

‘ENVIRONMENTAL DISPLACEMENT: A NEW CHALLENGE FOR EUROPEAN MIGRATION POLICY’

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Introduction

Global warming, natural disasters and other environmental destructions are increasingly causing widespread migration. Although we do not have reliable figures on the current and future extent of environmentally-induced population movements, one thing is clear: these population movements will increase. As for the future, the most commonly quoted figure is that of 200 million persons displaced by the year 2050 (Myers 2004; Castles 2002: 1; McAdam 2007: 1). As there recently is an increased awareness of the problem of environmental displacement, the time has come to focus attention on the elaboration of durable solutions. 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.¹ At the regional level, the European Parliament called for the development of instruments and policies of prevention regarding environmental displacement (Report European Parliament 2002). According to the European Commission, climate migration “should also be considered in the broader EU reflection on security, development and migration policies” (White Paper of the Commission 2009). These reflections should facilitate the elaboration of a protection regime for environmentally-displaced persons.

Since a substantial number of environmentally-displaced persons is expected to cross international borders, this paper discusses how to protect environmentally-displaced persons arriving in Europe. After briefly touching upon the origins of environmental displacement, we will analyse how environmentally-displaced persons could be protected against a forced return to their destructed region of origin. Through a study of both the general principle of *non-refoulement* and codified forms of complementary protection, it will be shown that environmentally-displaced persons are currently not sufficiently protected under European legislation.

¹ 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 succession to the Kyoto Protocol (UNFCCC 2009: 25(e)).

I. FROM ENVIRONMENTAL DISRUPTION TO HUMAN DISPLACEMENT

Already in 1985, UNEP researcher El-Hinnawi defined “environmental refugees” as

“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: 4).

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).

A variety of origins and types of environmental displacement exists. Three categories of environmental disruptions causing displacement can be distinguished (De Moor and Cliquet 2009: 5-8):

1. environmental degradation due to climate change and biodiversity loss
2. sudden environmental disasters, including natural and technological disasters
3. intentional destruction of the environment.

The largest group of environmentally-displaced persons are individuals affected by the gradual environmental degradation due to climate change and the loss of biodiversity, leading among others to sea level rise and severe desertification (Myers 1997; Myers 2004; Bates 2002: 474; Williams 2008: 504-506; Conisbee and Simms 2003: 14-19).

The category of ‘sudden environmental disasters’ can be divided into natural and technological disasters. Natural disasters are weather or geological events, such as earthquakes, floods, hurricanes and volcanic eruptions (Bates 2002: 471; McCue 1993: 160-161; Havard 2007: 67-69; Keane 2004: 211-212). 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; Conisbee and Simms 2003: 14-15). Technological disasters include industrial and chemical accidents (Lopez 2007: 373; Hong 2001: 333-335; Keane 2004: 212-213).

The third 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 offers sufficient relocation assistance. Intentional destruction of the environment often takes place in

times of war, in order to strategically relocate the enemy population (Bates 2002: 472; Hong 2001: 335-336; Keane 2004: 213).

These different environmental disruptions cause different types of displacement. 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). Another distinction is that between temporary and permanent displacement (Biermann and Boas 2007: 6). Natural disasters would mostly lead to temporary displacement, while climate change effects 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). As different categories of displaced persons have different needs, they should be dealt with differently.

II. COMPLEMENTARY PROTECTION OF ENVIRONMENTALLY-DISPLACED PERSONS IN EUROPE

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 Convention relating to the Status of Refugees (1951 Refugee Convention), is one of the greatest benefits for refugees². 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. But whilst their needs are comparable, their legal rights are not.

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 (article 1(2) 1951 Refugee Convention; art 1(2) 1967 Refugee Protocol). Therefore, we need

² 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".

to explore how to protect environmentally-displaced persons arriving in Europe through other mechanisms than the 1951 Refugee Convention.

Besides the international refugee regime, the principle of *non-refoulement* 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). The principle appears in various forms in a number of human rights instruments and has found expression in case law (Lauterpacht and Bethlehem 2003: 141-149). In particular for the prohibition on torture, cruel, inhuman or degrading treatment or punishment, the principle of *non-refoulement* is considered as a “component part of the prohibition” (Lauterpacht and Bethlehem 2003: 92). This Chapter analyses whether environmentally-displaced persons could rely on these rights and principles in order to protect them against a forced return.

2.1 (Non)-Refoulement of Environmentally-Displaced persons

A. Conventional Provisions of Non-Refoulement

The principle of *non-refoulement* has found expression in various human rights treaties, including the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1984 United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Only UNCAT has incorporated an explicit provision on *non-refoulement* (Durieux 2008: 4). Article 3 UNCAT prohibits to “expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”.

As for Article 3 of the ECHR, the European Court of Human Rights has ruled that

“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 consistently confirmed in a number of other cases, where the Court ruled that the reasoning of the *Soering*-case applies to expulsion of rejected asylum seekers (Cruz Varas v Sweden:

70; Vilvarajah and Others v. the United Kingdom: 103; Chahal v. the United Kingdom: 74; Salah Sheekh v. The Netherlands: 135). Thus 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. Similarly, Article 7 of the ICCPR has been interpreted by the Human Rights Committee as including a prohibition of *non-refoulement* (ICCPR General Comment No 20: §9; Lauterpacht and Bethlehem 2003: 145-146; Durieux 2008: 4).

Clearly, the principle of *non-refoulement* is a fundamental component of the prohibition of torture, cruel, inhuman or degrading treatment or punishment established in various human rights treaties. The *non-refoulement* provisions of these treaties have “contributed to the development of ‘asylum law’”, offering protection to individuals facing certain human rights violations upon return to their country of origin (Durieux 2008: 3-4). Displaced persons falling outside the scope of the 1951 Refugee Convention can rely on Article 3 UNCAT, Article 7 ICCPR, Article 3 ECHR and relevant case law in order to protect them against return. Since a violation of the ECHR can give rise to binding judgments of the European Court of Human Rights, rejected asylum seekers in Europe are most likely to rely on Article 3 ECHR (Durieux 2008: 4-5).

B. Non-Refoulement as a Principle of Customary International law

The above mentioned treaty provisions prohibiting *refoulement* have been widely accepted by a large number of States. The principle of *non-refoulement* in human rights law is generally considered to be part of customary international law (for an extensive reasoning: see Lauterpacht and Bethlehem 2003: 141-149)³. This means that States which are not parties to the 1951 Refugee Convention, nor to other human rights treaties prohibiting *refoulement*, are bound by the principle. And even within States which have excepted legal *non-refoulement* provisions, those provisions may need to be supplemented by the customary principle of *non-refoulement* (Lauterpacht and Bethlehem 2003: 141). This principle acts as a fundamental component of the customary prohibition of torture, cruel, inhuman or degrading treatment or punishment (Lauterpacht and Bethlehem 2003: 155-158).

³ The UNHCR Executive Committee even emphasized that the principle of *non-refoulement* amounts to a peremptory rule of international law, and is not subject to derogation (General Conclusion No. 25, paragraph (b); General Conclusion No 79, paragraph (i); Lauterpacht and Bethlehem 2003: 141).

As regard to environmental displacement, the customary principle of *non-refoulement* alone is inadequate to provide sufficient protection to forcibly displaced persons. Firstly, it is difficult to enforce this principle in practice. In this sense Article 3 ECHR offers a stronger protection, due to the possibility to achieve a binding judgment of the European Court of Human Rights (McAdam 2008: 268). Secondly, and this is the same for Article 3 ECHR, the principle of *non-refoulement* does not provide the applicants with a legal residence status (see further in Chapter 2.3). However, the principle could act as a possible basis for the elaboration of a protection regime for environmentally-displaced persons.

C. Relevance for Environmentally-Displaced Persons

As shown above, the prohibition on torture and inhuman or degrading treatment implies a duty not to return a person to a place where he risks being subjected to the prohibited treatment. Some authors argue that sending environmentally-displaced persons back to a region where they can no longer survive, amounts to inhuman or degrading treatment (McAdam 2007: 9). 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 ECHR 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 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. 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 destructed region of origin. In 1979, the European Court of Human Rights 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 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). 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.

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 case of natural disasters. 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 generally accepted practice, or even a binding norm. In our opinion, the principle of *non-refoulement* could become the basis for a new regional system of asylum for environmentally-displaced persons. Through a bottom-up development of law, generally accepted *non-refoulement* practices could lead to a 'soft law' instrument (comparable to the IDP-principles) or even to customary international law (Williams 2008: 512; Morel 2009: 14). Further research is necessary to examine the State practice and *opinio iuris* for a future application of the principle of *non-refoulement* in certain situations of environmental displacement.

2.2 Codified Complementary Protection in Europe

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 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 persons⁴.

⁴ This Chapter is based on a more extensive discussion of complementary protection in Europe in DE MOOR, N. AND CLIQUET, A. (2009), p. 9-17.

A. Temporary Protection in Case of Mass-Influx

The Temporary Protection Directive was adopted in 2001, in order to provide temporary protection to displaced persons arriving in situations of 'mass influx', namely when the influx of displaced persons is so big that national asylum systems cannot efficiently cope 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 nationals 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).

Although Finland advocated the inclusion of persons displaced by natural disasters, environmentally-displaced persons are not explicitly mentioned in the Directive (Council of the European Union 2001; Kolmannskog and Myrstad 2009). Nevertheless, since the Directive does not provide an exhaustive list of situations triggering temporary protection, 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). As severe environmental destructions could constitute a threat for human rights protection, environmentally-displaced persons could even fall under the example given in Article 2(c)(ii) (Kolmannskog and Myrstad 2009).

Whether or not the Directive applies is decided by the Council on a case-by-case basis (Article 5 of the Temporary Protection Directive). However, up till now, there has never been a political agreement to invoke the Directive, not even for the examples given in Article 2(c) (Kolmannskog and Myrstad 2009). And even if the Directive would be invoked in case of an environmental destruction, which is highly unlikely, the attached status is often not satisfying, as it offers mere temporary protection. 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). Furthermore, the Directive only gives temporary

protection in cases of “mass influx” (Article 2 (d) and 5 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).

Some individual Member States have adopted legislation or practices in order to provide temporary protection to certain categories of environmentally-displaced persons. Finland for example grants temporary protection to persons who cannot return safely to their home country because of an environmental disaster (Finnish Aliens Act, Section 109(1); Kolmannskog and Myrstad 2009). Other countries have not extended their legislation on temporary protection, but have granted “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.

B. Subsidiary Protection in case of Inhuman Treatment?

The Qualification Directive, adopted in 2004, covers two separate but complementary statuses of international protection. The 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”.

This provision is “a considerable step forward for some EU Member States, which had previously simply ‘tolerated’ the presence of non-removable persons but had not granted them a formal legal status” (McAdam 2008: 265; see further in 2.3).

The Qualification Directive has exhaustively enumerated the situations triggering 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."

As environmental destructions are not included in this list, environmentally-displaced persons are not entitled to subsidiary protection. Although the purpose of the Qualification Directive is to provide protection to those who need it, Article 15 reflects a mere political compromise based on "the least contestable human rights-based protections which already form part of most Member States' protection policies" (McAdam 2005a: 474). Despite the fact that the European Parliament recognised the need "to devise the appropriate instruments and policies of prevention" with regard to environmental displacement, environmentally-displaced persons were ignored in the Qualification Directive (Report European Parliament 2002).

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 interpretation (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). Human rights provisions could help to clarify the scope of Article 15 of the Qualification Directive. 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 (Meki Elgafaji, Noor Elgafaji v. Staatssecretaris van Justitie: 28). In March 2008, the European Court of 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. As the European 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. National legislation and practice could then serve as a model for a new sub-paragraph in Article 15 (Kolmannskog 2009). In particular the Finnish and Swedish legislation have introduced residence permits for persons who are unable to return because of an environmental disaster (Finnish Aliens Act, Section 88(1); Swedish Aliens Act, Chapter 4, Section 2(3); Kolmannskog 2009).

Whether or not the Qualification Directive could provide a solution in case of environmental displacement, will thus depend on the future development of jurisprudence and State practice, or on the adaptation of the Directive. However, a wide interpretation of the 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 as to the “actors of serious harm” (Article 6 of the Qualification Directive)⁵ and the “internal flight alternative” (Article 8 of the Qualification Directive)⁶, 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).

⁵ 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. According to the Intergovernmental Panel on Climate Change (IPCC), global warming is for a large part the result of human activities (IPCC 2007, Boon and le Tra 2007:91; Cooper 1998: 508). However, victims of natural disasters which are not linked to climate change could not rely on subsidiary protection.

⁶ 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.

2.3 Prohibition to Expel or Right to Stay?

The protection regimes discussed above vary enormously as to the attached rights. While the Qualification Directive obliges States to grant a legal status to persons eligible for protection, there is no comparable status attached to the recognition of protection under customary or conventional expressions of *non-refoulement* (McAdam 2008: 267; Mole 2007: 106). The principle of *non-refoulement* does not clarify whether persons which cannot be returned, are entitled to legal residency, leaving these individuals often in an illegal residence status (Kolmannskog and Myrstad 2009; McAdam 2008, 266, 268-270).

States could consequently be tempted to favour human rights-based protection over subsidiary protection, in order to avoid obligations beyond the prohibition to return a person (Durieux 2008: 7). We must therefore be careful that such a differentiation of protection does not lead States to rule out subsidiary protection for categories of persons who could fall within Article 15 of the Qualification Directive. Persons eligible for subsidiary protection should be granted a legal status, and not mere protection against a *forced return*.

Through a creative use of human rights, it could be argued that individuals which cannot be '*refouled*', should be granted legal residency in the host country. On the ground of Article 8 ECHR, the European Court of Human Rights ruled that the failure to regularise amounts to a violation of the physical and moral integrity of a person (*Sisojeva v. Latvia*). According to the Court, "[i]t is not enough for the host state to refrain from deporting the person concerned; it must also by means of positive measures if necessary, afford him or her the opportunity to exercise the rights in question without interference" (*Sisojeva v. Latvia*, Chamber Judgment: 104). Additionally, on the ground of Article 3, it is arguable that the prospect of a permanent irregular status, while one cannot be returned, could be considered as degrading and inhuman treatment. After all, illegal residency often brings along deprivation, lack of social benefits, and homelessness (McAdam 2008: 265). The prohibition on degrading treatment would then "prohibit a state from leaving anyone within its jurisdiction in conditions of complete destitution in the same way that expulsion to face destitution was found to violate Article 3 in *D. v. the United Kingdom*" (Mole 2007: 109; See above in Chapter 2.1 (D)).

The question of legal status is worth further research in the future, in particular in relation to the question whether environmentally-displaced persons could rely on *non-refoulement* provisions to protect them against a forced return. The Lisbon Treaty will introduce broad policy objectives on

asylum and migration into the EU treaties, such as “efficient management of migration flows” (Article 63a(1) TEC as amended by Article 2 of the Lisbon Treaty)⁷. Even the principle of *non-refoulement* will for the first time be written in a legal European text (Article 63(1) TEC as amended by Article 2 of the Lisbon Treaty)⁸. Since the ECJ often rules on the basis of policy objectives, this could bring along a change in the jurisdiction on asylum and migration cases.

Conclusion

Although the debate on environmental displacement emerged more than twenty years ago, the international community has failed to develop a comprehensive and pro-active policy to deal with this issue. This paper has focused on the extent to which environmentally-displaced persons arriving in Europe can receive complementary 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. With regard to the human rights-based approach and the general principle of *non-refoulement*, 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. Due to a lack of implementing mechanisms and the vagueness of these principles, human rights law “is strong on principle but weak on delivery” (McAdam 2008:267). Another question that remains to be examined is the question whether the principle of *non-refoulement* implies a right to legal residency.

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. Several recent developments show an increased awareness

⁷ Article 63a of the Treaty establishing the European Community will become the new Article 79 of the consolidated version of the Treaty on the Functioning of the European Union.

⁸ Article 63 of the Treaty establishing the European Community will become the new Article 78 of the consolidated version of the Treaty on the Functioning of the European Union.

to the problem of environmental displacement, both on the international and on the European level. It is to be hoped that the reference to environmental migration will make it into the successor to the Kyoto-protocol, to be decided upon in December 2009 in Copenhagen. This political frame would facilitate further discussions on the topic.

Due to the effects of global warming, the issue of environmental displacement is now more than ever urgent. Future generations will have to cope with massive flows of environmentally-displaced persons. Europe can no longer wait to create durable solutions for the protection of the growing category of environmentally-displaced persons. National and regional practices and policies regarding environmental displacement could lead to the emergence of a soft law instrument, eventually resulting in binding norms, or even customary international law. In this regard, the principle of *non-refoulement* could provide the basis for the elaboration of a new protection regime. Although such a “bottom-up” creation of international law takes more time than the conclusion of a new international agreement, it is probably a more feasible way to reach the final objective of a sustainable solution for the protection of environmentally-displaced persons.

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