

‘ENVIRONMENTAL DISPLACEMENT: A NEW SECURITY RISK FOR EUROPE?’

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Introduction

Climate change effects, natural disasters and other environmental disruptions are causing ever more people to flee their environment. Various independent reports announce that the world will be facing millions of “environmental refugees” within a few decennia. Although “environmental refugees” will outnumber ‘traditional’ refugees in the future, there is currently no international protection regime, comparable to the 1951 Convention relating to the Status of Refugees (1951 Refugee Convention), for persons forced to leave their destructed environment.

Being recognised as a refugee implies that one is entitled to international protection. In particular the right of *non-refoulement*, contained in Article 33 of the 1951 Refugee Convention, is one of the greatest benefits for refugees.¹ They have the right not to be sent back to territories where their life or freedom is at risk. Just like ‘traditional’ refugees, “environmental refugees” often face life-threatening circumstances were they to return home. They have similar needs for international protection, especially when they can no longer survive in their destructed environment. But whilst their needs are comparable, their legal rights are not. It is therefore necessary to set forth constructive solutions for the international protection of environmentally-displaced persons, either by an adaptation of existing mechanisms or the elaboration of a new regime.

Since a substantial number of environmentally-displaced persons is expected to cross international borders, the phenomenon of environmental displacement causes security risks for the ‘receiving regions’, the European Union being one of them (German Advisory Council on Global Change 2008). This paper therefore discusses how the European Union could provide protection to the growing category of environmentally-displaced persons. The first Chapter focuses on the issue of terminology, definition and classification. Chapter II analyses if and when persons fleeing a destructed environment are entitled to complementary protection under European legislation. Finally, Chapter III will touch upon a more human rights-based approach to the problem of environmental displacement. This paper does not constitute an exhaustive analysis of all issues involved. It is our belief that a focused approach allows a more comprehensive assessment of some of the pertinent legal questions relating to environmentally-induced population movements, and highlights some issues where further research is necessary.

¹ Article 33 of the 1951 Refugee Convention: “1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”.

I. CONCEPTUALISING ENVIRONMENTALLY-DISPLACED PERSONS

The research on environmentally-induced displacement is often hindered by a “lack of conceptual clarity” (Biermann and Boas 2008: 2). A clear theoretical frame is thus required, in order to facilitate the research on this topic. This would enable researchers and policy makers to identify similarities and differences with other refugee populations, and to set forth constructive solutions for the recognition and protection of the growing number of environmentally-displaced persons (Bates 2002). This Chapter will therefore propose a working definition and a preliminary classification of environmentally-displaced persons, taking into account their needs and the origins and types of their displacement.

1.1 Refugees, Migrants or Displaced Persons?

Before a definition of environmental ‘refugees’, ‘migrants’ or ‘displaced persons’ can be elaborated, a choice needs to be made regarding the appropriate terminology. The popular term “environmental refugees” was first used by the United Nations Environment Programme (UNEP) in 1985 (El-Hinnawi 1985). During the past decennia, most studies on environmentally-induced migration used the term “environmental refugee”. This term is nonetheless strongly disputed, because the word “refugee” has an important moral, legal and political connotation (Lopez 2007: 367-368; Keane 2004; German Advisory Council on Global Change 2008: 117-118; McAdam 2007: 6). The term can even be regarded as a “legal misnomer”, as the international refugee definition, established in the 1951 Refugee Convention, does not include people fleeing environmental degradation or destruction (Lopez 2007: 388; article 1(A)(2) of the 1951 Refugee Convention and article 1(2) of the 1967 Refugee Protocol). Furthermore, the term ‘refugee’ is considered to be limited to persons crossing international borders, while most people fleeing environmental degradation currently stay within the borders of their own country (Biermann and Boas 2007; McAdam 2007: 4; German Advisory Council on Global Change 2008). Therefore, the term ‘environmental refugee’ is not the most appropriate term for the purposes of this research.

Some intergovernmental agencies, such as the United Nations High Commissioner for Refugees (UNHCR), the International Organisation for Migration and the secretariat of the United Nations Framework Convention on Climate Change (UNFCCC), prefer instead to use the terms

'environmentally-displaced persons' or 'environmental migrants' (Biermann and Boas 2007: 6-7; Keane 2004: 215; Lopez 2007: 388). Others differentiate between environmental 'refugees' and environmental 'migrants', the former being people who are forced to flee, with immediate effect, while the latter migrate because of the gradual degradation of the environment, and have therefore more control over their migration (Bates 2002: 468-473; Black 2001: 13).

Nonetheless, some authors see no reason to reserve the term 'refugee' for persons defined by the 1951 Refugee Convention, and to invent less appropriate terms for individuals who are forced to leave their homes because of environmental degradation or destruction (Biermann and Boas 2007: 8). According to Biermann and Boas, the use of the term 'environmental refugees' for those who are compelled to leave their habitat for environmental reasons would only require "some terminological adjustment" within the current international refugee regime, but would be legally and practically unproblematic (Biermann and Boas 2007: 27-28). After all, the 1951 Refugee Convention defines refugees only for the purpose of its own regime. They consider the denial of the moral status of a refugee disrespectful with regard to the victims of environmental disruption (Biermann and Boas 2007: 8). Although I consider this argument to be praiseworthy, for the above-mentioned reasons I prefer not to use the term 'environmental refugees', but the better term 'environmentally-displaced persons'. More than the term 'migrants', 'displaced persons' carries an element of 'force' in it.

1.2 Classifying Environmentally-Displaced Persons

A variety of origins and types of displacement of environmentally-displaced persons exists. Three categories of environmental disruptions causing environmentally-induced displacement can be distinguished: environmental degradation due to climate change, sudden environmental disasters, and intentional destruction of the environment.

A. Environmental Degradation due to Climate Change

The largest group of environmentally-displaced persons are individuals affected by the gradual environmental degradation due to climate change. The phenomenon of global warming will lead among others to sea level rise and severe desertification, threatening to force more than 200 million

people to leave their environment (Myers 1997; Myers 2004; Bates 2002: 474; Williams 2008: 504-506). Myers estimates that sea level rise will lead to 26 million environmentally-displaced persons by 2050 in Bangladesh alone (Myers 2004: 5). Although industrialised countries are most responsible for global warming, the developing countries will suffer the most. Their inhabitants are more vulnerable because they live in fragile ecosystems and have less adaptive capacity (Bates 2002: 473; Biermann and Boas 2007: 8-9; Boon and le Tra 2007: 91-92; Conisbee and Simms 2003: 28-29; Castles 2002: 10-11; McAdam 2007: 5).

B. Sudden Environmental Disasters

Acute disruptions in the environment can unintentionally cause human displacement. Two subcategories can be distinguished, namely natural and technological disasters.

(i) Natural Disasters

Weather or geological events, such as earthquakes, floods, hurricanes and volcanic eruptions, can render a place temporarily or permanently uninhabitable (Bates 2002: 471; McCue 1993: 160-161; Havard 2007: 67-69). The volcanic eruption on the Caribbean island of Montserrat in 1995 for example, forced 7000 people to evacuate (Bates 2002: 471), and nearly 1 million persons were displaced in the aftermath of the Katrina hurricane of August 2005 (Havard 2007: 69). One of the most devastating natural disasters of the last years is the Tsunami of 26 December 2004 in the Indian Ocean, which displaced millions of people, among which 412.438 people in Banda Aceh (Indonesia) alone (UNEP 2005; Boon and Le Tra 2007: 88; Havard 2007: 68). Due to climate change, regions particularly vulnerable to natural disasters will face an increase in the occurrence and severity of those disasters (Cooper 1998: 503; Lopez 2007: 369-371). Although most victims of natural disasters receive international assistance, such aid is mostly emergency relief, arbitrarily given by humanitarian organisations and States. There is no international obligation on States to offer relocation assistance to those incapable to return to their homes.

The category of environmental displacement due to natural disasters seems to differ from all others, as it does not involve any man-made environmental disruption. However, some natural disasters are the result of man-made global warming. Furthermore, disasters as the 2004 Tsunami and the Katrina

hurricane are examples of natural phenomena where the seriousness of the effects is for a large part the result of the loss of biodiversity caused by human activities. Besides, for reasons of non-discrimination, this category cannot be forgotten in the research on environmentally-induced migration. After all, even if the disaster is not man-made, the victims often need international protection should their own government be unable or unwilling to offer any assistance for the relocation and rehabilitation of the population.²

(ii) Technological Disasters

Technological disasters that create a temporary or permanent environmental disruption include industrial and chemical accidents. Although they do not intentionally cause human displacement, such accidents can often be categorised as “man-made”. They usually occur because of poor construction or management planning, or due to neglected safety procedures (Lopez 2007: 373).

In the past, various examples of technological accidents have forcibly displaced large numbers of persons. The nuclear accident at Three Mile Island in the United States in 1979 forced 100.000 families to leave their environment temporarily, while 10.000 people were permanently displaced (Havard 2007: 72; Lopez 2007: 373; Keane 2004: 212; McCue 1993: 162). In 1984, the chemicals released by the Bhopal accident displaced 200.000 people (Havard 2007: 71; Lopez 2007: 373; Keane 2004: 212; McCue 1993: 163). The nuclear accident in Chernobyl displaced up to 100.000 people. A thirty-mile zone around Chernobyl remains permanently uninhabited (Lopez 2007: 373; Keane 2004: 212).

C. Intentional Destruction of the Environment

Another category exists of people who have been forcibly displaced because their traditional habitat is used for purposes incompatible with their residence (Bates 2002: 471-472). This group of environmentally-displaced persons is usually permanently dislocated, and the government seldom

² The aftermath of cyclone Nargis in Burma is a striking example of the need for international protection. See - ‘Burmese still lack aid a month on’ BBC News 2 June 2008 <<http://news.bbc.co.uk/1/hi/world/asia-pacific/7430960.stm>> (2 June 2008); - ‘Burma Policy costs lives, says US’ BBC News 31 May 2008 <<http://news.bbc.co.uk/1/hi/world/asia-pacific/7428916.stm>> (2 June 2008).

offers sufficient relocation assistance. Examples of this type of environmental destruction are the drainage of the Marshes in Southern Iraq, which displaced an estimated 350 000 to 500 000 Marsh Arabs (Human Rights Watch 2003; Lopez 2007: 384; Weinstein 2005: 714-722), and the construction of the Three Gorges Dam in China, which displaced at least 850.000 people (Bates 2002: 472; Boon and Le Tra 2007: 89; Havard 2007: 71). Such intentional destruction of the environment often takes place in times of war. This so-called “ecocide” is defined as “the intentional destruction of human environments in order to strategically relocate a target population during a period of war” (Bates 2002: 472). The use of herbicides in the Vietnam War and the placement of land mines near wells and roads in the Kurdish region of Iraq during the Gulf War are examples of attempts to displace the enemy population by destroying their environment.

1.3 Defining Environmentally-Displaced Persons

For the purpose of this paper, the term “environmentally-displaced person” shall apply to

“those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardi[s]ed their existence and/or seriously affected the quality of their life”. (El Hinnawi 1985)

This definition was elaborated by UNEP researcher El-Hinnawi in 1985. By ‘environmental disruption’ he meant “any physical, chemical, and/or biological changes in the ecosystem (or resource base) that render it, temporarily or permanently, unsuitable to support human life” (El Hinnawi 1985: 4).

Different types of environmental displacement can be distinguished. Although currently most environmentally-displaced persons relocate within the borders of their own country, cross-border migration is not excluded (Biermann and Boas 2007: 14). Environmental displacement can thus be both internal and international. Another distinction often made in literature is that between temporary and permanent displacement (Biermann and Boas 2007: 6). Natural disasters would mostly lead to temporary displacement, while environmental degradation due to climate change would often permanently dislocate people. Furthermore, the element of ‘force’ allows to differ between various categories of environmentally-displaced persons. Gradual environmental degradation leaves more space to choose the point of migration than sudden environmental disruptions (German Advisory Council on Global Change 2008: 118).

These distinctions have their value for the elaboration of a protection regime for environmentally-displaced persons, as different categories of displaced persons have different needs. Persons fleeing

sudden environmental disasters require assistance that is more akin to traditional disaster relief, while long-term displaced people due to climate change effects often need to be permanently relocated in a safer area. They should thus be dealt with differently.

II. COMPLEMENTARY PROTECTION IN EUROPE

The direction of the expected streams of environmentally-displaced persons is uncertain. Although most of them currently relocate within the borders of their own country, a substantial number is expected to cross international borders in the future. In particular those permanently displaced due to climate change will increasingly leave their own country.

Environmentally-displaced persons crossing international borders usually cannot make an appeal to the international protection regime for refugees. Unless they have a well-founded fear of being persecuted for one of the reasons stated in the 1951 Refugee Convention, they do not qualify as refugees as defined in that convention (article 1(2) 1951 Refugee Convention; art 1(2) 1967 Refugee Protocol).³ An expansion of the 1951 refugee definition so as to include environmentally-displaced persons is not a sufficient nor a realistic option, as it would render the international refugee protection regime overloaded and thus ineffective (Keane 2004: 215-216; Hong 2001: 339). Besides, environmentally-displaced persons have other needs for protection than refugees persecuted by their government (Williams 2008: 509). A renegotiation of the Convention could furthermore undermine the refugee protection regime, due to the reluctance of host countries to accept additional refugees (Kolmannskog 2009; Biermann and Boas 2007: 19-20; McCue 1993: 177; Cooper 1998: 500; Kolmannskog and Myrstad 2009; Williams 2008: 509-510). Therefore, we need to explore how to protect cross-border environmentally-displaced persons through other mechanisms than the 1951 Refugee Convention.

Many individuals now seeking protection in Europe have needs which the 1951 Refugee Convention does not address (Mole 2007: 10). In the past, States have often given complementary protection to

³ Although the 1951 Refugee Convention was not drafted with environmentally-displaced persons in mind and neither can be interpreted to include those persons, at least some of them do meet the criteria of the refugee definition, provided they are outside the country of their nationality, and are unable, or owing to the fear of persecution, unwilling to avail themselves of the protection of their State. Even though environmental harm is not recognised as a ground for refugee status, it can certainly be “a tool of persecution”. An individual is entitled to refugee status when environmental harm is deliberately inflicted on him, with the government’s participation or acquiescence, on the ground of his race, religion, nationality, membership of a particular social group or political opinion. See further in LOPEZ 2007; KOZOLL 2004.

forcibly displaced persons who do not fit within the 1951 refugee definition, but nonetheless deserve international protection. While such protection was often seen as a matter of charity, the past few years more and more legal frameworks of complementary protection have been elaborated, subject to regional and national law. Although such regimes often offer a lower form of protection than the international refugee regime, they are of great importance, as they could form the basis for the broadening of international protection mechanisms (Lopez 2007: 392-393). Within the legal framework of the European Union, two important regimes of complementary protection have been elaborated in order to protect categories of forcibly displaced persons, namely the Council Directive 2001/55/EC of 20 July 2001 (Temporary Protection Directive) and Council Directive 2004/83 of 29 April 2004 (Qualification Directive). This Chapter examines whether these regimes are applicable to environmentally-displaced persons, and if not, whether European legislation could and should be adapted in that sense.

2.1 Temporary Protection

Due to the Balkan conflicts in the 1990s, the European Union faced an increased occurrence of mass influxes of forcibly displaced persons. These displacement crises demonstrated that the asylum systems of individual Member States are not equipped to deal with mass flows of displaced persons. In the aftermath of those conflicts, the European leaders acknowledged that special procedures to deal with mass influxes are necessary to avoid overburdening of the asylum systems, and yet still provide basic protection for the displaced persons. Furthermore, the Member States wanted to share the 'burden' of receiving displaced persons (Kolmannskog and Myrstad 2009; Peers and Rogers 2006: 456-461).

On the basis of solidarity between Member States, the Temporary Protection Directive was adopted in 2001, in order to provide temporary protection to displaced persons without overburdening national asylum systems. This directive was the first legally binding asylum instrument adopted under Title IV of the EC Treaty (Peers and Rogers 2006: 453).⁴ The Member States had until 31 December 2002 to transpose the provisions of the Directive into their national laws.

The Directive establishes a protection regime for displaced persons in situations of 'mass influx', namely when the influx of displaced persons is so big that the asylum system cannot efficiently cope

⁴ The legal basis for the adoption of the Temporary Protection Directive is Article 63, 2(a) and (b) of the Treaty establishing the European Community (TEC).

with all persons involved on an individual basis (Article 2 (a) of the Temporary Protection Directive; Kolmannskog 2009). For the purpose of the Directive, ‘displaced persons’ are

“third-country nations or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular:

- (i) Persons who have fled areas of armed conflict or endemic violence;
- (ii) Persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights” (Article 2(c) of the Temporary Protection Directive).

Environmentally-displaced persons are not explicitly mentioned in the Directive. During the negotiations, Finland has repeatedly advocated the inclusion of persons displaced by natural disasters in Article 2(c). However, arguing that “such situations were not mentioned in any international instrument on refugees”, opponents of the Finnish proposal prevented the inclusion of environmentally-displaced persons in the Temporary Protection Directive (Council of the European Union 2001; Kolmannskog and Myrstad 2009).

Nevertheless, since the Directive does not provide an exhaustive list of situations leading to ‘mass influx’, natural disasters could qualify as situations where people *are unable to return in safe and durable conditions* (Lopez 2007: 395; Kolmannskog 2009; Kolmannskog and Myrstad 2009). Since severe environmental destructions could constitute a threat for human rights protection, environmentally-displaced persons could furthermore even fall under the example given in Article 2(c)(ii) (Kolmannskog and Myrstad 2009).

Whether or not the Temporary Protection Directive applies is decided by the Council on a case-by-case basis (Article 5 of the Temporary Protection Directive). However, up till now, the Directive has never been invoked, not even for the situations described in Article 2(c). It seems a difficult task to find the “political will and agreement to do so” (Kolmannskog and Myrstad 2009). Although the Temporary Protection Directive stays without effect so far, it is worthwhile to take a look at its implementation in legislation and practice of individual Member States. Finland for example has extended temporary protection in case of environmental disasters (Kolmannskog and Myrstad 2009).

The Finnish Aliens Act grants temporary protection to persons

“who cannot return safely to their home country or country of permanent residence, because there has been a massive displacement of people in the country or its neighbouring areas as a result of an armed conflict, some other violent situation or an *environmental disaster*.” (Finnish Aliens Act, Section 109(1)) (emphasis added)

Even though most European Member States have currently no national legislation explicitly addressing environmental displacement, it is still interesting to examine their State practice. In some cases, there have been “ad hoc immigration concessions for victims of natural disasters” (Kolmannskog and Myrstad 2009). For example after the volcanic eruptions of Montserrat in 1995, the United Kingdom has “introduced a voluntary evacuation scheme, granting Montserradians Two Years Exceptional Leave to Remain in the UK” (Kolmannskog and Myrstad 2009). Further research is necessary in order to investigate whether best practice of Member States could lead to a revision of European legislation regarding temporary protection for certain categories of displaced persons.

Although the Temporary Protection Directive may relieve victims of environmental destructions, there are some disadvantages to it. Firstly, as already discussed above, it is difficult to find the political will among the Member States to invoke the Directive. Secondly, the protection given under the Directive is only temporary. The normal duration is one year, with a maximum possible extension up to three years (Article 4 of the Temporary Protection Directive). However, reconstruction after a natural disaster can take longer than 3 years, and in case of gradual environmental degradation due to climate change, the displaced can in most cases never return to his region of origin. The Temporary Protection Directive is thus of limited assistance to persons not in a position to return to their region of origin in the near future (Lopez 2007: 395-396). The maximum duration of three years seems incompatible with the obligation for Member States to apply temporary protection “with due respect for human rights and fundamental freedoms and their obligations regarding non-refoulement”, as provided for in Article 3,2 of the Directive (Lopez 2007: 395). And although Article 22 obliges the Member States to consider any compelling humanitarian reasons which may make an enforced return impossible or unreasonable, it does not oblige States to give residence permits in such a case (Kolmannskog and Myrstad 2009). Lastly, the Directive only gives temporary protection in cases of “mass influx”, defined as “arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided” (Article 2 (d) of the Temporary Protection Directive). Persons displaced by gradual environmental degradation due to climate change are less likely to arrive in a situation of mass influx than victims of sudden natural disasters. The former can therefore mostly not apply for temporary protection (Kolmannskog and Myrstad 2009).

2.2 Subsidiary Protection

If the European Union wants to develop a comprehensive Common European Asylum System, it is necessary that international protection regimes are applied and interpreted in the same way across the EU. In April 2004, after a lengthy negotiation process, the Qualification Directive was adopted, covering two separate but complementary statuses of international protection, namely refugee status and subsidiary protection status (For an overview of the negotiation process, see: Peers and Rogers 2006: 326-327; McAdam 2005a: 462-466).⁵ By defining who is a refugee and who is otherwise in need of international protection, the Directive aims at ensuring a minimum standard of protection in all Member States and preventing asylum shopping in the Union (Preamble (4) and (6) of the Qualification Directive).

The Qualification Directive defines a refugee in consistence with the 1951 Refugee Convention, and attributes subsidiary protection to those displaced persons who do not fall within the 1951 Refugee Convention, but are nonetheless in need of international protection. According to Article 2(e), a person not qualifying for refugee status may be entitled to subsidiary protection if

“substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country”.

Unlike the Temporary Protection Directive, the Qualification Directive has exhaustively enumerated the situations which give right to a protection status. According to Article 15 of the 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.”

It seems from the purpose of the Qualification Directive, namely providing international protection to those who need it, that environmental displacement could trigger subsidiary protection. However, the exhaustive enumeration of types of “serious harm” giving right to subsidiary protection is

⁵ The legal basis for the adoption of the Qualification Directive is Article 63, 1(c), 2(a) and 3(a) of the Treaty establishing the European Community (TEC).

disappointing for the case of environmentally-displaced persons (Lopez 2007: 397-398). Environmental destructions are not included in the list provided for in Article 15, which reflects a political compromise based on “the least contestable human rights-based protections which already form part of most Member States’ protection policies” (McAdam 2005a: 474).

At the time the Qualification Directive was discussed, the international community seemed to be aware of the problem of environmental displacement (Lopez 2007: 398; McAdam 2005a: 464). The Council even asked Member States whether the new instrument should cover ‘environmental disasters’ (Council Discussion Paper 1999; Kolmannskog 2009; Kolmannskog and Myrstad 2009). According to the European Parliament, environmentally-displaced persons “equally need protection” (Report European Parliament 2002). Nonetheless, as Member States did not support the inclusion of environmental disasters in Article 15, environmentally-displaced persons were ignored in the Qualification Directive (Kolmannskog and Myrstad 2009).

During the drafting process, the types of ‘serious harm’ triggering subsidiary protection were heavily discussed. Some of the proposals granted subsidiary protection to persons displaced due to human rights violations (European Commission Proposal 2001; Lopez 2007: 398; Kolmannskog and Myrstad 2009). In such a “human rights paragraph”, serious harm would exist if a “violation of a human right, sufficiently severe to engage the Member State’s international obligations” (European Commission Proposal 2001: article 15; McAdam 2005b: 3). This would allow a broad interpretation of the Qualification Directive, granting subsidiary protection on the basis of human rights violations, and taking into account developments in the case-law of the European Court of Human Rights (McAdam 2005b: 3). As victims of environmental disasters often face violations of their human rights, such a human rights provision could be interpreted so as to include environmental displacement (Kolmannskog and Myrstad 2009).

However, none of the proposed human rights-provisions were retained in the final Directive. Instead, it was decided to limit the scope of the Directive to existing practices of complementary protection in the Member States, thus limiting the definition of “serious harm” to the three types enumerated in Article 15. Clearly, this exhaustive list left “little room for interpretation” (McAdam 2005b: 3). Only those persons facing a real risk of serious harm as defined in Article 15 are eligible for subsidiary protection. Nevertheless, Jane McAdam argues that Article 15 (b), namely ‘inhuman or degrading treatment or punishment’ could open some room for broadening the scope of the Qualification Directive in the future (McAdam 2005b: 3). Some authors have for example proposed to interpret the “inhuman or degrading treatment” so as to include the forced return of environmentally-displaced persons to regions which can no longer sustain human life.

Whether or not such a broad interpretation of the eligibility criteria will be accepted in the future as providing protection for environmentally-displaced persons, will largely depend on the case-law of the European Court of Human Rights and the European Court of Justice (ECJ). Article 15(a) and (b) of the Qualification Directive are after all still based on the European Convention on Human Rights, with the right to life (Article 2 ECHR) and the prohibition of torture, inhuman or degrading treatment or punishment (Article 3 ECHR) (Kolmannskog and Myrstad 2009).

In a recent judgment of 17 February 2009, the ECJ has referred to Article 3 of the ECHR for the interpretation of 'inhuman or degrading treatment' in Article 15(b) of the Qualification Directive.

"... while the fundamental right guaranteed under Article 3 of the ECHR forms part of the general principles of Community law, observance of which is ensured by the Court, and while the case-law of the European Court of Human Rights is taken into consideration in interpreting the scope of the right in the Community legal order, it is, however, Article 15(b) of the Directive which corresponds, in essence, to Article 3 of the ECHR." (Meki Elgafaji, Noor Elgafaji v. Staatssecretaris van Justitie: 28).

In March 2008, the European Court on Human Rights ruled on a violation of the right to life on account of the State's failure to act adequately in preventing a mudslide (Budayeva and others v. Russia; Kolmannskog and Myrstad 2009; Kolmannskog 2009). It remains to be seen whether case-law will develop further in this direction in the future.

Apart from interpreting the Qualification Directive more broadly, the ongoing amendment process of the Directive opens the possibility to amend Article 15 in order to explicitly include other categories of displaced persons in need of international protection. During the drafting process of the Directive, the European Parliament seemed to be in favour of the adaptation of instruments and policies regarding environmental displacement (European Parliament 2002; Kolmannskog 2009). As the Parliament will have a bigger say after the entering into force of the Lisbon Treaty, there could be a larger support for the explicit recognition of environmentally-displaced persons in the Qualification Directive, if the Directive would be renegotiated.

It is interesting to take a look at national legislation and practice to see whether there are examples that could serve as a model for a new sub-paragraph in Article 15 (Kolmannskog 2009). In particular the Finnish and Swedish legislation could provide 'best practice' in that sense. On the basis of Article 3 of the Qualification Directive, those Member States have introduced more favourable standards for determining who is eligible for subsidiary protection. The Finnish Aliens Act grants a residence permit to persons who "cannot return ... because of an armed conflict or environmental disaster" (Finnish Aliens Act, Section 88(1); Kolmannskog 2009). It was recently proposed to grant victims of environmental disasters 'humanitarian protection' instead of 'alternative protection'. The latter should then more precisely represent the Qualification Directive (Kolmannskog and Myrstad 2009).

In Sweden, the Aliens Act protects persons “unable to return to the country of origin because of an environmental disaster” (Swedish Aliens Act, Chapter 4, Section 2(3); Kollmannskog 2009). For practical reasons, there is a possibility to restrict the application of this provision “if Sweden’s absorption capacity is overwhelmed” (Kolmannskog and Myrstad 2009). Although the Swedish *travaux préparatoires* mention more permanent displacement due to for example “sinking islands”, a recent proposal suggests to limit the scope of subsidiary protection to sudden disasters, excluding gradual degradation of the environment (Kolmannskog and Myrstad 2009). Up till now, this legislation has not yet been applied. While most countries have no explicit recognition of environmentally-displaced persons in their legislation, some do offer them protection in practice. An example is the Danish policy of the “survival criteria”, giving humanitarian asylum to people coming “from areas where there was a lack of food and who would be in a particularly vulnerable position upon return” (Kolmannskog 2009).

Whether or not the Qualification Directive could provide a solution for environmentally-displaced persons, will depend on the future interpretation or adaptation of the Directive. However, some important provisions need to be taken into account when considering the Qualification Directive as a possible solution in case of environmental displacement. Firstly, there is the provision relating to an internal protection alternative. 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 like Bangladesh.

Furthermore, Article 6 of the Qualification Directive enumerates the actors of the “serious harm”, namely

- (a) the State;
- (b) parties or organisations controlling the State or a substantial part of the territory of the State;
- (c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7”.

It seems thus that the ‘serious harm’ must result from man-made situations, and not for example from natural disasters. According to the Intergovernmental Panel on Climate Change (IPCC), global warming, leading to gradual environmental degradation and an increase in the occurrence of natural disasters, is for a large part the result of human activities. Fossil fuel use and changes in land use brought excessive amounts of carbon dioxide and other greenhouse gases into the atmosphere (IPCC 2007; Boon and Le Tra 2007: 91; Cooper 1998: 508). Some natural disasters which are not linked to

climate change however do occur. Hence they have to be labelled 'natural' instead of 'man-made'. For victims of such disasters, subsidiary protection seems not to be an option.

2.3 Conclusion on Complementary Protection

Environmentally-displaced persons could qualify for temporary protection, provided that the Council so decides. However, this is not a satisfying solution for those environmentally-displaced persons which need to be permanently relocated, nor for those who do not arrive in situations of 'mass influx'. In particular those who are permanently displaced due to gradual environmental degradation are not covered by the Temporary Protection Directive.

As regard to subsidiary protection, it could be argued that Article 15 (b) of the Qualification Directive can become applicable in certain cases of environmental destruction and hence, protection should be granted on the basis of the prohibition of torture, inhuman or degrading treatment. However, this interpretation of the Directive was clearly not the intention of the drafters, and is currently not widely accepted. It will depend on the future development of jurisprudence and State practice whether such a broad interpretation will ever be accepted. Besides, due to requirements as "man-made actors of serious harm" and "internal flight alternative", the Qualification Directive is only of interest to a limited number of environmentally-displaced persons (Lopez 2007).

Nevertheless, it is not inconceivable that environmentally-displaced persons would be included in a forthcoming European asylum policy. Since Member States can adopt more favourable minimum standards for complementary protection, they could develop 'best practice' for the European framework on asylum and migration (Lopez 2007: 399). As the issue of environmental displacement is more and more brought under international attention, the ongoing amendment process of the Qualification Directive could open negotiations on the subject. This would "fulfil the objective of a common asylum system based on minimum protection standards", as required by Article 63 of the EC Treaty (Lopez 2007: 400).

III. HUMAN RIGHTS-BASED APPROACH

All Member States of the European Union are also parties to various international human rights instruments which may be relevant to migration and asylum cases, such as the 1948 Universal Declaration of Human Rights (UDHR), the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and the 1984 United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). The UDHR is the only of those instruments which explicitly protects the right to “seek and enjoy asylum from persecution” (Article 14 UDHR). However, although there is no right to asylum as such contained in the ECHR, the jurisprudence of the European Court of Human Rights is of important relevance to European asylum legislation and practice. This Chapter will therefore discuss whether the ECHR and relevant case law could provide constructive solutions for environmentally-displaced persons arriving in the European Union. After touching upon the applicability of the ECHR to asylum cases, I will delve further into the prohibition to expel individuals to countries where they risk being subjected to inhuman or degrading treatment. Lastly, the application of the principle of *non-refoulement* will be discussed.

3.1 Applicability of the ECHR to asylum cases

The European Court of Human Rights itself declared the ECHR to be applicable to asylum cases. In the case *Soering v. The United Kingdom*, the Court found that extradition of a person to a State where there were substantial grounds for believing that he would be faced by a real risk of exposure to inhuman or degrading treatment or punishment “would hardly be compatible with the underlying values of the Convention, that ‘common heritage of political traditions, ideals, freedom and the rule of law’ to which the preamble refers” (*Soering v. United Kingdom*: 88). According to the Court, the existence of other international human rights instruments addressing the issue of *non-refoulement* does not exclude the application of the ECHR (*Soering v United Kingdom*: 88).

Asylum applications may give rise to issues under different articles of the Convention, amongst which Article 2 (right to life), Article 3 (prohibition on torture and inhuman or degrading treatment or punishment), Article 5 (right to liberty and security of the person) and Article 8 (right to respect for family and private life). Most asylum related cases of the European Court of Human Rights do

however relate to Article 3 ECHR (Mole 2007: 21). For the purposes of this paper, only Article 3 will be discussed.

The European Court of Human Rights has, in a number of cases, ruled on the question whether the sending of individuals to a State where they risk being exposed to inhuman or degrading treatment, amounts to a violation of Article 3 ECHR (Mole 2007: 19). According to the Court,

“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 subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.” (Soering v United Kingdom, 91).

This view was confirmed in the case of *Cruz Varas v. Sweden*, where the Court ruled that the findings of the *Soering*-case applied to expulsion of rejected asylum seekers (Cruz Varas v Sweden: 70). This was again reaffirmed in later judgments, where the Court found that:

“expulsion by a Contracting State of an asylum seeker 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 faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he was returned.” (Vilvarajah and Others v. the United Kingdom: 103; See also *Chahal v. the United Kingdom*: 74).

In a more recent judgment of 2007 the Court summarises its position as follows:

“The right to political asylum is not contained in either the Convention or its Protocols. However, in exercising their right to expel such aliens, Contracting States must have regard to Article 3 of the Convention which enshrines one of the fundamental values of democratic societies and prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim’s conduct, however undesirable or dangerous. The expulsion of an alien may give rise to an issue under the provision, and hence engage the responsibility of the expelling State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country.” (Salah Sheekh v. The Netherlands: 135).

The European Court of Human Rights has up till now not ruled explicitly on the protection of environmentally-displaced persons. However, the Court has already ruled on cases dealing with disaster prevention and the right to life. The recent judgment of the Court in the *Budayeva*-case decided on a violation of the right to life on account of the State’s failure to act adequately in preventing a mudslide (Budayeva and others v. Russia; Kolmannskog 2009; Kolmannskog and Myrstad 2009). In other cases, Article 3 and the definition of ‘inhuman and degrading treatment’ have been interpreted in a progressive way (Kolmannskog and Myrstad 2009).

3.2 Inhuman or Degrading Treatment

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 (see above). Some authors argue that sending environmentally-displaced persons back to a region where they can no longer survive, amounts to an inhuman or degrading treatment. It remains to be seen whether the European Court of Human Rights will accept such an interpretation in the future. According to the Court, Article 3 can be applied in new contexts which might arise in the future, irrespective of the responsibility of the public authorities (*D. v. United Kingdom*: 49).

In 2007, 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 (*D. v. United Kingdom*; Kolmannskog and Myrstad 2009). Severe environmental disruptions caused by natural disasters or climate change could result in a similar situation, where vital infrastructure is destroyed and provision of basic services such as clean water, food and electricity is hindered (Kolmannskog and Myrstad 2009).

There are a number of differences between the protection guaranteed by Article 3 ECHR and the one offered by the Qualification Directive (Mole 2007: 21-29). As Article 3 ECHR is an absolute right, this prohibition applies irrespective of the conduct of the applicant and the author of the risk. Due to the absolute character of Article 3 ECHR, there are no exclusion clauses comparable to Article 17 of the Qualification Directive. Secondly, there is no requirement of a Geneva Convention ground for the application of Article 3 ECHR. Only the risk itself is relevant, not the reason. Lastly, the source of the risk is irrelevant. What matters, is whether or not the State is able and willing to provide protection. As to the internal flight alternative, the Court has ruled that, as a pre-condition for returning a person, he must be able to travel to the alternative region, gain admittance and settle there (*Salah Sheekh v. The Netherlands*: 141).

Whether or not environmentally-displaced persons could be protected against return by Article 3 ECHR would thus depend on the severity of the environmental disruption, the possibility of an effective flight alternative, and the possibility and willingness of the State to protect them.

3.3 General Principle of *Non-Refoulement*

The principle of *non-refoulement* prohibits the expulsion of individuals to a State “where their life or freedom may be endangered” (Da Lomba 2004: 5). This fundamental principle is of crucial importance to international refugee protection, and is enshrined in Article 33 of the 1951 Refugee Convention. It is also a cornerstone of human rights law, where it acts as “an absolute and general ban on returning persons, independent of conduct or status, to places where they risk certain rights violations” (Kolmannskog and Myrstad 2009; Da Lomba 2004: 5-7). Article 3 ECHR for example prohibits States to return persons to a place where they risk exposure to torture or inhuman and degrading treatment. The Qualification Directive confirms the commitment of EU Member States to the principle of *non-refoulement* ‘in accordance with their international obligations’ (Article 21 (1) of the Qualification Directive).

With regard to environmental displacement, it is interesting to investigate whether displaced persons arriving in Europe could rely on the fundamental principle of *non-refoulement* in order to protect them against return. In certain cases of environmental disruption, the victims obviously cannot return to their region of origin. In particular people displaced due to the effects of global warming, are permanently displaced. The most infamous example are the ‘sinking’ island States in the Pacific (Kolmannskog 2009). However, also in case of temporary displacement caused by sudden disasters, the principle of *non-refoulement* could imply a temporary ban on the return to the destroyed region of origin.

Up till now, the principle of *non-refoulement* has not been accepted by any Court in cases of environmental displacement. However, in practice, considerations based on the principle of *non-refoulement* have been applied in situations of natural disaster. For example, in the aftermath of the 2004 Tsunami, UNHCR called for the suspension of returns to the affected regions, which was widely respected (Kolmannskog and Myrstad 2009). It remains to be seen whether such practices could lead to a legal provision. Further research is necessary to examine the possibility for a future application and interpretation of the principle of *non-refoulement* in situations of environmental displacement.

Conclusion

Environmental destruction is causing millions of people to flee their environment. Even though the debate on environmental displacement emerged more than twenty years ago, the international community has failed to create durable solutions for the recognition and protection of environmentally-displaced persons. The protection of this growing group of displaced persons however should not be a matter of charity. Their recognition and protection should be institutionalised on an international level, both in terms of emergency relief and of planned and organized relocation. Through cooperation and further development of international law, environmentally-induced migration can be managed in order to prevent destabilisation and conflicts arising from it. Therefore, we need to develop a comprehensive and pro-active international and European policy to deal with this issue, taking into account the interests of all stakeholders.

This paper has focused on the extent to which environmentally-displaced persons arriving in Europe can receive protection under the current legal framework of the European Union. It has been demonstrated that the European regimes of complementary protection currently do not offer sufficient protection to environmentally-displaced persons. Although they could theoretically qualify for temporary protection, this could only provide relief to *temporary* displaced persons which arrive in a situation of 'mass influx'. Besides, it is not realistic that the Council will decide to apply the Temporary Protection Directive to a situation of environmental displacement. With regard to the Qualification Directive, environmentally-displaced persons are currently not entitled to subsidiary protection. It remains to be seen whether a broad interpretation of the Directive including environmentally-displaced persons will be accepted in the future. In this regard, the possibility and feasibility of both the adaptation of existing European protection regimes and of the elaboration of a new regime specifically dealing with environmentally-induced population movements is worth further discussion.

With regard to the human rights-based approach to environmental displacement, one has to be careful. Although such an approach is legally very interesting, it remains questionable whether it is also practically relevant for the protection of environmentally-displaced persons. Another question that remains to be examined is the question whether the principle of *non-refoulement* implies a right to legal residency. Article 3 ECHR does not guarantee a legal status, leaving non-removable individuals in an illegal residence status (Kolmannskog and Myrstad 2009). It is therefore worthwhile to examine whether, on the basis of human rights, such individuals should be entitled to legal residency in the host country.

Severe environmental disruptions harm people on a fundamental level. It forces them to flee their homes in search of an inhabitable environment that can support their subsistence. Due to the effects of global warming, the issue is now more than ever urgent. Future generations will have to cope with massive flows of environmentally-displaced persons. There is no need to wait for islands like Tuvalu and the Maldives to be completely flooded. The 'high tide' calls for immediate action.

Although it would be difficult to get the EU Member States to endorse environmentally-displaced persons as a legally defined group, there are some reasons to be optimistic. Several recent developments show an increased awareness to the problem of environmental displacement, both on the international and on the European level. At the Un Climate Change Talks in Bonn in June 2009, the issue of environmental displacement was for the first time discussed in formal climate negotiations. A reference to climate related human mobility is now even included in the proposed negotiating text, that should lead to a new protocol to the UNFCCC (UN Framework Convention on Climate Change) in December in Copenhagen, in succession to the Kyoto Protocol (UNFCCC 2009: 25(e)).

At the European level, the European Parliament stated already in 2002 that, with regard to displacement due to environmental degradation, "there is an urgent need to devise the appropriate instruments and policies of prevention". According to the Parliament, this "should provide step 2 of a Common European Asylum Policy" (Report European Parliament 2002). Secretary-General Javier Solana and commissioner Ferrero-Waldner have released a report in March 2008, advocating that the EU should "consider environmentally-triggered additional migratory stress in the further development of a comprehensive European migration policy" (Paper from the High Representative and the European Commission to the European Council 2008). In 2009, the European Commission stated that climate migration "should also be considered in the broader EU reflection on security, development and migration policies" (White Paper of the Commission 2009). This political frame will facilitate further discussions on the topic, with a sustainable solution for the protection of environmentally-displaced persons as a final objective.

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