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# **“Returning to a destructed environment: on the right and duty to return”**

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WORKING PAPER

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## I. Introduction

Historically, return migration to the country of origin is seen as one out of three durable solutions to protracted refugee and displacement crises, next to resettlement to a third country and local integration in the country of stay<sup>1</sup>. In light of the mobility challenges posed by our ever changing and increasingly degrading environment, we might have to reconsider return migration as a durable solution for environmentally-induced migrants and displaced persons<sup>2</sup>. Furthermore, considering the increasingly strict migration policies of many destination countries, a greater proportion of return migration is now involuntary, invoking questions concerning the need for international protection of environmentally-displaced persons.

Within this changing migration context, this paper seeks to discuss both voluntary as well as involuntary return migration in relation to environment-induced mobility. Before getting more into detail, the paper first conceptualises return migration within the general migration debate (1.1). The right to freedom of movement then provides the starting point for the further analysis, including the right for any person to leave a country, as well as the right to return to his or her own country (1.2). While it is often advocated that people living in a degrading environment should have a “right to leave” and a “right to stay”<sup>3</sup>, these assumptions surely deserve more legal academic attention, discussing how we could guarantee these rights in a warming world.

As return migration can obviously only be a *durable* solution if it contributes to the socio-economic re-establishment of the returnee in his country of origin, Chapter II analyses how return migration could act as a durable development and adaptation strategy for environment-induced migrants and their communities of origin. Secondly, this paper explores the role of human rights if returning to a destructed environment becomes a duty rather than a choice, analysing non-refoulement obligations in the context of deteriorating living conditions (Chapter III).

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<sup>1</sup> According to the UNHCR, voluntary repatriation is one out of 3 durable solutions (next to local integration in the country of asylum and resettlement in a third country), that should allow refugees to rebuild their life in dignity. See <http://www.unhcr.org/pages/49c3646cf8.html>.

<sup>2</sup> M. Bradley and J. McAdam, 'Rethinking Durable Solutions to Displacement in the Context of Climate Change', Paper for the Brookings-LSE Project on Internal Displacement of 14 May 2012, available at: <http://www.brookings.edu/research/papers/2012/05/14-displacement-bradley-mcadam>, p. 2-3.

<sup>3</sup> F. Gemenne, 'Climate-induced displacements in a 4°C+ world: scenarios and policy options', IDDRI Science Po, Presentation at the Nansen Conference, Oslo, 6 June 2011; F. Gemenne, 'Migration, Security and Human Development in the Face of Climate Change', IDDRI Sciences Po, Presentation for the 'Jornada Vint Anys després Rio' in Barcelona, 29 February 2012.

## **1.1. Conceptualisation of ‘return migration’**

Worldwide, many migrants cherish the hope to be able to return to their place of origin. In particular for those which were forced to leave their original habitat, a safe and dignified return is considered as a ‘durable solution’ and a way to relieve some of the harm imposed by the displacement<sup>4</sup>. But also in case legal procedures do not lead to a residence permit, there is often no other choice than to return to the country of origin.

According to the IOM, return migration is a “relatively new area of migration”, without standard meaning in migration policy or law<sup>5</sup>. Obviously, a sustainable and consistent asylum and migration policy cannot go without a sustainable return policy. However, considering its complex and sensitive nature, return is an emotionally charged topic. Nonetheless, the past few years, return migration has come to the forefront. In particular assisted voluntary return (AVR) is increasingly recognised as a valuable alternative in the migration process, as it helps migrants to return to their home countries when they do not have the means to do so. AVR programmes represent a humane alternative to forced removals, and can even contribute to the socio-economic development of the regions of origin (*see further below*).

Even though return migration can take different forms, the general migration debate uses a rather limited terminology, referring only to forced or voluntary return. This wrongly gives the impression that there are only two return modalities. Furthermore, the policy debate generally focuses on the return of irregular migrants, while it are often migrants with a legal residence status who choose to return to their country of origin. In that sense it is better only to speak of ‘voluntary return’ when the decision to return is taken by foreigners who have a right to stay in their country of destination (*e.g.* asylum seekers awaiting a decision on their asylum application, as well as migrants with a temporary or permanent residence permit). After all, a return is not “voluntary” if it is only a reaction to an order to leave the territory, in which case it is better to use the term “mandatory return”. Migrants who receive an order to leave the territory can do so independently, with their own means, or they can make use of organized, assisted return programmes. If they refuse to leave, they can be forcibly removed from the territory.

In many countries, irregular migrants are encouraged to obey to a removal order, both through return and reintegration programmes, as well as by the prospect of a forced removal. Projects that

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<sup>4</sup> Bradley and McAdam, *supra* note (2), p. 2.

<sup>5</sup> Webpage of the International Organisation on Migration (IOM) on ‘return migration’, available at: <http://www.iom.int/jahia/Jahia/about-migration/managing-migration/managing-migration-return-migration/lang/en>.

support the return of rejected asylum seekers or other irregular migrants undeniably have an added value compared to forced removals, both for the individual concerned and for the country of residence, but they should leave the discourse of "voluntariness"<sup>6</sup>.

	<b>Voluntary</b> return	<b>Mandatory</b> return
<i>Who?</i>	Migrants who legally reside in the country of destination	Migrants who do not have the right to remain in the country of residence, thus being obliged to leave the territory.
<i>Return modalities</i>	→ <b>Independent</b> return  → <b>Assisted</b> return	→ <b>Independent</b> return  → <b>Assisted</b> return  → <b>Forced</b> return

This figure reflects better how migrants perceive their return. When they leave their country of destination after a removal order, they do not sense their return as “voluntary”, as they only choose to return to avoid a forced removal or irregular stay. Voluntary return only exists when migrants makes an informed and conscious choice between returning to their country of origin or integrating in the country of stay. The "obedient" return of people who are not allowed to stay in their country of destination is not a voluntary return, but can be supported by assisted return and reintegration programmes, in order to help them to rebuild a dignified existence in their home country.

**1.2 The right to return and to leave in international law**

The right to freedom of movement, as incorporated in the Universal Declaration of Human Rights of 1948<sup>7</sup> and the International Covenant on Civil and Political Rights (ICCPR) of 1966<sup>8</sup>, seems crucial for

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<sup>6</sup> 'Assisted Voluntary Return and Reintegration, Annual Report of Activities 2011', Report of the International Organisation for Migration (IOM), 2012, Geneva, available at: [http://www.emnbelgium.be/sites/default/files/publications/avrr\\_report\\_2011\\_final.pdf](http://www.emnbelgium.be/sites/default/files/publications/avrr_report_2011_final.pdf), p. 21.

<sup>7</sup> Article 13 of the Universal Declaration of Human Rights, adopted through Resolution 217A of the UN General Assembly of 10 December 1948, declares that:  
“(1) Everyone has the right to freedom of movement and residence within the borders of each state.  
(2) Everyone has the right to leave any country, including his own, and to return to his country.”

<sup>8</sup> Article 12 of the International Covenant on Civil and Political Rights, adopted in New York on 16 December 1966, entered into force on 23 March 1976, UNTS 999, p. 171, holds that:

a discussion on return migration. According to Article 12 ICCPR, this right includes the right for any person to leave any country, as well as the right to enter, or to return to, his or her own country. The question now rises how we could guarantee these rights in a warmer world, where more and more regions of origin become uninhabitable. In other words, what are States' obligations in relation to the right to leave, and the right to return?

The right to enter one's own country implies the right to remain in one's own country, as well as the right to return to his own country<sup>9</sup>. As for the latter, this implies that States are obliged to take their citizens back in. However, it is generally accepted that the right to return entails only a passive duty for states to allow their citizens back in, and not the active duty, nor for the country of origin, nor for the country of stay, to facilitate or support the return for migrants who do not have their own means to do so. Moreover, it is not stipulated that the return must be a "sustainable" return, whereby the returnee has a perspective in his country of origin. However, a State may not hinder the return, for example by making it difficult or impossible to obtain the necessary travel documents.

The counterpart of the right to return is the right to leave any country, including his own. This means that also the country of stay may not put obstacles in the way of migrants to leave the territory, and return to the country of origin<sup>10</sup>. Limitations concerning the transfer of social security rights are thus not only uninteresting from a policy point of view, but also questionable from a legal point of view, as they entail limitations to the right to return to his or her country of origin.

Furthermore, the right to freedom of movement includes the right to leave his or her own country. However, there is no general right to asylum contained in human rights instruments. Whether or not forcibly displaced persons leaving their own country, can find asylum in another country, depends on the particular flight motive of the persons concerned, and of the specific asylum instruments which the State has ratified or put in place. The realisation of the right to leave seems thus hindered by current restrictive asylum and migration policies. Furthermore, as the adverse effects of climate change severely touch upon household's resources, the most vulnerable people often do not have the means to leave their destructed environment. It could thus also be argued that the realisation of

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"(1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

(2) Everyone shall be free to leave any country, including his own.

(3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

(4) No one shall be arbitrarily deprived of the right to enter his own country."

<sup>9</sup> Human Rights Committee, General Comment No. 27 on the Freedom of Movement (art. 12), U.N. Doc. CCPR/C/21/Rev.1/Add.9, adopted at the 1783rd meeting (sixty-seventh session), held on 18 October 1999, §19.

<sup>10</sup> *Ibid*, §9.

the right to leave is increasingly “jeopardised” by environmental changes<sup>11</sup>. However, as the right to leave his own country does not imply an active duty for States, this right does not offer the necessary legal protection to forcibly displaced persons which are not able to return to their country of origin. In order to fill this protection gap, other civil and political human rights, including a non-refoulement obligation, might be more relevant (*see further below in Chapter III*).

## **II. The right to return in relation to environment-related mobility**

Just as for any other category of international migrants or displaced persons, a return to the country of origin might be a desire for people which left their original habitat due to environmental disruptions. For regions which are not rendered uninhabitable, or where human life is (again) possible after a period of recovery or ecological restoration, we should therefore aim to facilitate a safe and durable return and reintegration in the community of origin<sup>12</sup>.

### ***2.1. Return migration as a development and adaptation strategy***

Obviously, return migration can only be successful when the returnee has sufficient perspectives in his country of origin. When for example large groups of refugees return to their region of origin after a conflict situation, their return has to be accompanied by measures supporting the recovery and reconciliation within the region. Measures that contribute to the reconstruction of the home region or the socio-economic development of the home community enlarge the sustainability of the return process<sup>13</sup>. The same is true for regions affected by severe sudden-onset natural disasters, where return programmes should contribute to the reconstruction of the affected area in order to be successful. Similarly, return migration could be opportune for communities affected by gradual environmental degradation, under the condition that the return process contributes for example to the socio-economic development of the home community. According to Afifi, return migration can even contribute to the ecological restoration of the region of origin. In Niger for example, severe environmental disruptions, caused inter alia by droughts, soil degradation, sand intrusion and the shrinking of Lake Chad, have an impact on migration at the national and international level. Working

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<sup>11</sup> Gemenne, *supra* note (3).

<sup>12</sup> J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford, Oxford University Press, 2012, p. 256.

<sup>13</sup> European Commission, 'Green Paper on a Community Return Policy on Illegal Residents', Brussels, 10 April 2002, COM(2002) 175 final, p. 23-24.

age males who used to migrate seasonally to coastal cities within the country, now tend to leave to further destinations in and outside the country, and migrate for longer periods, or even permanently. The women, children and elderly who stay behind, lack sufficient physical support to restore the environment. In 2006 the government therefore started a programme, offering financial support to encourage young men to return to their region of origin, and to take part in the ecological restoration of the environment. Indeed, the programme created about 35.000 temporary jobs, including the fixing of sand dunes, controlling tree chopping, digging half moons, and digging out sand from the river<sup>14</sup>.

Returned migrants often have acquired new knowledge and skills in their former country of residence, allowing them to diversify their income upon return to their country of origin. However, although it is generally accepted that the reintegration of migrants has development benefits, the policy in many countries is not equipped to bring this knowledge, skills and/or financial means into action for the socio-economic development of the region of origin. Fortunately, there is now a tendency to actively link return policies to development needs in countries of origin<sup>15</sup>. More and more specific reintegration projects are created for small entrepreneurs, which could provide opportunities for employment in the region of origin. Various organisations provide assistance to returnees to concretize their business plans, and provide them with business trainings or financial assistance to realize their dreams as entrepreneurs (*see further below*). This way, assisted return offers a valuable and dignified perspective for the returnees future as well as for his community of origin.

The last decennia brought about a myriad of initiatives supporting the return of migrants to their country of origin. However, besides better guidance, assistance and supervision, it is also necessary to remove some of the obstacles that might hinder migrants to return to their country of origin. By facilitating circular migration between countries or origin and former countries of residence, for example through flexible access conditions or multiple entry visas, migrants could be encouraged to re-migrate to their country or origin. Furthermore, bilateral or multilateral agreements on the portability of social security rights could ensure that returnees do not lose their accrued rights<sup>16</sup>.

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<sup>14</sup> T. Afifi, 'Economic or Environmental Migration? The Push Factors in Niger', in *International Migration* Vol. 49, Issue S1, June 2011, pp. e1-e249, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, p. e95 - e124.

<sup>15</sup> Global Forum on Migration and Development (GFMD), 'Background Paper to Roundtable 2: Migrant integration, reintegration and circulation for development' (Session 2.2.: Reintegration and circular migration - effective for development?), prepared by the Governments of Brazil and Portugal in collaboration with the RT team, the RT coordinator Dr. Irena Omelaniuk and the Task force set up by the Greek government for the preparation of the third meeting of the GFMD in Athens, 2009.

<sup>16</sup> *Ibid.*



Moreover, it is important to provide rejected asylum seekers or other “unwanted” migrants with a longer period to fulfil a removal order, before a state can proceed to a forced removal. This way, migrants have a better chance to prepare their return properly, with or without the help of a support programme. Finally, international agreements could provide the necessary framework to support the link between return, reintegration, development and adaptation to changing environmental conditions.

## **2.2. Assisted return as a modality for return migration**

### *2.3.1. In general*

Even though States are not obliged to assist migrants to return to their home country in a safe, dignified and durable manner, assisted return has gained significant weight in the general debate on return migration, both at the national, regional as well as the international policy level. Not only do assisted return programmes aid migrants to return to their countries of origin in a more humane and dignified manner than forced removals, they are also more cost-effective for the country of stay, they ensure that migrants have more time to prepare for their return, and allow migrants to return when they do not have their own means to do so<sup>17</sup>.

In general, assisted return programmes provide administrative, logistical as well as financial support to migrants unable or unwilling to stay in the country of residence. They do not only facilitate the actual return of migrants, for example by making travel arrangements and facilitating the provision of travel documentation, but also aim to assist migrants to cope with the challenges they face prior to and after their return. Pre-return assistance can for example include the provision of information and advice to migrants on their available options, so as to help them to decide on whether or not they wish to return. Often, assisted return programmes focus particularly on vulnerable groups, such as migrants with health-related needs or other highly vulnerable migrants<sup>18</sup>.

In order to guarantee a dignified and sustainable return, the reintegration of the returnees must also be supported. A returnee will indeed re-migrate if he sees no future in his country of origin. In order to help returnees to be reinserted into their communities of origin, the provision of reintegration

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<sup>17</sup> International Organisation for Migration (IOM), *supra* note 6, p. 21.

<sup>18</sup> *Ibid*, p. 17.

assistance has increasingly gained attention, and has now become an integral part of many assisted return programmes. Assistance is provided in the form of short- or longer-term accommodation after arrival in the region of origin, or medical support. Furthermore, the sustainability of the return process becomes more important in policy formulation, acknowledging the fact that the root causes of migration must be addressed in order for the return to be durable and sustainable<sup>19</sup>. Among other things, it is for example crucial to provide the necessary tools for migrants to be self-sufficient upon return to their country of origin. Reintegration assistance can thus include assistance with job placement, the set-up of small businesses, education and training<sup>20</sup>.

Reintegration assistance not only benefits the individual returnee, but can also enhance the socio-economic development of the wider community of origin. In order to guarantee a greater sustainability of an individual's return, it is important to address the socio-economic needs of the community of origin, thereby addressing the root causes of the original migration. Moreover, reintegration assistance could prevent potential disadvantages of the return process for the community of origin, such as the shortage of labour or the loss of remittances<sup>21</sup>. Return and reintegration assistance might thus have a triple-win effect, benefiting the migrants themselves as well as the country of residence and the community of origin.

### *2.3.2. Assisted return migration for environmentally-induced migrants?*

The question now rises whether assisted return and reintegration programmes could also benefit the sustainable return of migrants who left their region of origin due to environmental disruptions. As discussed above, all migrants have a right to return to their country of origin. However, in reality, even if people are allowed to return to their region of origin after an environmental disaster has occurred, their return can only be safe and durable if the physical, social and economic recovery of the affected area is rapid and effective. In the immediate aftermath of sudden-onset natural disasters, for example the diversification of livelihood provision and the reconstruction of infrastructure are crucial factors for the sustainability of a return, whether it is mandatory or voluntary<sup>22</sup>.

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<sup>19</sup> *Ibid*, p. 25.

<sup>20</sup> *Ibid*, p. 20-24.

<sup>21</sup> *Ibid*, p. 19, 25.

<sup>22</sup> K. F. Warner, 'Assessing Institutional and Governance Needs Related to Environmental Change and Human Migration', The German Marshall Fund of the United States, Study Team on Climate-Induced Migration, June 2010, p. 3.

As discussed above, assisted return and reintegration programmes could render the return process more humane, dignified and sustainable. As for environmentally-induced migration, they could make financial means available for recovery and rehabilitation in a post-disaster phase. Furthermore, return assistance could help environmentally-vulnerable communities to adapt to a changing environment, for example by helping returnees to diversify their income. In addition, it is important not only to address the socio-economic root causes of migration, but also the potential environmental push factors, through mitigation and adaptation assistance. In order to decrease a community's vulnerability to recurring natural disasters, return assistance could also be directed towards resilience building and disaster risk reduction. Finally, as return migration could even contribute to the ecological restoration of certain regions of origin, assistance could be directed towards the creation of jobs in ecological restoration.

As the number of environmental disasters, and thus the number of environmentally displaced persons, is expected to increase in the future, humanitarian organisations assisting in the return process could face a capacity challenge in the future. It is therefore important that they start preparing now, if they want to be able to assist many more millions of displaced persons in returning to their region of origin in a safe and durable manner. In 2011, the International Organisation for Migration (IOM), which is mandated by its Constitution to ensure orderly migration, *inter alia*, through voluntary return and reintegration assistance, has, with the help of its partners, provided 55.124 migrants with return assistance, in 166 countries of origin. About half of these migrants also received reintegration assistance to help them to reintegrate in their communities or origin<sup>23</sup>. Given the organisation's crucial position regarding assisted return and its interest in the environmental migration debate, the IOM seems to be in an ideal position to start up the dialogue on assisted return towards regions affected by environmental degradation, taking the adaptation challenges and needs for ecological restoration into account. In light of this process, it can be recommended to install pilot projects for the assisted return of environmentally-induced migrants. As such projects with an environmental aspect are currently not (yet) in place, lessons can be learned from good practices of other IOM-supported return projects, assisting displaced persons to return to conflict-affected areas, and supporting them in the reconstruction of the affected regions.

However, the lack of recognition of environmental push factors as a legitimate cause of migration might hinder such effective policy responses<sup>24</sup>. It should therefore also be recommended to firstly fill the normative gap which exists for people forcibly displaced due to environmental disruptions, thereby recognising environmentally-induced migration as a legal concept. After all, if disaster

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<sup>23</sup> International Organisation for Migration (IOM), *supra* note (6), p. 13-15, p. 23.

<sup>24</sup> Warner, *supra* note (22), p. 2.

responses are too slow and ineffective, or adaptation challenges are not met, migrants will not be able to return to their region of origin in a safe and durable manner. To some regions of origin, a return will even be physically impossible, such as for the population of some small island States in the Pacific Ocean<sup>25</sup>. Yet as there are currently no international legal frameworks in place to protect environmentally-displaced persons in the country of stay, the next Chapter will discuss what happens when a returning to a destructed environment becomes a duty rather than a choice.

### **III. The duty to return to a destructed environment: revisiting the non-refoulement principle**

The previous chapter has attempted to describe how a sustainable and durable return to the country of origin could be facilitated for environment-induced migrants. However, when those migrants cannot return to their region of origin that will no longer support their survival, the question rises under which circumstances a country of stay can force migrants to return. This Chapter attempts to answer this question by analysing human rights-based non-refoulement obligations in the context of deteriorating living conditions, based on case law of the European Court of Human Rights and the European Court of Justice.

As for people displaced due to a slow-onset deteriorating environment or sudden natural disasters, the lack of protection mechanisms at the international and regional level has been widely discussed<sup>26</sup>. The International Refugee Convention of 1951<sup>27</sup> does not apply to environmentally-displaced persons, and nor do regional protection instruments such as the European Qualification Directive<sup>28</sup> (*see further below*). Therefore, several authors have adopted a more human rights-based

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<sup>25</sup> Bradley and McAdam, *supra* note (2), p. 2.

<sup>26</sup> See for example J. McAdam, 'Climate Change Displacement and International Law: Complementary Protection Standards', Paper prepared for the UNHCR's Expert Roundtable on Climate Change and Displacement convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011; A. Lopez, 'The Protection of Environmentally-Displaced Persons in International Law', *Envtl. L.* 37, 2007; F. Biermann and I. Boas, 'Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees', *Global Environmental Politics* 10, no. 1, 2010; V. Kolmannskog and F. Myrstad, 'Environmental Displacement in European Asylum Law', *European Journal of Migration and Law* 11, 2009.

<sup>27</sup> Convention Relating to the Status of Refugees, adopted on 28 July 1951, entered into force on 27 April 1954, 189 *UNTS* 137.

<sup>28</sup> Council Directive 2004/38 of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection

approach, discussing whether environmentally-displaced persons could be protected against a forced return or ‘*refoulement*’ through general human rights law. After all, the non-refoulement principle is not only one of the greatest benefits of the 1951 Refugee Convention, it is also a cornerstone of human rights law, where it acts as a general ban on returning persons to places where they risk certain human rights violations. The principle has found expression in, *inter alia*, the International Covenant on Civil and Political Rights (ICCPR)<sup>29</sup> and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>30</sup>.

This Chapter summarizes the general findings on the applicability of the non-refoulement principle to environmental displacement, before it analyses more specifically States’ non-refoulement obligations in relation to deteriorating socio-economic living conditions.

### **3.1. Non-refoulement obligations towards environmentally-displaced persons?**

#### *3.1.1. In general*

Except from the 1951 Refugee Convention and the Convention against Torture<sup>31</sup>, international human rights instruments do not explicitly contain non-refoulement obligations, but instead contain *implied* obligations not to return a person to countries where certain primary human rights are violated<sup>32</sup>. The European Court of Human Rights has ruled that the prohibition on torture and inhuman or degrading treatment of Article 3 ECHR implies a duty not to return a person to a place where he risks being subjected to the prohibited treatment. According to the Court in the *Soering*-case,

“the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being

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and the content of the protection granted, L 304/12, *Official Journal* of 30.9.2004 (hereafter: Qualification Directive).

<sup>29</sup> International Covenant on Civil and Political Rights, adopted in New York on 16 December 1966, entered into force on 23 March 1976, *UNTS* 999, p. 171.

<sup>30</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Rome on 4 November 1950, *Council of Europe Treaty Series* No. 5.

<sup>31</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly Resolution 39/46 of 10 December 1984, entered into force on 26 June 1987, 1465 *UNTS* 85, 113.

<sup>32</sup> M. Foster, 'Non-Refoulement on the basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law', *New Zealand Law Review* PART II, 2009, p. 265.

subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.”<sup>33</sup>

This view was consistently confirmed in a number of other cases, where the Court ruled that the reasoning of the *Soering*-case applies to the expulsion of rejected asylum seekers<sup>34</sup>. Clearly, the *non-refoulement* principle is a fundamental component of the prohibition of torture, cruel, inhuman or degrading treatment or punishment. In this context, the principle is generally even considered to be part of customary international law<sup>35</sup>.

The existence of such implicit non-refoulement obligations has been generally accepted in relation to the right not to be subjected to torture or to cruel, inhuman or degrading treatment, and the right to life<sup>36</sup>. For other human rights, there is disagreement about the existence of a non-refoulement component. Treaty bodies such as the UN Human Rights Committee have declared that the scope of the non-refoulement principle is not confined to the right to life and the right not to be subjected to torture, and to cruel, inhuman or degrading treatment<sup>37</sup>. Likewise, the European Court of Human Rights has in various cases ruled that non-refoulement protection might in the future be extended to other human rights than Article 3 ECHR<sup>38</sup>. In theory, non-refoulement protection would thus be possible for all human rights violations, but in practice, non-refoulement protection is generally only established for absolute rights, such as the right not to be subjected to cruel, inhuman or degrading treatment<sup>39</sup>. As explained by the European Court in the case *Z and T v. United Kingdom*, the fundamental importance of the rights involved, their absolute or non-derogable nature as well as the fact that the obligations are “internationally accepted”, determines to what extent the non-refoulement doctrine could be extended to other human rights<sup>40</sup>.

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<sup>33</sup> European Court of Human Rights, Case of *Soering v. The United Kingdom*, Application No. 14038/88, Judgment of 7 July 1989.

<sup>34</sup> European Court of Human Rights, Case of *Cruz Varas v. Sweden*, Application No. 15576/89, Judgment of 20 March 1991; European Court of Human Rights, Case of *Vilvarajah and Others v. the United Kingdom*, Application No. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, Judgment of 30 October 1991; European Court of Human Rights, Case of *Chahal v. the United Kingdom*, Application No. 22414/93, Judgment of 15 November 1996; European Court of Human Rights, Case of *Salah Sheekh v. the Netherlands*, Application No. 1948/04, Judgment of 11 January 2007.

<sup>35</sup> E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement', Opinion, United Nations High Commissioner for Refugees (UNHCR), 2001, p. 141-149.

<sup>36</sup> Foster, *supra* note (31), p. 265-266.

<sup>37</sup> United Nations Human Rights Committee, General Comment No. 31 on the 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant', Adopted on 29 March 2004 (2187th meeting), CCPR/C/21/Rev.1/Add.13. (General Comments) of 26 May 2004, para 12.

<sup>38</sup> Foster, *supra* note (31), p. 274.

<sup>39</sup> McAdam, *supra* note (11), p. 53-55.

<sup>40</sup> European Court of Human Rights, Case of *Z and T v. The United Kingdom*, Application No. 27034/05, Decision of 28 February 2006, available at: <http://www.unhcr.org/refworld/docid/45ccab042.html>, p. 6; Foster, *supra* note (32), p. 277-278.

It has been widely discussed whether or not people displaced due to severe environmental conditions in their country of origin can rely on non-refoulement protection in a country of stay. There is no doubt that, in certain cases of severe environmental disasters, people can not (yet) rebuild their lives in their region of origin. The most infamous example are the “sinking” island States in the Pacific Ocean. However, also in case of sudden-onset natural disasters, a temporary ban on forced removals to the destructed region of origin would be advisable. However, whether or not States have a legal non-refoulement obligation in such cases, depends on the interpretation of the human rights-based non-refoulement principle, subjected for a large part to the assessment made by international and regional human rights courts.

Up till now, the European Court of Human Rights has not explicitly dealt with environment-induced displacement. Nonetheless, lessons can be learned from the Court’s progressive interpretation of the notion of ‘inhuman and degrading treatment’ of Article 3 ECHR<sup>41</sup>. Various authors have argued that sending environmentally-displaced persons back to a region where they can no longer survive, amounts to an inhuman or degrading treatment. It is up to the Court to decide whether such a progressive development of Article 3 is acceptable. For the case of environmentally-displaced persons, it is for example interesting to explore whether deteriorating socio-economic living conditions could trigger a right to non-refoulement protection, as they often suffer from famine, a lack of medical treatment or education, or other forms of socio-economic deprivations.

### *3.1.2. Relevance of socio-economic living conditions in the country of origin*

In considering whether the non-refoulement doctrine can also apply to a deprivation of socio-economic rights, our attention is obviously first turned to international instruments protecting socio-economic rights, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>42</sup>. However, as up to this moment, it is not generally accepted to attach non-refoulement obligations directly to socio-economic rights, the ICESCR is not (yet) relevant for the present purpose<sup>43</sup>. Since violations of socio-economic human rights in the country of origin do not lead to a

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<sup>41</sup> Kolmannskog and Myrstad, *supra* note (26).

<sup>42</sup> International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976.

<sup>43</sup> Foster, *supra* note (32), p. 278-284.

direct non-refoulement protection, it has often been attempted to re-characterize them as violations of civil and political human rights<sup>44</sup>.

The idea that civil and political rights can be interpreted as incorporating obligations of a socio-economic nature is increasingly gaining attention, and has even been recognised by various treaty bodies and regional human rights courts, such as the European Court of Human Rights<sup>45</sup>. Both the right to life and the right not to be subjected to torture or to cruel, inhuman, or degrading treatment have been recognised as extending to socio-economic deprivation under certain circumstances. Homelessness might for example engage the right to privacy or the right to life<sup>46</sup>, while poor detention conditions have been characterised as inhuman or degrading treatment<sup>47</sup>. The question then rises whether this interpretation also applies to the removal context. Even though treaty bodies as well as human rights courts have attempted to define the scope of implied non-refoulement obligations, there still remains uncertainty as to its exact limitations.

#### **A. Socio-economic living conditions and the notion of inhuman and degrading treatment**

In assessing whether sending a person back to a degraded or destructed environment is prohibited, the scope of the notion of 'inhuman or degrading treatment' has been widely discussed. According to the European Court of Human Rights, Article 3 ECHR can be applied in new contexts which might arise in the future, irrespective of the responsibility of the public authorities<sup>48</sup>. According to Antonio Cassese, Article 3 ECHR, which is grounded in the concept of human dignity, must be interpreted broadly, not limited to physical or psychological mistreatment in the civil rights area, and is therefore suitable to protect economic and social rights, be it only in extreme cases<sup>49</sup>. However, it is up to the Court to decide how progressively it wants to develop Article 3 ECHR.

Already in 1990, the European Court of Human Rights (then the European Commission of Human Rights) was asked to rule on whether the notion of 'inhuman or degrading treatment' could be

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<sup>44</sup> McAdam, *supra* note (12), p. 53-55.

<sup>45</sup> Foster, *supra* note (32), p. 266.

<sup>46</sup> *Ibid*, p. 266.

<sup>47</sup> European Court of Human Rights, Case of M.S.S. v. Belgium and Greece, Application No. 30696/09, Judgment of 21 January 2011.

<sup>48</sup> European Court of Human Rights, Case of D. v. The United Kingdom, Application No. 30240/96, Judgment of 2 May 1997, 24 EHRR 423.

<sup>49</sup> A. Cassese, 'Can the Notion of Inhuman and Degrading Treatment be Applied to Socio-Economic Conditions?', *European Journal of International Law* 2, no. 1, 1991, p. 143.



applied to socio-economic conditions<sup>50</sup>. Francine Van Volsem, a Belgian single mother with 2 children, was unable to hold a stable job due to severe health issues. She relied for her living on the alimony paid by her ex-husband, as well as on social security provided by a Belgian social welfare centre. As the heating in her small apartment ran on electricity, she was unable to pay the disproportionately high electricity bill. In December 1983, the electricity company therefore cut off her electricity<sup>51</sup>. In her application to the European Commission of Human Rights, Mrs. Van Volsem argued *i.a.* that the cutting of her electricity in a cold winter period amounted to inhuman and degrading treatment as prohibited by Article 3 ECHR. Although the case was held inadmissible, the Commission, ruling by a Committee of three, did not rule out the possibility to apply Article 3 to situations where social and economic conditions are so humiliating so as to amount to inhuman treatment<sup>52</sup>.

However, this decision concerns socio-economic *treatment* by a State actor, instead of socio-economic conditions prevailing in a certain country. It seems therefore difficult to extend the Committee's reasoning to environmental conditions. Furthermore, the Committee did not clarify under which circumstances a person's daily living conditions, more in particular the lack of public social services, turns into inhuman or degrading treatment<sup>53</sup>. It also remains unclear whether the Committee took the specific circumstances of the case, such as Mrs. Van Volsem's health conditions and the fact that electricity was cut off in the coldest period of the winter, into account. It is therefore regrettable that the Committee of three did not refer this case to the plenary Commission, to provide greater clarity on these issues.

Later, the question whether a violation of social and economic rights could amount to inhuman or degrading treatment also came up in non-refoulement cases. However, most cases concerned a lack of medical treatment in the country of origin. In the case *D. v. United Kingdom* of 1997, the Court found that returning a HIV-infected person would amount to 'inhuman treatment', due to a lack of sufficient medical treatment, social network, a home or any prospect of income in the country or origin<sup>54</sup>. The Court came to this conclusion as the forced return would hasten the death of the individual concerned, and "subject him to acute mental and physical suffering"<sup>55</sup>. In light of these exceptional circumstances, and "bearing in mind the critical stage now reached in the applicant's

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<sup>50</sup> European Commission on Human Rights, Case of Francine Van Volsem v. Belgium, Application No. 14641/89, Decision of 9 May 1990, published in 2 *Revue Universelle des Droits de l'Homme*, 1990, 384-385.

<sup>51</sup> Cassese, *supra* note (49), p. 141-142.

<sup>52</sup> *Ibid*, p. 143.

<sup>53</sup> *Ibid*, p. 143.

<sup>54</sup> Case of *D. v. United Kingdom*, *supra* note (48); Kolmannskog and Myrstad, *supra* note (26).

<sup>55</sup> Case of *D. v. United Kingdom*, *supra* note (48), § 52.

fatal illness”<sup>56</sup>, the Court found that the return would amount to a violation of Article 3 ECHR by the United Kingdom. This ruling is remarkable, as the source of the ill-treatment in this particular case lies not with the public authorities of the country of origin<sup>57</sup>. Furthermore, besides a lack of medical treatment, the Court also referred to the general situation of poverty in the country of origin<sup>58</sup>, thus confirming that the notion of ‘inhuman or degrading treatment’, in the removal context, extends to deprivations of socio-economic rights other than a lack of medical treatment<sup>59</sup>.

Severe environmental disruptions, caused by natural disasters or climate change, could lead to similar circumstances, when vital infrastructure is destroyed and provision of basic services such as clean water, food and electricity is hindered<sup>60</sup>. It remains to be seen however whether the European Court of Human Rights would apply the non-refoulement principle contained in Article 3 ECHR in such situations. After all, the Court emphasized in subsequent cases that its ruling in *D. v. United Kingdom* is only valid in “extreme circumstances”<sup>61</sup>. In *N. v. United Kingdom* for example, the Court distinguished the circumstances of the case from the “very exceptional case” of *D. v. United Kingdom*, “where the humanitarian grounds against the removal [were] compelling”<sup>62</sup>, and found the case inadmissible, as the applicant was “not at present time critically ill”<sup>63</sup>. By emphasizing the exceptional character of the *D. v. United Kingdom* ruling, the Court has thus “limited any potential for an expansive approach to medical care cases in the future”<sup>64</sup>. It is clear that the ill-treatment needs to attain “a minimum level of severity”, depending *i.a.* on the duration of the treatment and the sex, age and health of the person concerned, so as to fall within the scope of Article 3 ECHR<sup>65</sup>.

While the European Court of Human Rights did not apply this founding in removal cases relating to violations of socio-economic rights other than medical cases, Article 3 ECHR has been applied to other socio-economic contexts in “domestic cases”<sup>66</sup>. Based on a considerable body of international, regional and national jurisprudence, Michelle Foster argues that the same analysis can be applied to

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<sup>56</sup> Case of *D. v. United Kingdom*, *supra* note (48), § 53.

<sup>57</sup> Case of *D. v. United Kingdom*, *supra* note (48), § 49.

<sup>58</sup> Foster, *supra* note (32), p. 290.

<sup>59</sup> *Ibid*, p. 290-291.

<sup>60</sup> Kolmannskog and Myrstad, *supra* note (26).

<sup>61</sup> Foster, *supra* note (32), p. 292.

<sup>62</sup> European Court of Human Rights, Case of *N. v. United Kingdom*, Application No. 26565/05, Judgment of 27 May 2008, 47 *EHRR* 39, § 42.

<sup>63</sup> *Ibid*, § 42 and 50.

<sup>64</sup> Foster, *supra* note (32), p. 293.

<sup>65</sup> Case of *N. v. United Kingdom*, *supra* note (62), § 29; Foster, *supra* note (32), p. 289.

<sup>66</sup> Foster, *supra* note (32), p. 302.

refoulement cases outside the medical context, and is not restricted to cases where the socio-economic deprivation is caused by intentional action of State actors<sup>67</sup>.

Support for this viewpoint can also be found in the latest landmark ruling of the European Court of Human Rights in the case *M.S.S. v. Belgium and Greece* of January 2011<sup>68</sup>. The case concerned an Afghan asylum seeker who, having transited through Greece, sought asylum in Belgium. After he was transferred back to Greece in application of the European Dublin regulation, he was placed in a detention centre in a reduced space, with little access to food and sanitary facilities, in poor hygienic conditions, without ventilation and a proper place to sleep<sup>69</sup>. After he was released from the centre, M.S.S., having no means of subsistence, lived in a park in Athens in complete destitution<sup>70</sup>. These degrading detention and living conditions led the Court to condemn Greece for a violation of Article 3 ECHR, attaching substantial weight to the specific situation of M.S.S. as an asylum seeker<sup>71</sup>. According to the Court, asylum seekers should be regarded as “particularly vulnerable”, due to the traumatic experiences they might have endured<sup>72</sup>. In light of this particular vulnerability, the socio-economic deprivation *in casu* attained the level of severity required to fall within the scope of Article 3 ECHR.

Applying the non-refoulement principle to this decision, Belgium was also condemned, not only for the possible ‘indirect’ refoulement of the applicant to Afghanistan through Greece, but also for the ‘direct’ refoulement to Greece<sup>73</sup>. Based on the available information, Belgium should have decided that the applicant faced a real and individual risk in Greece to be treated in violation of Article 3 ECHR<sup>74</sup>. This decision is important, as it confirms that inhuman and degrading living conditions must be considered when applying Article 3 ECHR in expulsion cases, taking the particular vulnerable situation of the applicant into account.

It remains to be seen whether the European Court of Human Rights will take this line of reasoning further, and apply it when severe environmental disruptions lie at the basis of inhuman and degrading (socio-economic) living conditions. Much depends on Court’s interpretation of “exceptional circumstances” as in *D. v. United Kingdom*, and the “particular vulnerable” situation of the persons concerned as in *M.S.S. v. Belgium and Greece*. It is questionable whether the Court will

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<sup>67</sup> *Ibid*, p. 302-305.

<sup>68</sup> European Court of Human Rights, Case of *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011.

<sup>69</sup> *Ibid*, §§ 34 and 161-166.

<sup>70</sup> *Ibid*, §§ 35-37 and 167-172. V. Moreno-Lax, 'Dismantling the Dublin System: *M.S.S. v. Belgium and Greece*', *European Journal of Migration and Law* 14, 2012, p. 20-22.

<sup>71</sup> Case of *M.S.S. v. Belgium and Greece*, *supra* note (68), §§ 225, 231-233, 259, 262-263; Moreno-Lax, *supra* note (70), p. 22.

<sup>72</sup> Case of *M.S.S. v. Belgium and Greece*, *supra* note (68), § 232.

<sup>73</sup> Moreno-Lax, *supra* note (70), p. 26.

<sup>74</sup> Case of *M.S.S. v. Belgium and Greece*, *supra* note (68), §§ 347-354.

consider general situations of poverty or a lack of resources for a whole affected community. So while it is, in theory, possible to re-characterize environmental harm as inhuman or degrading treatment, this idea needs to be much further developed by international bodies and regional human rights courts, before it will ever be applied in practice by States<sup>75</sup>.

## **B. Socio-economic living conditions and the right to life**

As mentioned above, the European Court of Human Rights has, up till now, only attached a non-refoulement obligation to the right not to be subjected to torture or to cruel, inhuman or degrading treatment (Article 3 ECHR), and not (yet) to the right to life (Article 2 ECHR). However, the Court clearly left this possibility open for the future. Furthermore, it has been recognised in other fora that the right to life, as for example contained in Article 6 of the ICCPR, contains the right of every person not to be sent back to regions where he or she faces a real risk of being subjected to a violation of the right to life<sup>76</sup>. In examining whether or not a violation of socio-economic rights could lead to non-refoulement protection, the right to life thus offers another pathway. After all, the right to life is closely connected to other, socio-economic, human rights, such as the right to an adequate standard of living (including the right to food, housing,...), and the right not to be deprived of a means of subsistence. The European Court of Human Rights has for example declared that “an issue may arise under Art 2 [...] where it is shown that the authorities of a Contracting State put an individual’s life at risk through the denial of health care which they have undertaken to make available to the population generally”<sup>77</sup>.

In addition, unlike article 3 ECHR, Article 2 ECHR has been applied in relation to environmental disruptions, be in not in removal cases. According to the European Court of Human Rights, the right to life includes the obligation for States “to take appropriate steps to safeguard the lives of those within its jurisdiction”, including protection from environmental harm, for example caused by an industrial accident at a waste-collection site<sup>78</sup>. In 2008, the judgment of the Court in the *Budayeva-*

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<sup>75</sup> McAdam, *supra* note (12), p. 53-55.

<sup>76</sup> *Ibid*, p. 56.

<sup>77</sup> European Court of Human Rights, Case of Cyprus v. Turkey, Application No. 25781/94, Judgement of 10 May 2001, 35 *EHRR* 30, § 219.

<sup>78</sup> European Court of Human Rights, Case of Öneriyildiz v Turkey, Application No. 48939/99, Judgement of 30 November 2004, *ECHR* 491, § 71; McAdam, *supra* note (12), p. 59.

case decided on a violation of the right to life on account of the State's failure to act adequately in preventing a mudslide<sup>79</sup>.

Although there is, at this moment, no *non-refoulement* obligation attached to Article 2 ECHR, State practice and jurisprudence could develop in this direction in the future. After all, just as the right not to be subjected to torture or to cruel, inhuman or degrading treatment, the right to life provides a basis for granting subsidiary protection in Article 15 of the Qualification Directive (*see further below*). The right to life thus deserves further attention in the future as a possible way to grant non-refoulement protection to environmentally-displaced persons.

### **3.2. Extended interpretation of European asylum law?**

In light of the search for legal solutions to fill the normative gap for environmentally-displaced persons, the human rights-based concept of non-refoulement protection provides an interesting starting point. However, it is important to keep in mind that the non-refoulement prohibition does not oblige States to grant a residence status to protected persons<sup>80</sup>.

In 2004, the European Union therefore adopted the Qualification Directive, with the aim of granting a legal complementary protection status to the many displaced persons within its territory which do not fit within the 1951 Refugee Convention, but are nonetheless in need of international protection. The Directive confirms the commitment of the EU Member States to the principle of non-refoulement "in accordance with their international obligations"<sup>81</sup>. While such protection used to be considered as a matter of charity, the Directive now grants subsidiary protection to persons not qualifying for refugee status if

"substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin [...] would face a real risk of suffering from serious harm as defined in Article 15

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<sup>79</sup> European Court of Human Rights, Case of Budayeva and others v. Russia, Application No. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment of 20 March 2008; Kolmannskog and Myrstad, *supra* note (26).

<sup>80</sup> J. McAdam, 'The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection' in J. McAdam (ed.), *Forced Migration, Human Rights and Security*, Oxford, Hart Publishing, 2008, p. 266-270; N. Mole, *Asylum and the European Convention on Human Rights*, 4th ed., Strasbourg, Council of Europe, 2007, p. 106; Kolmannskog and Myrstad, *supra* note (26).

<sup>81</sup> Qualification Directive, *supra* note (28), Article 21 (1).

[...] and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country”<sup>82</sup>.

In recent years, many authors have discussed whether subsidiary protection could be granted to environmentally-displaced persons. As the Directive exhaustively enumerates three types of “serious harm”, thus triggering a protection status<sup>83</sup>, persons fleeing a destructed environment do not qualify for subsidiary protection.

However, various authors have argued that Article 15(b), granting protection in case of ‘inhuman or degrading treatment or punishment’, could open some room for a larger interpretation<sup>84</sup>. Based on the above described case law of the European Court of Human Rights, some have proposed to interpret the notion of “inhuman or degrading treatment” so as to include the forced return of environmentally-displaced persons to regions which can no longer sustain human life<sup>85</sup>.

However, the European Court of Justice (ECJ) has also discussed whether severe socio-economic living conditions should be taken into account in the assessment of claims for a protection status under the Qualification Directive. In the case *Salahadin Abdulla and Others v. Bundesrepublik Deutschland* of March 2010<sup>86</sup>, the ECJ was asked in a preliminary ruling whether the cessation of refugee status under Article 11(e) also requires that the general living conditions in the country of origin ensure a minimum standard of living. While the Court left this question unanswered, the Advocate General Mazák held that the availability of a minimum standard of living in the country of origin is not “an independent relevant criterion when assessing cessation”, but that they “must however be taken into consideration as part of the assessment of whether the change in circumstances there can be considered significant and non-temporary in nature in accordance with Article 11(2)”<sup>87</sup>.

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<sup>82</sup> Qualification Directive, *supra* note (28), Article 2(e).

<sup>83</sup> Article 15 of the Qualification Directive: “serious harm consists of:

- (a) death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”

<sup>84</sup> See for example J. McAdam, ‘Complementary protection and beyond: How states deal with human rights protection’, in *New Issues in Refugee Research*, UNHCR, Geneva, 2005, p. 3.

<sup>85</sup> Kolmannskog and Myrstad, *supra* note (26).

<sup>86</sup> European Court of Justice, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, Aydin Salahadin Abdulla and Others v. Bundesrepublik Deutschland, Judgement of the Grand Chamber, 2 March 2010.

<sup>87</sup> Opinion of Advocate General Mazák, in the Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, Aydin Salahadin Abdulla and Others v. Bundesrepublik Deutschland, European Court of Justice, delivered on 15 September 2009, § 63.

Although the Court remained silent on this issue, the Advocate General thus seems to suggest that socio-economic living conditions may be considered when ruling on the effectiveness of the available protection. Nonetheless, the ECJ seems, at this moment, not to support the idea that deteriorating socio-economic living conditions can be part of a wide interpretation of the notion of ‘inhuman or degrading treatment’, thereby granting access to subsidiary protection to persons fleeing a situation of socio-economic destitution.

However, whether or not such a broad interpretation of this eligibility criterion will be accepted in the future, not only depends on the case law of the European Court of Justice (ECJ), but also on the European Court of Human Rights, as Article 15 (b) is based on Article 3 ECHR<sup>88</sup>. It is generally accepted that human rights provisions could help to clarify the scope of Article 15 of the Qualification Directive. In a judgment of 17 February 2009, the ECJ has explicitly referred to Article 3 ECHR for the interpretation of ‘inhuman or degrading treatment’ in Article 15(b) of the Qualification Directive<sup>89</sup>. Based on the above described evolution within the case law on Article 3 ECHR, it could thus be argued that the Qualification Directive might provide the necessary protection to environmentally-displaced persons in the distant future. In particular the ruling of the ECtHR in the case *M.S.S. v. Belgium and Greece*, which came later than the ECJ ruling in *Salahadin Abdulla*, might act as a catalyst in European case law on asylum. If the ECJ wants to keep its jurisprudence in line with that of the ECtHR, it will have to adapt its line of reasoning in *Salahadin Abdulla*, and accept that inhuman and degrading living conditions may trigger a right to subsidiary protection.

For the case of environmentally-displaced persons, it is however important to keep the limits of what can be achieved within the existing legal framework of the European Union in mind. At this moment, Article 2 nor Article 3 ECHR have been applied by the ECtHR in removal cases concerning environmentally-induced migration, and it is clear that the ECJ will not take this step before the ECtHR does. A wide interpretation of the Qualification Directive so as to include environmentally-displaced persons was clearly not the intention of the drafters, and is currently not widely accepted. Besides, due to requirements concerning the “actors of serious harm”<sup>90</sup> and the “internal flight alternative”<sup>91</sup>, the Qualification Directive might only be of interest to a limited number of

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<sup>88</sup> Kolmannskog and Myrstad, *supra* note (26).

<sup>89</sup> European Court of Justice, Case C-465/07, *Meki Elgafaji, Noor Elgafaji v. Staatssecretaris van Justitie*, Judgment of the Grand Chamber of 17 February 2009, §28.

<sup>90</sup> It seems from the exhaustive enumeration of “actors of serious harm” in Article 6 of the Qualification Directive that ‘serious harm’ must result from man-made situations.

<sup>91</sup> Member States may exclude subsidiary protection if “in a part of the country of origin there is ... no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country” (Article 8 of the Qualification Directive). This criterion can easily be met in the case of sinking Island States in the Pacific, but more difficult in the case of inundations due to sea level rise in countries such as Bangladesh.

environmentally-displaced persons<sup>92</sup>. While the principle of non-refoulement in relation to socio-economic living conditions could, in theory, act as a possible basis for the elaboration of a regional asylum regime for environmentally-displaced persons, in practice, such a development currently still seems an unattainable ideal.

## **Concluding remarks on the way forward**

This paper has attempted to initiate the discussion on return migration in relation to environmental push factors of international migration. It argues that our migration policy should not only address the needs of those displaced persons which are not able to return to their country of origin, but also of those willing to, or being obliged to, return to an environment which is suffering from environmental degradation or recovering from a natural disaster. We need to support policies that allow, or even assist, people to return when they want to, and at the same time advocate for the necessary legal frameworks that allow people to stay in their country of destination, when they cannot return to their destroyed environment.

For many migrants, a return to the country of origin remains an unattainable ideal, which is often difficult to achieve due to a lack of sufficient resources or a lack of sustainable perspectives in the region of origin. By facilitating the safe and dignified return of environment-induced migrants and encouraging their sustainable reintegration in their region of origin, we are one step closer to a comprehensive, effective, sustainable and mutually beneficial approach to return migration. And if we want to address the root causes of migration in the process of return migration, we must not ignore environmental push factors. Assisted return and reintegration projects should for example address adaptation needs in the region of origin, or direct assistance towards resilience building and disaster risk reduction.

Yet we do have to recognise that some environmentally-displaced persons will not be able to return to their destroyed region of origin. Nonetheless, a new international protection regime, based on a wide interpretation of the human rights-based non-refoulement obligation, seems currently further away than ever. However, in practice, considerations based on this principle of non-refoulement have been applied in case of natural disasters. For example, in the aftermath of the 2004 Tsunami, the Office of the United Nations High Commissioner for Refugees (UNHCR) called for the suspension

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<sup>92</sup> Lopez, *supra* note (26).



of returns to the affected regions, which was widely respected<sup>93</sup>. Furthermore, case law on non-refoulement protection in relation to socio-economic rights seems to develop slowly in the direction of protection against inhuman and degrading living conditions. So in theory, this interpretation could act as a new ground for the elaboration of a protection regime for environmentally-displaced persons.

However, as States tend to be more willing to accept persons on the basis of ad hoc humanitarian schemes or decisions, instead of relying on a human rights-based legal protection regime<sup>94</sup>, several authors now suggest to create a soft law instrument concerning environment-induced migration, to guide national and international policies on the topic<sup>95</sup>. Since several recent developments show an increased awareness to the problem of environmental migration and displacement, the possibility, practical feasibility and added value of such an instrument is certainly worth further discussion. And in order for such a soft law instrument to offer a comprehensive and sustainable solution, it would have to include provisions on various return modalities in relation to environment-induced migration.

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<sup>93</sup> Kolmannskog and Myrstad, *supra* note (26).

<sup>94</sup> Foster, *supra* note (32), p. 260.

<sup>95</sup> See for example McAdam, *supra* note (12).