LUMIN Final report: Climate change related displacement and strategic litigation

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Introduction

The research project set out to examine the potential scope of existing international protection law in the context of climate change related cross border displacement. The point of departure was a recognition that people who are displaced across international borders in the context of increasingly frequent and intense 'natural disasters' do not readily qualify for refugee status under the Refugee Convention, nor do they generally qualify for 'complementary protection' under instruments such as the European Convention on Human Rights. Noting a lack of political will to develop a new international protection instrument designed for 'climate refugees', this project asked what role lawyers and the judiciary could play in developing the law through strategic litigation.

More than two years later, the prominence of climate change is diminished in favour of a focus on 'natural' disasters more generally, for reasons that will be explained below. The important contribution that litigation can play in developing understanding of the scope of existing international protection law in the context of disaster related displacement is confirmed. In this end of project report, key findings of the research to date will be summarised.

Regarding the phenomenon of climate change, disasters and displacement

1. Climate change contributes to a demonstrably increased frequency and intensity of natural hazard events, which in turn can contribute to displacement. However, it is not possible to establish a direct causal link between climate change and disasters, although some studies have established that climate change increases the likelihood of a particular event occurring. Equally, it is not always possible to establish a direct causal connection between disasters and displacement, particularly in the context of slower onset disasters associated with drought and sea level rise.
2. Whether a causal connection with climate change can be established or not, natural hazard events have the potential to cause serious damage to property and infrastructure and expose individuals to serious harm, including hunger, homelessness, disease, injury, impoverishment and displacement.
3. Displacement in the context of sudden-onset events like cyclones or floods tends to be relatively short distance and short-term, although there are numerous examples of longer distance and longer term displacement in this connection, such as in relation to population displacements following the 2010 earthquake in Haiti, the 2001 earthquake in El Salvador, and the 1998 hurricane Mitch in Honduras and Nicaragua.
4. Displacement in the context of slower onset events like droughts or sea level rise may contribute to longer-distance movement, which could be permanent. There are greater challenges associated with understanding displacement in

this context because of the multiple factors that interact over time to contribute to displacement, such as poverty, conflict and persecution.

5. The vast majority of people affected by disasters do not cross an international border, but instead become internally displaced.

Regarding the existing international protection framework

6. The 1951 Convention and the 1967 Protocol relating to the Status of Refugees applies in situations where an individual crosses an international border into a signatory host state and establishes that, owing to a well-founded fear of being persecuted for reasons of her race, religion, nationality, membership of a particular social group or political opinion, she is unable or unwilling to return home. Cases that have sought to establish an entitlement to refugee status in the context of climate change have all failed. There are three primary reasons.

   First, the Convention definition of a refugee, along with case law and academic commentary interpreting the scope of the Convention, clearly requires the source of harm to emanate from a human actor.

   Additionally, the human conduct must be discriminatory, in that it singles out an individual or group owing to their possession of a 'protected characteristic', such as race, religion, nationality, membership of a particular social group or political opinion.

   Courts and tribunals in Australia and New Zealand have considered whether climate change and its impacts could ever amount to persecutory conduct for a Convention reason and have consistently determined the question in the negative. Although lawyers have advanced arguments seeking to attribute persecutory agency to developed countries, these arguments have failed owing to a lack of evidence of any discriminatory persecutory intent. Although there is strong evidence establishing that more industrialized countries have contributed disproportionately to the concentration of greenhouse gasses in the atmosphere and oceans, there is no direct causal connection between the emission of greenhouse gases, particular extreme weather events, and harm that befalls individuals in such contexts. Additionally, the emission of greenhouse gases has not been conducted with the intention or effect of singling out a particular population for harm. Other arguments seeking to hold the claimant's home country responsible for failing to protect elements of the population from climate change related harm have similarly failed.

   Finally, in order for any conduct to amount to 'persecution', the impact must attain a sufficiently high level of severity. In the few cases that have considered this element, the facts in the claimant's country of origin (small island developing states in the Pacific including Tuvalu and Kiribati affected by rising sea levels and increasingly frequent and intense storms) have not indicated that such a severity threshold would be met if the claimant were to be returned home.

Thus, the clear and consistent message coming from courts and tribunals, which is echoed in academic commentary and the official position of the UNHCR, is that the adverse human impact of climate change is not something that falls readily within the scope of the Refugee Convention. A clear limitation that weakens this conclusion is that the range of disaster scenarios that have been judicially considered is exceptionally limited, being focused almost exclusively on the adverse impacts of sea level rise in small island developing states in the South Pacific.

7. Although the three factors identified above clearly delimit the scope of the Refugee Convention, **this research project has found that more people displaced in the context of disasters are entitled to refugee status than prevailing judicial and academic interpretations would suggest**. Drawing on literature from anthropology and disaster risk reduction, this research project has identified a novel theoretical framework for approaching the question of refugee protection in the context of disasters and the impacts of climate change. Whereas 'natural disasters' tend to be understood predominantly as uncontrollable, non-discriminatory acts of nature, there is in fact a strong social dimension to disasters, and one which substantially determines who suffers harm. The thesis that has emerged from this theoretical perspective is that the nature and severity of the harm individuals suffer in the context of disasters can result from the discriminatory, persecutory conduct of state and non-state actors. For example, when famine is declared in an area, a full 70% of the people living in that area may not be suffering from acute malnutrition. From a theoretical perspective that sees disasters as being socially constructed, the question that asks why certain individuals suffer when others do not is of deep interest. Where the answer to this question lies in discrimination for a Convention reason, the answer is also of interest to people concerned with the correct application of the Refugee Convention in novel contexts.

8. The same requirement to identify a human actor behind the serious harm an individual risks being exposed to on return is present in instruments extending complementary protection. Article 3 of the European Convention on Human Rights (a source of strong interpretative guidance for determining an individual's entitlement for 'subsidiary protection' within the Common European Asylum System) has evolved from entailing a purely territorial prohibition on Contracting States from torturing or inflicting inhuman or degrading treatment or punishment on individuals within their jurisdiction. However, as the case law of the European Court of Human Rights developed, the scope of the obligation extended to include a prohibition on sending a non-citizen to another country where she risked being exposed to such harm. The case law draws a distinction between the obligations of states where an individual faces the intentional infliction of serious harm in another state, and situations where the harm an individual would be exposed to can be seen as being 'purely naturally occurring' and owing to the state's lack of resources to deal with the problem.

   There have been no attempts by lawyers to secure complementary protection under Article 3 ECHR (or subsidiary protection under the Qualification

Directive) for individuals fearing the adverse impacts of climate change in their home countries and the protective scope of the Convention and the Directive remains therefore undetermined. Although consideration of the availability of complementary protection under Article 7 of the International Covenant on Civil and Political Rights (the international human rights law equivalent to Article 3 ECHR) has resulted in a negative determination in the New Zealand system, a different approach to the responsibility of the host state was applied.

However, the scope of protection under Article 3 ECHR is itself extremely limited when disasters are understood as a form of 'purely naturally occurring' harm. The threshold established by the ECtHR in *N v United Kingdom* is one of 'very exceptional circumstances', and the Court has not recognized a *non-refoulement* obligation in any similar case since that judgment was handed down in 2008. Although it is recognized by leading academic commentators that certain disaster situations could give rise to a risk of serious harm that would attain this threshold, it is generally considered that the scope of complementary protection in the context of disasters and the adverse impacts of climate change remains narrow.

9. **A second key finding of the research** relates to the wider application of Article 3 ECHR in the context of disasters, whether related to climate change or not. Drawing on the 2011 decision of the European Court of Human Rights in the case of *Sufi and Elmi v United Kingdom*, the research project has identified a third 'threshold test' in the context of Article 3 removals cases. In addition to the classic 'intentional infliction of harm' test and the 'purely naturally occurring harm' test, this third test applies where the conduct of human actors can be considered the 'predominate cause' of a humanitarian crisis. Where this test applies, an individual need not establish that her case is 'very exceptional', but instead enjoys a lower threshold where consideration is given to her ability to satisfy basic needs such as food and shelter, the security situation, and the anticipated duration of the humanitarian crisis. The judgment sets a precedent for individuals facing return in the context of complex humanitarian emergencies, where the impacts of 'natural' disasters are compounded and complicated by an ongoing situation of armed conflict. Substantial research suggests that complex humanitarian emergencies can be expected to become more prevalent as climate change increases existing pressures both within and between states.

10. Taking the *Sufi and Elmi* principle one step further, an argument can be made that other disaster situations that do not involve armed conflict can also give rise to host state protection obligations under Article 3. Adopting again the theoretical framework that sees disasters as being socially constructed, a majority of disaster situations, whether slow onset or sudden onset, can be seen to have been predominantly caused by human agents. The impact of a natural hazard event is as much a consequence of poorly developed infrastructure, limited response capabilities, and a vulnerable population, as it is the result of the magnitude of the event itself. Thus, where states have failed to put in place effective disaster risk reduction, response and recovery mechanisms, and where populations are exposed and vulnerable, it is

arguable that a person fearing serious harm on return to such a situation should have her claim assessed under the lower *Sufi and Elmi* threshold test, as opposed to the more restrictive 'purely naturally occurring harm' threshold test.

Regarding the role of strategic litigation in developing the law

11. Initially, the research project had an ambition to participate in actual claims brought by 'climate refugees' seeking international protection. However, a pilot study with lawyers in Sweden and the United Kingdom, as well as discussions with judges in both jurisdictions strongly suggests that the time for strategic litigation focusing on *climate change* related cross border displacement has not arrived, if it ever will. There are several reasons for the lack of litigation in this connection:
12. First, lawyers in both Sweden and the United Kingdom have confirmed that the phenomenon of cross-border displacement in the context of disasters and the adverse impacts of climate change does not feature prominently in their professional activity. Clients do not refer to adverse environmental conditions in their home countries, and lawyers themselves are not actively looking for country of origin information that could support a claim for refugee status or complementary protection in the context of disasters. Although this lack of litigation may suggest that longer distance disaster related cross border displacement is an issue for the future, the fact that the United States has granted Temporary Protected Status to approximately 300,000 people fearing disaster-related harm in countries such as El Salvador (based on a series of earthquakes in 2001 and subsequent disasters), Haiti (based on the 2010 earthquake), Honduras and Nicaragua (based on the 1998 hurricane Mitch and subsequent disasters), and Somalia (based on the complex and interrelated humanitarian and environmental conditions prevailing in the country) strongly confirms that the phenomenon of long distance cross-border displacement in the context of disasters is a reality. The challenge is making the phenomenon visible in the European context.
13. Second, there is a lack of guidance for lawyers to follow. Without a clear precedent identifying the circumstances in which an individual may satisfy the requirements for recognition as a refugee or person otherwise in need of international protection, the possibility of advancing such a claim will not be within the standard scope of a lawyer's practice. Other factors appear to be at play in the Swedish context, where there is a clear invitation for such cases to be tested owing to the existence of a statutory protection ground under Paragraph 4:2a of the Aliens Act. However, although some lawyers whose comments have informed the research confirmed having advanced arguments under this provision, none had met with success in court.
14. Most lawyers interviewed as part of the research project cautioned against framing legal challenges in terms of climate change-related harm. There were several reasons for this caution. First, there was a concern that such a claim would encounter perhaps insurmountable challenges in terms of establishing a causal link between climate change, disasters and harm, as highlighted at paragraph 1 above. Second, lawyers anticipated that reference to climate change in an international protection claim would deter judges, who would consider a) that the matter was more appropriately addressed through

political processes and b) that a positive judgment would open the 'floodgates' to countless millions of people who are or who are expected to become displaced in the context of global climate change. Moreover, as discussed in paragraph 6 above, the legal and factual basis linking climate change to either persecution or serious harm is lacking in most cases. However, some lawyers, adopting an advocacy perspective, considered that even unsuccessfully litigated cases could have positive wider implications, for example by highlighting the issue of climate change and disaster related displacement through the media, as happened in the New Zealand case of *Ioane Teitiota v Minister for Business Innovation and Skills*.

Conclusions and ways forward

15. There is a substantial lack of knowledge, both academically as well as amongst practitioners, about the scale of the phenomenon of longer distance cross-border displacement in the context of disasters and the adverse impacts of climate change. Where accepted statistics highlight that an average of 27.5 million people are displaced annually in the context of sudden onset disasters alone, there is a strong basis for presuming that individuals who, by whatever means, find themselves on the territory of the European Union, have protection needs that engage international obligations under the Refugee Convention or instruments extending complementary protection, such as the European Convention on Human Rights. Identification of such individuals is a necessary step in any initiative seeking to develop understanding of the scope of international protection law in the context of disasters and the adverse impacts of climate change. A strategic legal fund encouraging lawyers to identify such cases could provide an important impetus to legal development in this connection.
16. Leading sources of country of origin information, such as the UK government Country of Origin Information Service and the US State Department do not systematically incorporate information relating to disasters in their reports. Initiatives that review disaster data from an international protection perspective can also promote the development of the law in this area.
17. Finally, it is important to emphasize that, notwithstanding innovative academic thinking and strategic legal practice, most people displaced across borders in the context of disasters and the adverse impacts of climate change will not qualify for international protection under existing international and regional instruments. There is clearly a need to develop normative frameworks, whether in the form of binding bilateral, regional or international agreements, or as soft law principles (see nanseninitiative.org for further information on a substantial process that has been underway since 2012). Litigation can contribute to the larger project of developing normative frameworks by providing concrete and carefully considered examples of individual cases where protection needs are articulated, examined and argued.