass that has no law, because it’s now everyone fending for themselves, with mass rioting and looting, and
\end{quote}

\textsuperscript{24} \textit{Soering v United Kingdom} - 14038/88 [1989] ECHR 14
\textsuperscript{25} See paragraph 44 where the Court considers the burden that would be placed on host states if the test under Article 3 were not interpreted restrictively.
\textsuperscript{26} Above n 3
\textsuperscript{27} Para 42
murdering, rape and everything else commonplace?… If you’re simply returning to a very, very difficult life because of you know, environmental disaster and presumably the economy nose-diving, I’m not sure if it’s going to get you anywhere.

Later in the interview he elaborated

How long do we think that the Philippines will take to get back to where it was before the disaster took place? How long would it take for law and order to exist? And it may be that the answer to that is two weeks, three weeks, four weeks, five weeks; but we’re talking weeks rather than generations. Let’s, can we think about a slightly different sort of disaster, just for the purposes of this, can we think of Chernobyl?

[Interviewer] That affected the whole of the country?

That affected the whole of the country, and for generations, arguably for generations, or at least for years as opposed to days or weeks. I think that if the impact of the harm was much more significant, and the recovery period that would be required for a modicum of services and the like to be restored, was much more significant, then I think there would be an issue. Or a potential. But I think that if we’re dealing with a situation in which a disaster, terrible as it is, actually is so commonplace, sadly, or is one for which efforts are being made to find solutions, within days or weeks, then it may be difficult to show that life has materially altered such that the risk remains. And of course if things have improved then by definition life can go on and the risk is therefore small, and the harm is small.

Informant 4 imagined a similar scenario as being necessary to engage the protection of Article 3

I don’t know what these places are like, but you imagine Haiti after the cyclone, or whatever it was…You imagine this sort of, Bladerunner-type apocalypse, where people are going around stealing, raping, there are rampant…diseases like cholera or typhoid, where people die very quickly… And the risk of sending someone back to an immediate and brutal environment, you would say that their vulnerability is a relevant factor, but anyone going back to that situation, or almost anyone going back to that situation, is open to a very more immediate harm than Re N. You know, you could imagine, a complete break down of law and order.

In the Refuge from climate change-related harm document I address the harm threshold as well as the issue regarding the duration of adversity in the aftermath of a disaster. Although in that paper I set out an argument for why it may in some cases be incorrect to apply the N threshold in cases of environmentally related harm, the assessment provided

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28 see page 12-13 for discussion of the harm threshold and page 16 for discussion of the duration of harm
by Informant 4 and Informant 5 echo findings from the doctrinal analysis.

Thus, in most environmentally related harm scenarios, most claimants would be unable to demonstrate that the harm they risked being exposed to on return would attain the exceptionally high threshold required by current jurisprudence on Article 3 ECHR. However, as Informant 4 points out, in an ‘apocalyptic’ scenario such as the aftermath of one of the many disasters that befall Haiti, claimants may engage host state protection obligations without the need to point to particular vulnerability factors. This insight is supported by the case of Sufi & Elmi v United Kingdom\textsuperscript{29} to the extent that human agents can be considered the ‘predominant cause’ of the humanitarian crisis. I consider certain disaster scenarios in which this lower harm threshold might be applicable in the articles Refuge from climate change-related harm and Natural disasters, climate change and non-refoulement. The need otherwise to point to particular vulnerability factors is addressed in more detail below.

\textit{Internal relocation alternative}

In addition to the exceptionally high harm threshold, many lawyers considered the internal relocation alternative to present an insurmountable obstacle for most claimants most of the time. Apart from disasters such as the 2010 earthquake in Haiti, where large parts of the country, including the capital Port au Prince, were devastated\textsuperscript{30}, most disasters affect only a part of a country, making relocation a potentially viable alternative. Informant 8 put the point succinctly when discussing the case of a client whose immigration case her organisation had been instructed in.

\begin{quote}
… if her case had been ‘I can’t go home’ – well I wouldn’t even have taken the case. I would have said ‘Madam, you know, there are parts of the Philippines that are still standing… you haven’t got an argument.’
\end{quote}

Informant 9 also saw internal relocation as a significant obstacle for most claimants seeking international protection in the context of a disaster, unless, however, there were individual vulnerability factors:

\begin{quote}
And if you are a person who cannot relocate internally to any situation of dignity and relative safety, why not? Is it because people are in camps and your society’s attitude to women is so awful that women in camps are at permanent risk of sexual assaults and everything else?
\end{quote}

Informant 4 echoed the need for some form of individual vulnerability if challenges presented by the internal relocation alternative were to be overcome:

\textsuperscript{29} Sufi & Elmi v United Kingdom, Application No 8319/07 (2012) 54 EHRR 9

… I would then look to see whether they would be vulnerable internally, you know, if there was a young woman with no family support dumped into Manila, you know, then I would think about the potential risks of exploitation or oppression there, but beyond that, you know I think the case is a bit of…

**Vulnerability**

The relevance of individual vulnerability to an assessment of an international protection claim under Article 3 ECHR was identified by many of the lawyers interviewed as part of the pilot study. The more an individual could be distinguished from other victims of a disaster, the greater would be her prospects of securing protection under Article 3 ECHR.

Informant 5 made the connection between the harm threshold and vulnerability explicit:

I think that my starting point would be whether or not, for that individual, I can show the consequences of harm are greater than the consequences of harm for their next-door neighbour. I think that would be my initial thought. It may not necessarily be the only thought that I have, but my initial thought would be to try and see whether or not this individual is the atypical victim of environmental damage or whether this is a person who, because of other circumstances, may be in a far more vulnerable position. For example, and again, I’m just sort of mulling things over, if there was a significant disability that this person had, that their ability to spring back from such a natural disaster was significantly greater, then I might be seeking to make a case based upon the consequences for them as an individual…

I suppose that’s why I was interested in the idea of differentiating the consequences for the individual client that I’m assisting, from the population as a whole, because I’m probably already reading into that the fact that I have to demonstrate something that is, for want of a better expression, truly exceptional, or abundantly exceptional, or, you know, significantly different. And I suppose that drilled down within my thinking is the need to demonstrate that in order to have a chance of success. Whether or not it would be a new test I’m not sure. I, this is probably not expressing it very well, but I can’t see what is wrong with the old test. Well I can see what’s wrong with the old test, but I can’t see why that wouldn’t be the test that you would apply.²¹

Informant 3 explained how the *Thlimmenos* vulnerability principle could be applied in the case of environmentally related harm:

…vulnerable groups… are entitled to different consideration from non-vulnerable groups and… to treat them the same in relation to a perceived serious harm is to breach this *Thlimmenos* principle… which is a Greek case about chartered accountants… The court in Strasbourg said that the principle of non-

³¹ The ‘old test’ that he is referring to is the test set out in *N v United Kingdom* discussed above

³² *Thlimmenos v Greece*, Application No 34369/97 [2000] ECHR 162
discrimination not only means that you mustn’t treat differently people who ought to be treated the same, but you mustn’t treat the same people who ought to be treated differently. So to say that you have a general principle which says that you don’t use your grounds [arguments in the paper I emailed her before the interview] for not sending somebody back is fine if you’re not sending back a sort of healthy young male like you, but it’s completely different sending back a disabled single mother with two sick children….

In light of the foregoing, a provisional conclusion to be drawn from the pilot study is that the scope of protection from environmentally related harm under Article 3 ECHR is very narrow, but that pathways to protection can be identified. Where the devastation and social chaos that follows from a natural hazard-induced disaster is so great and so dangerous as to potentially be described as ‘apocalyptic’, claimants of all descriptions may have a chance of avoiding enforced removal under Article 3. Where circumstances are less dire, and in particular where an internal relocation alternative is ostensibly available, practitioners need to point to individual vulnerability factors to distinguish their clients from the larger group of people adversely affected. Subsection 2.3 revisits the vulnerability concept within the context of a strategic litigation initiative.

2.2.3 Article 8 ECHR

Article 8 ECHR protects an individual’s right to a family and private life. The private life element has been interpreted by the European Court of Human Rights as including protection of an individual’s right to ‘physical and moral integrity’

33. Article 8 is also relied upon heavily by non-citizens who have strong ties to a European host state. There is limited but potentially helpful jurisprudence on the physical and moral integrity element

34 to assist individuals facing exposure to environmentally related harm in home countries.

Although most time was spent discussing the threshold under Article 3, some lawyers saw scope in Article 8 ECHR. In this connection, discussion focused around the ‘physical and moral integrity’ aspect of Article 8. Several lawyers pointed to some recent case law in the Upper Tribunal (Immigration and Asylum Chamber) (in particular the case of Akhalu

35), which was seen as opening up the possibility, on a case by case basis, for individuals facing significantly adverse conditions of existence if returned to their countries of origin, to secure protection where the Article 3 threshold had not been attained.

Informant 3 considered that an argument could be advanced on Article 8 physical and moral integrity grounds alone, without seeking to engage Article 3:

I mean, the other one that isn't, that is under-utilized is, forget about falling within

33 Bensaid v United Kingdom App no 44599/98
34 Bensaid v United Kingdom; Razgar, R (on the Application of) v. Secretary of State for the Home Department [2004] 3 All ER 82
35 Above note 11
the threshold of Article 3… if you've got a sufficiently serious interference with moral and physical integrity under Article 8, then you've got to have a correspondingly serious justification for disregarding that interference. But they don't want to go there yet. They will, but not yet.

[Interviewer] Cause that's something that I try to argue in the paper as well, that, I saw that the impact of physical and moral integrity could – if Article 3 fails, Article 8 could be engaged and you use proportionality.

Yeah. I think, it's very hard to persuade them, if they've gone through Article 3 and decided it fails, that the moral and physical integrity rubric of Article 8 will be sufficient to bite.

[Interviewer] Hmm, and just say Article 8?

Just say Article 8, moral and physical integrity, vulnerable group...

Informant 9 also saw potential advantages in relying on Article 8 ECHR instead of or in addition to Article 3:

I’d certainly be running Article 8, I mean on…

[Interviewer] Physical and moral integrity?

Yes, but, how can you send me back to this place when… I’d probably run Article 3 as well, and say it’s all terrible there, it’s inhuman and degrading, and you would be responsible for popping me into this dreadful scenario and it’s a mean thing to do. I think on Article 3 you’re in difficulty, because there is no intentionality in it and you are running D, at which point you know you’re desperate, cause you’re running up a cul-de-sac with your arguments. You’ve got to bring yourself, essentially, because the jurisprudence is now developed from D, and you’ve got N as a brick wall, you’ve got to bring yourself within D.


So, “I will die”. Which in Haiti at that time…probably not. Or at least, maybe if you had some illness or something that you could have shown that any question of you not getting clean water or catching any sort of bacteriological, you had no immune system for example, you’d be out. Maybe you’d have a chance. But I think a better chance on Article 8, where you just don’t send someone back, it’s again, it’s the proportionality.

[Interviewer] There’s really scope in Article 8, you see that, for these kinds of assessments? The balance?

Absolutely, absolutely. The Home Secretary is desperately trying to close it down.
Like Informant 9, Informant 5 expected any claims under Article 8 ECHR to be vigorously opposed by the host state as a successful outcome in court of such a claim could substantially expand the scope of protection by opening another pathway to protection. Discussing a case anecdotally recounted elsewhere about an appeal by an elderly woman that was allowed by the First-Tier Tribunal under Article 8, owing to the anticipated psychological impact on the claimant if returned to her country of origin in the aftermath of a disaster, he observed:

Whereas I think if it were a matter that went up in the Tribunal, it would have been fought all the way tooth and nail. So I think that if she’d lost and sought to appeal, then I think that it would have been heavily contested.

[Interviewer] Because…?

Of the, the idea of that being a gate-way or a path-way to providing some form of subsidiary protection for those who don’t meet an Article 3 threshold, but were able to show that the impact on them as individuals is so severe that consequences overseas, whilst presenting no risk for them personally, are too unbearable for them to return to.

Other practitioners commented on the potential scope of Article 8 ECHR in the context of environmentally related harm, but more in terms of a strategic approach to developing the law in the context of climate change. Their comments are reserved for discussion in section 2.3.

Given the fact that claims under Article 8 ECHR are no longer funded under the Legal Aid contract, Informant 9’s expectation of a slowdown in jurisprudence clearly has implications for the development of the law on international protection from environmentally related harm.

*Summing up*

The perspectives of practitioners regarding the scope of protection from environmentally related harm correspond, perhaps unsurprisingly, with the doctrinal analysis reflected in the documents ‘Refuge from disaster-related harm’ and ‘Natural disasters, climate change and non-refoulement’. Where there is discriminatory ill-treatment for a Convention reason, some individuals facing environmentally related harm will fall to be recognised as refugees. Absent persecution, adverse conditions of existence might engage host state protection obligations under Article 3 where conditions are so dire as to be accurately described as ‘apocalyptic’, or where individual vulnerability factors made the case ‘very exceptional’ and where the humanitarian considerations were ‘compelling’. In some instances, a proportionality assessment under Article 8 ECHR may result in a finding that expulsion of an individual to face environmentally related harm would unlawfully interfere with that person’s right to enjoyment of her physical and moral integrity, although this last proposition is not supported expressly in any authoritative
judicial interpretation regarding the scope of Article 8.

In all scenarios, the view held in common by interview participants was that the scope of protection is narrow. In what follows, I consider practitioner responses to questions about how a strategic litigation initiative may seek to expand the scope of protection from environmentally related harm.

2.3 On determining and developing the scope of international protection through strategic litigation

A diversity of views were presented by the nine practitioners who participated in the pilot interviews. Some were doubtful about the potential for the law to address the risk of non-citizens being exposed to environmentally related harm, whereas others were more willing to consider the potential for future development, notwithstanding significant challenges. In what follows, I first present the views lawyers about the challenges of developing the law in relation to protection from environmentally related harm in general. I then set out one approach that would strategically develop the law by advancing claims that would reinforce existing precedents (such as Sufi & Elmi) which contain grains of potential protection from environmentally related harm whilst gradually expanding the kinds of scenarios where protection obligations arguably arise. I term this approach the ‘incrementalist’ approach. After describing this approach and (briefly) considering the prospects and limitations, I turn to consider perspectives of practitioners on the opportunities and threats associated with advancing arguments that point expressly to the role of climate change in an environmentally related harm scenario. I find in this part an indication of a potentially different kind of strategic litigation initiative, where achieving a binding precedent may be less of an objective than triggering some form of state acceptance of a duty towards (some) non-citizens who risk being exposed to environmentally related harm in their home countries.

2.3.1 General challenges to developing the law on protection from environmentally related harm

Informant 9, whilst being opposed to the idea of advancing arguments based on the role of environmentally related harm in an international protection claim, was also attuned to the political factors that impact on the way the law develops. In particular, she considered the current climate in the United Kingdom, where judges face substantial criticism from political leaders and media outlets for taking decisions that protect individual fundamental rights notwithstanding a perceived detriment to the interests of society at large.

And I think that, you’ve also certainly here, got massive hostility towards judges, and the human rights arguments have no doubt given them power, undreamt of power, as has the growth of judicial review, undreamt of power, which, I don’t think they have been that self-denying in exercising. Not only for poor people, but for poor people among others, I think they’ve actually been quite bold in where they’ve taken the law in the last 20 years. But, the more pressure they’re under,
the more they’re going to question those decisions – ‘is this ground that we have over the last 20 years managed to colonize, or is this another frontier?’ And with government pushing back, undoubtedly, you are sensitized to the political nature of some of your decisions.

Thus, some judges who may have been willing to entertain arguments that would lead to an expanded scope of protection from environmentally related harm may, in light of the current political context in which they operate, be less willing to prefer such arguments in practice.

At the same time, judges both domestically and internationally are attuned to the political implications of their decisions, and where they consider it appropriate will defer to the executive or legislative branch of government in domestic cases, and regional courts such as the European Court of Human Rights or the Court of Justice of the European Union will defer to the Member States where those bodies consider it appropriate. One context in which judicial concern for the impact of their judgments is most pronounced is where a case raises the prospect of opening the figurative ‘floodgates’, with the result that the one case that fell to be decided invites an innumerable ‘flood’ of similar claims, with perceived adverse public policy implications. In the context of international protection from environmentally related harm claims, judges were considered likely to be concerned that a positive decision would open the ‘floodgates’ to an indeterminate number of non-citizens facing environmentally related harm in their home countries. This perception is reinforced by the recent Teitiota judgment in High Court of New Zealand36, where Priestly J observed at paragraph 51:

On a broad level, were they [arguments about protection obligations towards non-citizens fearing environmentally related harm] to succeed and be adopted in other jurisdictions, at a stroke, millions of people who are facing medium-term economic deprivation, or the immediate consequences of natural disasters or warfare, or indeed presumptive hardships caused by climate change, would be entitled to protection…

Informant 8 was attuned to the floodgates concern:

I couldn’t tell you what a reference for it is, because you just know, that an, say if you instruct counsel in a case that’s going to the Court of Appeal on some point like that, the last thing you would do is you would say this is a representative case for lots of other people. You would say my client is individually harmed by this general horrible situation, and you would hide the floodgates argument as far as you possibly could.

Informant 9 pointed out that the case of N v United Kingdom was taken with explicit reference to floodgates concerns. Indeed, at paragraph 44 if the judgment the Court observed

36 Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment [2013] NZHC 3125
… Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States.

For Informant 2, the floodgates argument would be prominent in any claim brought in the context of environmentally related harm as well:

And I think the other problem is that while you are right about individual cost, the difficulty with the non medical cases is that the numbers are just likely to be larger, and they’re not expected to die. Remember D was expected to die pretty soon. This wasn’t placing a burden on the UK. He wasn’t going to have any kids, whereas climate change refugees are going to come, they’re going to be pregnant and have kids and be a migrant population and the larger frame is ‘we are full, we don’t want any more’.

Against this background, the two options for a strategic litigation initiative seeking to develop the scope of protection from environmentally related harm fall to be considered.

2.3.2 The ‘incrementalist’ approach to strategic litigation

Informant 3 presented a clear vision of a strategic litigation initiative that only very gradually incorporated reference to climate change. Her approach involved identifying a ‘hybrid case’, like Sufi and Elmi plus climate change, including a particularly vulnerable claimant along with, for example, ‘a bit of violence, a bit of persecution, a bit of being the wrong clan, a bit of climate change, a bit of drought, a bit of famine, a bit of overcrowding in the camps, a bit of lack of fire-wood’. She said:

… you can't ask them to wake up one Tuesday morning in the tribunal and say ‘oh, we're going to overturn the refusal of asylum on the basis that it hasn't rained in the Sahel for God knows how long’, because they won't do that. But, if you do it incrementally...

Subsequent cases could then build on the previous case, but perhaps make more reference to climate change and rely less on the role of physical violence in a displacement scenario. As cases continue to build on one another, eventually, according to Informant 3, ‘they shift…’

Informant 3 identified a range of strategic considerations that would shape a strategic litigation initiative seeking to extend the scope of protection from environmentally related harm.

In her view, a claim would perhaps ideally be brought before the Court of Justice of the

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37 I have developed the ‘incrementalist’ approach in the article submitted as part of the mid-seminar entitled Refuge from climate change-related harm: Evaluating the scope of international protection following New Zealand’s Teitiota Judgment.
European Union under Article 15 of the Qualification Directive, rather than before the European Court of Human Rights under Article 3 ECHR because of the more generalized impact of CJEU Judgments compared to the case-specific findings of the European Court of Human Rights. She observed:

Well, if you can get Luxembourg to say that these situations fell within the meaning of serious harm of Article 15(c) of the Qualification Directive, then it would matter more than if you got Strasbourg to say in these particular circumstances, in the case of this particular individual or these particular individuals, and the particular place to which they’re planning to send them, because one of them has got three left feet, it would be inappropriate to send them back…

Lawyers would also need to pay close attention to the political standing of the host country in relation to the court, because in her view (echoing to an extent some of Informant 2’s observations), judges can be swayed by wider political factors. Thus, a case against Hungary is more likely to have a positive outcome for a claimant than a similar case against the United Kingdom. Whereas Hungary ‘has horns and a tail’ as far as the Strasbourg court is concerned, a finding against the United Kingdom would be more problematic owing to the political tension between that country and the court.

Additionally, the claimant’s country of origin is significant. A claimant from Nigeria, Pakistan or Bangladesh ought not seek to bring a piece of strategic environmentally related harm litigation against the United Kingdom owing to the profile that asylum and immigration cases from those countries have in the UK. A Bangladeshi citizen fearing environmentally related harm could bring a case against France, but not the United Kingdom.

A fourth consideration would be that the host state ought not to be delivering any kind of development assistance to the claimant’s home country, in order to pre-empt any arguments that the host state is taking reasonable steps to address the environmentally related harm directly, as opposed to through the institution of international protection.

Informant 8 also adopted the approach to developing the law incrementally, with significant emphasis on individual vulnerability.

And so, I think what you’d have to have, you’d have to have particularly vulnerable clients, I mean beyond their drought, and beyond the loss of their home and food supply… Say, I don’t know, a one-legged black lesbian woman, you know, that kind of, I’m not trying to be rude! Being sent back to say northern Nigeria, that area around northern Nigeria where there’s serious fighting between Christians and Muslims, plus drought. And then you’d have to say, say in… countries, but between Mali and northern Nigeria… places that are very, very sub-Saharan poor, with no water and no crops and no animals. Plus fighting. But then we’re back in the Article 15(c) issue. So, I would say a person from that area could possibly win their case, and you wouldn’t really have to go into the devastation any more than in Sufi and
Elmi. It’d be exactly like Sufi and Elmi. Can you manufacture an example where you couldn’t argue internal relocation? It would have to be that your whole country is pretty much become a desert.

[Interviewer] Or there were unique vulnerability factors that made internal relocation un…

Yeah, which make the cases legally not very interesting. I think that’s why I was saying, every time we try to manufacture an argument, the argument gets you back to, you know, in the jurisprudential sense, it gets you back to, into a not very big development of the law or into no development of the law.

Whilst recognising the strategic need to cast an individual protection claim within the vulnerability context, Informant 8 also considered this approach to be problematic in the wider political context:

You know, to me it’s bizarre, it’s, like I said, it’s like we’ll offer a few of them a Lamborghini, and the rest of you can just stay there. And it’s just inappropriate. You could even say, alright, suppose you’ve got these people on the outskirts of the Congo, and you pick out all the women who have been raped and all the lads who’ve had their arms cut off, but the ones who haven’t actually been raped, or only raped once, or who’ve still got both arms, you don’t do anything for them, well how can that be? So, it’s almost like, in order to avoid the floodgates, you make the test very precise and very narrow, and I suppose I’m saying, although there are definitely people who fit those criteria, undoubtedly, there are probably a hundred times more that never get recognized.

Informant 6 employed the concept of the ‘rationing device of refugeehood’ to refer to the situation described by Informant 8:

… focusing on something which is such an egregious violence, such a striking human rights violation, what you’re doing is you are using the rationing device of refugeehood in a way that restricts it to these one or two glaring examples… but what this does, is that A it allows for receiving states to say ‘well look, we are terribly, terribly, and deadly, deadly serious about our refugee laws because look at how we reach out to these really deserving cases.’ But B, it also allows them to overlook the real refugee case before them, the elephant in the room, namely the hundreds, maybe hundreds of thousands of climate change refugees that are knocking on the door.

Informant 8 considered that the number of people affected by such a decision would be miniscule in relation to the scale of the problem. She expressly queried the merits of strategic litigation in this connection, likening the successful outcome of a claim to the gift of a Lamborghini to a tiny minority of affected individuals:
... I think the idea of there being a legal solution is, a legal solution might last five or ten years, and it might give Lamborghini to slightly more people, and that’s the context I would put it in. It goes nowhere really. I don’t think legal practice and legal strategy goes anywhere to solving those kind of problems looked at, at that kind of global strategic level.

The strength of the incrementalist approach is that it works within the existing confines of the international protection system, both legal and extra legal. It is realistic and pragmatic. It holds out the prospect of expanding the scope of protection under Article 15 of the Qualification Directive and/or Articles 3 and 8 ECHR. Particularly vulnerable claimants would find increasingly consistent authority confirming that expulsion to face a risk of environmentally related harm can breach host state protection obligations. In this way, the protection gap would be narrowed.

The approach is not radical, which is of course its strength. The often perceived need to employ narrow interpretations of the law and emphasize concepts such as individual vulnerability in order to restrict the scope of protection to some notionally ‘manageable’ quantity of humanity is unlikely to fade from prominence as disasters and population movements increase in a changing climate. Consequently, and in light of the responses from the pilot study, it is clear that individual vulnerability is a crucial concept in developing the scope of international protection from environmentally related harm.

However, some of the lawyers interviewed saw a larger frame for strategic litigation in the context of environmentally related harm, one where the role of climate change in contributing to the harm took centre stage.

2.3.3 The ‘climate change’ approach to strategic litigation

In my article Climate change, natural disasters and non-refoulement: What scope for resisting expulsion under Articles 3 and 8 ECHR? I considered whether the scope of international protection could be extended if the role of climate change in an environmentally related cross-border displacement scenario were to be factored into the assessment of the claim. I developed an argument under Article 3 ECHR that invited the application of a lower harm threshold to be applied where it could be demonstrated that climate change was the ‘predominate cause’ of a particular disaster. Additionally, I considered the possibility of arguing that the proportionality assessment under Article 8 ECHR could factor in the (shared) responsibility of a European host state for the adverse impacts of climate change. A minority of the interview participants had read the Article in advance of the interview but the potential for advancing arguments relating to (host state responsibility for) the adverse impacts of climate change were discussed in all interviews.

Most lawyers interviewed expressed some reservation about making reference to climate change related harm in any strategic litigation scenario. A number of reasons were given, some focusing on more technical issues like the standard of proof whilst others addressed more political considerations.
Seeking to develop the law by pointing to the role of climate change in an environmentally related harm scenario is not without risks, as several lawyers pointed out in the course of the interviews. First, one concern was that pointing to climate change as a cause of harm risked depoliticising harm scenarios where domestic actors carry primary responsibility. A second concern, shared by many participants, was the risk of setting a negative precedent that would affect the development of the law in subsequent cases. I discuss each concern in turn.

For Informant 9, making reference to climate change in an international protection claim is ‘potentially quite harmful’ because it ‘tries to depoliticize things that… are fundamentally political’. This perspective is not surprising given the view she expressed earlier regarding the likelihood that individuals fearing environmentally related harm would generally be those who faced persecution for one of the five reasons under the Refugee Convention.

Searching for a domestic persecutor would not, however, assist the fictional ‘Maria’ who lost her husband and her livelihood in Typhoon Haiyan. However, although without persecutory intent, some have identified international political factors as directly contributing to the harm that resulted from that extreme weather event. Addressing the 19th Conference of Parties to the UN Framework Convention on Climate Change, the Philippines’ lead climate negotiator Nadarev Saño attributed the typhoon to climate change:

Science tells us that simply, climate change will mean more intense tropical storms. As the Earth warms up, so do the oceans. The energy that is stored in the waters off the Philippines will increase the intensity of typhoons and the trend we now see is that more destructive storms will be the new norm… Typhoons such as Haiyan and its impacts represent a sobering reminder to the international community that we cannot afford to procrastinate on climate action.38

However, rather than focusing on domestic political and economic factors, Saño saw the harm as resulting from a failure by the international community to address the causes and consequences of climate change. His support for calls by the G7739 plus China for action


39‘The Group of 77 is the largest intergovernmental organization of developing countries in the United Nations, which provides the means for the countries of the South to articulate and promote their collective economic interests and enhance their joint negotiating capacity on all major international economic issues within the United Nations system, and promote South-South cooperation for development.’ < http://www.g77.org/doc/> accessed 26 September 2014
on loss and damage\textsuperscript{40} attributes primary responsibility for climate change related harm to the developed countries identified collectively as the Annex II countries\textsuperscript{41}.

That an international protection claim could not be made out by identifying ‘the international community’ as an actor of persecution under the Refugee Convention was confirmed by the High Court of New Zealand in \textit{Teitiota}\textsuperscript{42}. Addressing that argument, which had been advanced by the claimant’s lawyer, Priestly J pronounced at paragraph 63:

\begin{quote}
The attempt to expand dramatically the scope of the Refugee Convention and particularly Article 1A(2) is impermissible.
\end{quote}

However, might some pathways to protection under other international protection instruments be opened through reference to the role of climate change in an environmentally related harm scenario? In light of the many challenges identified above, several lawyers identified the risk of setting a negative precedent as a factor weighing against the advancement of climate change-specific arguments in international protection claims. The risks arise both from advancing a good argument with poor facts as well as from challenges to the legal argument itself.

\textit{Factual and legal challenges}

Attempting to advance a novel legal argument that is not fully supported by the facts and securely grounded in existing legal principles and precedents risks a judgment that will restrict the development of the law for years to come. Informant 3 explained:

\begin{quote}
…this is another thing that you need to be aware of, which is a litigant’s dilemma, not the dilemma of an academic writer, which is if you win, great, if you lose, you have put nails that big in the coffin of this idea for ever after.
\end{quote}

\begin{quote}
\textbf{[Interviewer]} The negative precedent?
\end{quote}

\begin{quote}
Yes, the negative precedent. Look at Saadi. Saadi, the detention at Saadi. You know, a case from Malta should have gone first, not a case about a nice Iraqi
\end{quote}

\textsuperscript{40} The proposal by the G77 and China for the establishment of an International Mechanism on Loss and Damage expressly envisaged ‘compensation’ from Annex II states for damage caused by climate change – see Subsidiary Body for Implementation Thirty-ninth session, Agenda item 11, Approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity, Submission from the Group of 77 and China, FCCC/SBI/2013/CRP.1, 12 November 2013, <http://unfccc.int/resource/docs/2013/sbi/eng/crp01.pdf> Accessed 26 September 2014

\textsuperscript{41} Annex II states include all 1990 OECD Member states and are described within the UNFCCC as ‘developed country Parties and other developed Parties included in Annex II’. Annex II states include Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, and the United States of America.

\textsuperscript{42} Above note 35
doctor being held in Oakington detention centre being held for 77 days, where he had a room of his own and played ping-pong…

The limiting factor is don't waste a really good argument on a case that's going to establish a known negative precedent. I mean it doesn't matter if it's only the Home Office that would reject it, but you don't want it in the Court of Appeal.

Interestingly, Informant 2 was less influenced by the concern about setting a negative precedent than Informant 3 was. In his view, particularly because it is not practically possible to control the actions of other lawyers, waiting for an ideal case could result in a case with less persuasive facts being brought earlier. He considered whether the case of N v United Kingdom was an example of a wrong decision to bring a bad case to the European Court of Human Rights, as this case is widely regarded as having set a negative precedent affecting almost all subsequent Article 3 medical non-refoulement claims. In his view, there was a possibility that perhaps a ‘better’ claimant could have been found, but a ‘worse’ case might also have made it to court in the intervening period. In any event, Informant 2 recognised that N v United Kingdom was not an example of a case brought as part of a strategic litigation initiative, but was rather a client-led piece of litigation where the only consideration a lawyer can have is the best interests of the client.

A clear distinction was drawn by Informant 9 between client-facing lawyers and strategic litigators. Responding forcefully to the question whether a lawyer should bring a ‘bad’ case on behalf of a client even if it risked setting a negative precedent, she replied:

Absolutely, because your duty is to your client, and *fiat justicia*, there is no way, I mean, I think there is a real problem with the ethics in strategic litigation, and I think some people forget that, and if your client is likely to benefit in the undertow of a really strong case leaping over her, and winning the point, where she would never win it because her case is rubbish, and you can persuade her to hold back in her own enlightened self-interest, and that does the world a favor, that’s win-win. If your client’s only hope is to go in and be Mrs McCarthy or whoever…Then you run McCarthy! Of course, if your Mrs McCarthy’s lawyer, you run McCarthy! You know, and we’ll all hate you forever, but you’ll run McCarthy. And I think if strategic litigation loses sight of that, we are screwed! *43*

An interesting tension is thus visible between an initiative that would seek to identify an ideal claimant to be the subject of a strategic international protection case, lawyers in

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*Note* Mrs McCarthy refers to Shirley McCarthy, who, in *McCarthy (European citizenship)* [2011] EUECI C-434/09 (05 May 2011), appealed against a decision to refuse to issue her with a residence card as a European Citizen exercising free movement rights under the Treaties. She was a dual Irish and British citizen and had resided her entire life in the United Kingdom, and was unemployed. Had her claim succeeded, her Jamaican husband, who had no lawful basis of stay in the United Kingdom, would have been entitled to reside in the United Kingdom under European law. The case was dismissed by the Court of Justice of the European Union and is considered by some to represent a lost opportunity to develop the law relating to the right of family reunion of European citizens who do not exercise their free movement rights under EU law.
client-facing practices have a professional obligation to advance legal arguments that would most advance their clients’ interests, even if doing so risked setting a negative precedent. Taking the perspective of Informant 2, then, it would seem that organisations with a strategic litigation mandate would need to weigh up the possibility that a client-facing lawyer will bring the first European ‘climate refugee’ claim under Article 3 or 8 ECHR, perhaps on less than ideal facts and without the support of specialist organisations with a strategic litigation mandate. Holding out for a better set of facts for fear of setting a negative precedent could result in a case with weaker facts and fewer legal resources becoming the lead case.

One major factual challenge to any climate change related harm claim is that current scientific evidence does not establish a causal link between climate change and particular extreme weather events, an issue considered significant by Informant 9. This point would affect arguments under both Article 3 and Article 8.

In addition, in relation to the Article 8 argument, the legal challenges associated with any attempt to attribute responsibility for the adverse impacts of climate change were considered to be particularly problematic by several of the lawyers interviewed. Informant 8, for example, questioned what the test would be for establishing responsibility of the host state. Would the claimant have to establish intention on the part of the host state, or would reckless causation suffice?

Similarly, Informant 7 considered arguments about the responsibility of the host state would be ‘terribly difficult’ because they would seek to establish the nature of responsibility of one country for a problem that is caused by many countries. Indeed, both Informant 7 and Informant 3 had previous experience considering responsibility-based arguments in their own involvement in Article 3 ‘medical’ cases. Informant 3 had considered advancing an argument that the British Government, which had administered the claimant’s home country until a few years before his claim was brought, arguably bore some responsibility for the poorly developed infrastructure in the country, which could not provide the necessary palliative care for a terminally ill patient like the claimant. However, she decided not to advance a responsibility-based argument, concluding that ‘nobody was going to listen to an argument about the responsibility of post-colonial powers for the poverty of their former colonial territories’. For Informant 7, a potential argument she considered advancing concerned the responsibility that the United Kingdom arguably bore for failing to control the pricing of antiretroviral drugs by pharmaceutical companies. Recognizing the exceptional evidentiary challenges of attributing responsibility in this connection, a view was reached that such an argument ‘would not go down very well with the judges’.

Arguments pointing to the disproportionate emission of greenhouse gasses by wealthy countries are not dissimilar to the arguments dismissed by these leading lawyers even before testing them out in court.

Amplifying the general political concerns that would likely sway judges, as identified in section 2.3.1, a concern raised by some participants is that arguments based on host state
Responsibility for climate change-related harm would require courts to extend the current scope of protection. For Informant 8, for a court to accept such an argument would amount to a significant extension in both numbers of people and types of situation covered by existing international protection instruments. Making a finding that a host state owed an international protection obligation to an individual owing to that state’s contribution to climate change would thus potentially amount to an overstepping of the judge’s proper role:

So a judge would say this is an exceptional, huge extension of responsibility, and if such a responsibility was going to be taken, it’s not really the role of a High Court of a Court of Appeal judge, to make this decision. You know, this is the kind of thing which is a responsibility of parliament in the individual countries or, you know, it’s the responsibility of the European countries to think politically about this, you know ‘what should our response be, to these kind of disasters?’ Politically, that would be my position.

In a similar vein, Informant 4 and Informant 6 doubted whether the law as currently interpreted would allow a judge to take into account the responsibility of a host state for contributing to the adverse impacts of climate change. According to Informant 6, an Article 8 claim would probably not succeed because ‘we do not have any legal mechanism that allows us to bring into play, as a balancing exercise, the fact that the state had a role to play…’

In sum, arguments relating to climate change, and in particular arguments relating to host state responsibility for contributing to climate change, face substantial legal and evidentiary obstacles in practice.

Additionally, there is a perception amongst practitioners that there are some arguments that just cannot be advanced as they will not ‘go down well’ with the judiciary. Whilst part of the explanation is that the arguments are simply very difficult to establish in light of the multiple intervening factors, there is also a convention in the United Kingdom that judges should seek to avoid becoming embroiled in political controversy. Having regard to the existence of such a convention, any claim based on host state responsibility for the adverse impacts of climate change would need to be firmly grounded in both law and fact. Reference by some interview participants to the need for a finding of liability to be made before any international protection claim based on host state responsibility could be made out are relevant in this connection, and will be discussed in some detail later in this section.

Opportunities

Notwithstanding the many challenges identified above, several lawyers nonetheless saw a potential role for an argument expressly focusing on climate change-related harm in the context of an international protection claim.

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44 Convention re judges seeking to avoid political controversy
Informant 7 believed that a court finding of liability would be an important prerequisite for any successful international protection claim based on host state responsibility for climate change-related harm. If such a finding of responsibility were to be made, she believed that an Article 8 argument based on host state responsibility for climate change-related harm could be advanced with reference to the public interest in complying with the moral obligations that flow from a legal recognition of liability.

Her view was echoed by Informant 6:

I think the whole point about where does a public interest lie, and how is the public interest calculated?... Public interest cuts both ways: there is a public interest in the individual having the rights as an individual to remain here, but there's also a public interest in saying that if the state should not be doing something, i.e. … returning someone in conditions where the state has had a hand, a part to play, then the public interest requires that the state should not act in that way. And I think once you can show that there's a liability on the part of the state, then I think Article 8 can be deployed this way.

Informant 4 saw that a responsibility-based argument under Article 8 could seek to establish a threshold at the level that would address the needs of people who, on return, would live in destitution for the rest of their lives, as opposed to the existing Article 3 threshold, which helps only those sent back to essentially death.

Informant 2 saw reason to focus on climate change in a protection claim because a lot of people were concerned about the phenomenon. Moreover, there was some urgency in litigating cases on the basis of climate change-related harm. In his view, the more serious the impacts of climate change become, the greater the likelihood of European states ‘battening down the hatches’, making cases harder to win.\(^{45}\) In his view, the problem was not too much premature litigation, but ‘not enough good litigation’.

Interestingly, in Informant 2’s view, the strength of the legal argument supporting such a claim is only a small part of the puzzle. What is crucial to the success of a claim in the European Court of Human Rights is an ability to persuade a panel of judges who will have different perspectives on the phenomenon of climate change and on their proper role in deciding cases. Thus, Informant 2 asks, how would the judge who is sceptical about the role of climate change in extreme weather events, but who is committed to the humanitarian ideals of the Convention, respond to a climate change responsibility argument? In his view, ‘there are no convenient camps of right and left, liberal or conservative’, and different messages for different judges would be essential to enable coalition-building to take place.

It is a question of doing it better and by that I don’t primarily mean the legal arguments but building the wider political and community support to create a sense of why the support for the outcome you are asking the judges to reach so that they’ve [the judges] got that, not just the cover in the sense of the legal argument… but that they feel that there is enough of the people in their community who want them to make the judgment. You know that when they’re [the judges] on the bus and meeting people, you might get people who say ‘what did you do that for?’, but you’ll also get people who shake them by the hand and say thank you, you’ve made me proud to be Macedonian. We do neglect the kind of human gratification of the actors involved. People need to feel good about what they do, not martyred.

Like other practitioners, however, Informant 2 recognized that climate change-specific arguments may well lose in court, for a variety of reasons. Indeed, in addition to the political and legal challenges identified above, Informant 2 recognized that some judges interested in seeking an expanded scope of protection in the context of climate change-related harm may rule against an individual claim, not wanting to take the pressure off the political establishment to comprehensively address the phenomenon. This last observation prompts consideration of the potential contribution that strategic litigation can make to wider state led processes such as the Nansen Initiative and the Warsaw International Mechanism on Loss and Damage. I will explore this question in more detail as the thesis develops.

What emerges from the above discussion is that a strategic litigation initiative focusing on climate change-related harm is possible, and could help to raise the profile of the phenomenon and bring political pressure to bear in the interests of bringing about a more comprehensive political response, even if the case were to lose in court. However, substantial resources and expertise would be required to manage the initiative and coordinate the work of the multiple actors that practitioners considered would be required to maximize the impact of such an initiative.

Organisations with a strategic litigation mandate, for example the (now closed) Interrights or the AIRE Centre which have been involved in many of the precedent-setting asylum cases that have been before the European courts in recent decades, would be well-placed to help steer such a strategic litigation initiative. However, given the potential scale of such an initiative, and in particular considering the overlap with international environmental law and the UNFCCC process, specialist international environmental lawyers, such as the Foundation for International Environmental Law and Development (FIELD), as well as other actors, could play a collaborating role.

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46 For more on this approach in the general strategic litigation context, see Ben Depoorter, ‘The upside of losing’, *Columbia Law Review*, v113: 817-862 (2013)
47 http://www.interights.org/home/index.html
48 http://www.airecentre.org
49 http://www.field.org.uk
3. Conclusions

As this summary document has hopefully demonstrated, the interviews with senior lawyers in the United Kingdom and Sweden provide a rich insight into the current state of protection for individuals facing environmentally related harm and the potential for strategic litigation to develop the scope of protection in this connection.

The key insights from the pilot project may be summarised as follows.

First, lawyers in Sweden and the United Kingdom are not routinely involved in seeking international protection for individuals who express a fear of being exposed to environmentally related harm if returned to their countries of origin or habitual residence. The possibility that claimants may not be articulating their claims in terms of environmentally related harm was identified as one explanation for the limited activity in this area. Additionally, lawyers themselves may be failing to identify claimants who face a risk of being exposed to environmentally related harm, not least because they are not looking. Dismissing as implausible the suggestion that there may be no ‘environmental migrants’ in Europe, I suggest that lawyers themselves may compound the protection gap in the positive law by failing to identify cases where protection from environmentally related harm could be available. By failing to identify cases in the first instance, the opportunity for determining and potentially developing the scope of protection through litigation is missed.

In terms of the actual scope of protection from environmentally related harm, the pilot study strongly suggests that only a small minority of individuals facing environmentally related harm could hope to secure international protection on the basis of current interpretations of the law. In particular, the harm threshold and the internal relocation alternative were considered to present insurmountable challenges for most potential claimants. Identification and emphasis of individual vulnerability factors was seen by most practitioners as offering individual claimants the best prospect of success in a claim for international protection. The wider implications of adopting a litigation strategy based on individual vulnerability will be considered later in the thesis.

When considering the possibilities of developing the scope of protection, two clear approaches emerged.

One approach, which I called the ‘incrementalist’ approach, would seek to gradually expand the scope of protection by reinforcing existing precedents whilst subtly making (initially only factual) reference to the role of climate change in a displacement scenario. Ideal cases would include particularly vulnerable claimants. Focusing on individual vulnerability would increase the prospect of a successful outcome in court, but the scope of protection would only marginally expand. Further consideration of the legal basis of the vulnerability approach and the strategic implications of adopting such an approach in the context of environmentally related harm is called for.
The second approach, which I describe as the ‘climate change’ approach, would emphasize the role of climate change in the international protection claim, and would seek to build a substantial advocacy initiative alongside the legal work, including through media and academic writing as well as in the form of amicus curiae briefs in the actual case. Multiple technical as well as political impediments suggest the climate change approach would have at best a moderate prospect of success in court. However, the possibility that such litigation could trigger action at the interstate level invites further detailed consideration.
ANNEX 1

PILOT Questions for semi-structured interviews in pilot study

BACKGROUND

1. Your background

CURRENT WORK

2. Your current work
3. To what extent does ‘developing the law’ feature in your practice?

INTERNATIONAL FRAMEWORK AND PROTECTION GAPS

4. Who is not entitled to international protection and why

STATE PRACTICE

5. How does the government deal with environmentally related harm cases at the moment? Is it satisfactory?

PRACTICE AND LITIGATION

6. Do you know of any cases where environmental factors were referred to / determinative?
7. Have any of your clients ever identified environmental factors as influencing their unwillingness to return home?
8. Do you ask your clients questions about environmental conditions in their home countries?
9. Are you minded to start asking? Why/why not?
10. 1 billion people were affected by natural disasters between 2007-2013. Why do you think this has not impacted on immigration cases?
CULPABILITY AND CLIMATE ARGUMENTS

11. Are you aware of the cases that have been argued in Australia and New Zealand – what do you think about that?

12. What opportunities / threats do you see in that kind of litigation?
   - Client
   - Precedent
   - Your reputation

13. What do you think about the focus on climate change in these kinds of cases?

OBSTACLES

14. What impediments to bringing that kind of litigation in Europe? [legal – i.e. threshold; extra-legal i.e. funding; awareness by lawyers/clients; ]

15. If there was a legal provision expressly providing for the grant of subsidiary protection in the context of a disaster, how would that affect your practice? [more inclined to look for evidence of disaster in asylum claim?]

STRATEGY

16. How would you advise a client who is unwilling to return home in the aftermath of a cyclone? [threshold]

17. Would your advice be different in the case of slower onset disasters such as drought? [threshold]

18. Do you think its better to wait for ‘the right case’ or start litigating with any case where a potential argument could be made out, even if it does not have the strongest facts? What is the best ‘litigation strategy’

19. What sort of considerations do you think a judge would be making when asked to determine eligibility for international protection in the context of environmentally related harm? [floodgates?]

SNOWBALL

20. Can you think of any colleagues who would be interested in these kinds of issues?