



Finding Refuge from Wilder Weather: How Does European Asylum Law Meet the Challenge of Climate Change and Environmental Displacement

Numéro 4 - Avril 2011



Vikram Kolmannskog¹

According to the Intergovernmental Panel on Climate Change (IPCC), human-induced climate change is accelerating and already has severe impacts on the environment and human lives.² It affects Europe and neighbouring regions. Africa is among the most exposed and vulnerable areas. Various researchers and international institutions have arrived at the conclusion that climate change will likely contribute to “major forced displacements” over time.³ A highly relevant

1 Vikram Kolmannskog holds degrees in Law (LLM, Oslo; LLM in Human Rights with distinction, LSE) and the Humanities (BA with History of Ideas, Religion and Psychology; Cand.Mag. with Spanish). He has worked extensively with the topic of climate change and forced migration, previously as the Norwegian Refugee Council Legal Adviser, and currently as an independent scholar and consultant. See the website www.vikramkolmannskog.no.

2 IPCC, 2007. *The Fourth Assessment Report of the Intergovernmental Panel on Climate Change*. Cambridge University Press.

3 Hodgkinson, D., Burton, T., Anderson, H., and Young, L.,

question becomes how well environmentally displaced persons are protected in current law and what can be done to enhance protection. This paper looks briefly at how climate change can trigger displacement before moving on to address the question of protection by examining European asylum law and practice, including the 1951 Convention relating to the Status of Refugees and the Common European Asylum System.

Climate change and displacement

While recognising that people move for a complex set of reasons, there is an increasing understanding of the importance of climate change as a risk

2009. “Copenhagen, Climate Change ‘Refugees’ and the need for a Global Agreement.” *Public Policy*, Vol. 4, No. 2, p. 159.



multiplier.⁴ The link to human mobility is thus an indirect one. Climate change as such does not cause human movement, but the effects of climate change may trigger people to move. Voluntary migration can be a form of coping or adaptation, but climate change also contributes to forced displacement as a survival strategy.

One effect of climate change that can trigger displacement is a change in certain natural hazards.⁵ Hazards combined with human vulnerability can result in sudden-onset disasters such as floods and slow-onset disasters such as droughts. These natural disasters can be called climate-related disasters since their frequency, severity, timing and/or location can be influenced by climate change. The overall trend shows that the number of recorded natural disasters has doubled from approximately 200 to over 400 per year over the past two decades.⁶ The majority are climate-related disasters. According to the United Nations Emergency Relief Coordinator, this may be “the new normal.”⁷

According to a pilot study by the United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA) and the Internal Displacement Monitoring Centre (IDMC) of the Norwegian Refugee Council (NRC), as many as 36 million people were displaced as a result of sudden-onset natural disasters in 2008.⁸ More than 20 million people were displaced by climate-related sudden-onset disasters alone. Estimating displacements from slow-onset disasters is much more challenging due to multi-causality and the blurred line of

4 For empirical case studies, see the EACH-FOR project, available at www.each-for.eu/index.php?module=main.

5 IPCC, 2007.

6 Emergency Event Database, available at www.emdat.be.

7 United Nations Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, 2008. Opening Remarks at the Dubai International Humanitarian Aid and Development Conference and Exhibition, DIHAD 2008 Conference, 8 April 2008, available at <http://www.reliefweb.int/rw/rwb.nsf/db900sid/YSAR-7DHL88?OpenDocument>.

8 UNOCHA and IDMC/NRC, 2009. *Monitoring Disaster Displacement in the Context of Climate Change*. Geneva.

voluntary and forced movement. Nevertheless, the numbers above give an indication of the scale of displacement triggered by climate-related disasters already today. Current projections for the number of people who may be displaced in the future vary greatly.

In addition to sudden-onset and slow-onset disaster displacement – what could be called direct environmental displacement – people may also be displaced due to conflicts related to these disasters – what we could call indirect environmental displacement. Particular challenges for this group will not be considered here.⁹

Finally, while some people remain where they live because of resilient capacity, others may in fact be forced to stay. They do not have the resources to move.¹⁰ Displacement will result in particular needs, but it is important to also develop an inclusive approach to all affected.

“ (...) From a protection perspective and in a victim-centred approach, however, there is normally no compelling reason to distinguish between the climate change-related and the other environmental displacement cases. ”

All countries will eventually be affected by climate change, but some areas are more immediately and particularly exposed, such as small island developing states, Africa, mega-deltas and the

9 For more about this group and topic, see Kolmannskog, V., 2009. “The Point of No Return”. *Refugee Watch*, Vol. 34, pp. 27-42.

10 Black, R. et al., 2008. “Demographics and Climate Change: Future Trends and their Policy Implications for Migration”. Working paper. Brighton: University of Sussex.

polar regions.¹¹ Much of the environmental displacement is temporary and depends on the effectiveness of rehabilitation and recovery, but some displacement becomes permanent. Most is likely to be internal and regional, but there may also be some longer-distance displacement. While internally displaced persons are clearly covered by the Office of the United Nations High Commissioner for Refugees (UNHCR) 1998 Guiding Principles on Internal Displacement,¹² the legal situation for people displaced across borders is less clear.¹³

This paper focuses on those who are forced to flee across international borders – or finding themselves in exile, cannot return to their country of origin – mainly because of a sudden-onset or slow-onset natural disaster. For practical purposes the descriptive term “environmentally displaced persons” (EDPs) will be employed for this group of people. This also includes those displaced by natural disasters unrelated, or less related, to climate change. The end results for someone fleeing an earthquake, tsunami or cyclone are often the same, namely temporary or permanent displacement with particular protection needs. Separating out climate change-related displacement can be justified in order to establish climate change as an important cause of displacement, the wider responsibility for displacement and the need for climate change mitigation and funding. From a protection perspective and in a victim-centred approach, however, there is normally no compelling reason to distinguish between the climate change-related and the other environmental displacement cases.¹⁴

11 IPCC, 2007.
 12 UNHCR, 1998. *Guiding Principles on Internal Displacement*, 22 July 1998, E/CN.4/1998/53/Add.2.
 13 See for example Informal Group on Migration/Displacement and Climate Change of the Inter-Agency Standing Committee (IASC), 2008. *Climate Change, Migration and Displacement: Who will be affected?* Working paper submitted by the informal group on Migration/Displacement and Climate Change of the IASC, 31 October 2008, p. 1.
 14 See also Kälin, W., 2010. “Conceptualising Climate-Induced Displacement”. In: McAdam, J. (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives*. Hart Publishing, p 85. This was also the conclusion of the expert roundtable on climate change and displacement organised by UNHCR in Bellagio, 22nd to 25th February 2011.

Refugee protection

In article 2(c) of the Qualification Directive,¹⁵ the European Union (EU) has incorporated the refugee definition of the 1951 Convention relating to the Status of Refugees as modified by the 1967 Protocol. According to article 1A of the Convention, a refugee is a person who, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country [...]”

“ Neither climate change nor natural disasters are explicitly mentioned anywhere in the Convention. ”

Neither climate change nor natural disasters are explicitly mentioned anywhere in the Convention. Several national courts have clarified that it does not apply to environmental displacement in general.¹⁶ In one case, the Refugee Status Appeals authority of New Zealand explained that “this is not a case where the appellants can be said to be differentially at risk of harm amounting to persecution due to any one of these five grounds.”¹⁷

15 Council directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as person who otherwise need international protection and the content of the protection granted, 2004/83/EC; see also arts. 9 and 10.
 16 See for example *Canada (Attorney General) v. Ward* (1993) 2 SCR 689, 732; *Applicant A v. Minister for Immigration and Ethnic Affairs* (1997) HCA 4, (1997) 190 CLR 225; *Minister for Immigration v. Haji Ibrahim* (2000) HCA 55, 204 CLR 1, §140, cited in McAdam, J., 2011(a). “Climate Change Displacement and International Law: Complementary Protection Standards”. In: *The expert roundtable on climate change and displacement organised by UNHCR in Bellagio, 22nd to 25th February 2011* (paper to be published at www.unhcr.org), fn 53-57.
 17 Refugee Appeal No 72189/2000, RSAA (17 August 2000) §13, cited in McAdam, J., 2011(a) fn 53-57.

Some advocates have suggested amending the Convention. However, critics, including UNHCR, have highlighted that this would risk a full renegotiation of the Convention, which, in the current political situation, may undermine the international refugee protection regime altogether.¹⁸ Moreover, the 1951 Convention concepts and mechanisms may not be suitable. It is problematic to use persecution in the traditional sense to speak about human-induced climate change. Granted that we could, one could see the big polluter countries rather than the home governments as the persecutor. Yet, some displaced persons are likely to seek protection in these same countries. As McAdam writes, this would be “a complete reversal of the traditional refugee paradigm.”¹⁹ It is also unlikely that there is political will today to establish a new effective comprehensive framework with strong and clear rights for the displaced so what are we left with?²⁰

The author of this paper has argued elsewhere for dynamic and contextual interpretations of existing law.²¹ The now 60-year-old Convention has shown flexibility and remained relevant. For example, gender-related persecution was not considered by the drafters of the Convention either, but feminist jurisprudence has been successful in arguing for a gender-sensitive interpretation of the Convention. Similarly, it may be too quick to say that environmentally displaced persons are never covered by the refugee definition.

18 See for example UNHCR, 2009. *Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective*. Geneva; and Kolmannskog, V., 2008(a). *Future floods of refugees*. Oslo: NRC.

19 McAdam, J., 2011(a), pp. 21-22.

20 For a thorough critique of the Convention proposal, see McAdam, J., 2011(b). “Articles Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer.” *International Journal of Refugee Law*, Vol. 23, No. 1, pp. 2–27.

21 See for example Kolmannskog, V., 2008(b). “Climates of displacement.”, *Nordic Journal of Human Rights*, Vol. 26(4), pp. 302-320; Kolmannskog, V. and Myrstad, F., 2009. “Environmental Displacement in European Asylum Law.” *European Journal of Migration and Law*, Vol 11, pp. 313–326; Kolmannskog, V. and Trebbi, L., 2010. “Climate Change, Displacement and Protection: A Multi-Track Approach”. *International Review of the Red Cross* No. 879.

According to the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, paragraph 39, “the expression ‘owing to well-founded fear of being persecuted’ for the reasons stated [...] rules out such persons as victims of famine or natural disaster, unless they also have well-founded fear of persecution for one of the reasons stated. Such other motives may not, however, be altogether irrelevant to the process of determining refugee status, since all the circumstances need to be taken into account for a proper understanding of the applicant’s case.”

There are often several reasons why a person moves, and Convention refugees may flee in the context of disasters while the well-founded fear of persecution exists independently.²²

In addition, serious or systematic human rights violations are normally considered to amount to persecution.²³ Experience shows that situations of natural disasters are prone to human rights violations. For example, the recognition of the human rights, discrimination and persecution aspects in natural disaster situations, in particular in the aftermath of the 2004 Asian Tsunami, led to the development of the IASC guidelines on human rights and natural disasters.²⁴ Certain groups of people are more vulnerable and exposed to disasters in the first place. For example, political dissidents, particular social groups like widows and ethnic groups may be marginalised and forced to live in areas of high risk. They may also receive less protection and assistance during and after a disaster. In a similar manner to gender cases, the nexus requirement of the Convention could be fulfilled when lack of protection from the state is linked to one of the five grounds (race, religion, nationality, membership of a particular social group

22 See Kolmannskog, V., 2008(b).

23 UNHCR, 1992. *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. Geneva, §53.

24 IASC, 2006. *Protecting Persons Affected by Natural Disasters. IASC Operational Guidelines on Human Rights and Natural Disasters*. Brookings-Bern Project on Internal Displacement.

or political opinion). One can see persecution and lack of protection as a *continuum* where a certain lack of protection in extreme circumstances in itself can be considered as persecution. This is in line with the tendency towards more positive human rights obligations in human rights law. As a minimum the 1951 Convention will be applicable in situations where people flee because their government has consciously withheld or obstructed assistance in order to punish or marginalize them on one of the five grounds. This has been clarified by the UNHCR,²⁵ and recently confirmed at the Bellagio expert roundtable on climate change and displacement hosted by the organisation from 22nd to 25th February 2011. These would be cases where, as the New Zealand authority put it, “the appellants can be said to be differentially at risk of harm amounting to persecution due to any one of these five grounds.”

There may also be cases of “environmental persecution” such as when a government induces famine by reducing the water flow, poisoning water or destroying crops.²⁶ This was also confirmed at the Bellagio roundtable. At a first glance, these are cases of man-made disaster and seem to differ from the environmental displacement we have been concerned with here. However, it is important to remember that there are human factors to any so-called “natural disaster” in creating human vulnerabilities, and in the case of climate-related disasters, also in inducing climate change. The governments may intentionally increase vulnerabilities and contribute to environmental destruction and disasters.

25 UNHCR, 2009. *Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective*. Geneva.

26 *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v. Nigeria*, African Commission on Human and Peoples’ Rights, Communication No. 155/96, ACHPR/COMM/AO44/1, 7 May 2002. The persecution of the Marsh Arabs can also illustrate this. In retribution for a failed Shia uprising, Saddam Hussein diverted the Tigris and Euphrates away from the marshes, converting the wetlands into desert, to eliminate the food sources of the Marsh Arabs. See also Cooper, J., 1998. “Environmental Refugees: Meeting the Requirements of the Refugee Definition”. *6 NYU Environmental Law Journal* 480; and, McAdam, J., 2011(a), p. 24.

In sum, the 1951 Convention is relevant to some cases of environmental displacement, but many EDPs will still fall outside its scope.

Temporary protection

The possibility of temporary protection in situations of “mass influx” is established with the EU Temporary Protection Directive.²⁷ Official minutes of the negotiations reveal that the Finnish delegation was unsuccessful in explicitly including EDPs.²⁸ Kolmannskog and Myrstad have argued that temporary protection can be applicable nonetheless.²⁹ Firstly, article 2(c) of the Directive does not provide an exhaustive list of categories of persons protected (cf. “in particular”). Secondly, generalised violations of human rights – a situation that is explicitly mentioned – often occur during or after a natural disaster. Thirdly, it was decided that the term “mass-influx” should be defined on a case-by-case basis by a qualified majority of the Council. Arguably, if a majority decides that a natural disaster calls for invoking the Temporary Protection Directive mechanisms, it is free to do so. A challenge would be to mobilise the political will and agreement to do so.

It remains to be seen how Member States practice develops. So far Finland is the only EU country explicitly granting temporary protection, in section 109(1) of the Immigration Law, for 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.”³⁰

27 Council directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, 2001/55/EC.

28 Council, 2001. Outcome of proceedings. 6128/01. Available at <http://register.consilium.europa.eu/pdf/en/01/st06/06128en1.pdf>. Cited in Kolmannskog, V. and Myrstad, F., 2009, fn 14.

29 Kolmannskog, V., and Myrstad, F., 2009.

30 Utlänningslag 30.4.2004/301. Unofficial translation by the

The *travaux préparatoires* emphasise that the first alternative is internal flight and international humanitarian help, but acknowledge that mass influx may occur and temporary protection may be necessary. So far the provision has not been used.

“ The EU Directive and national temporary protection mechanisms may provide some protection, but there are weaknesses. ”

The EU Directive and national temporary protection mechanisms may provide some protection, but there are weaknesses. An individual may still be in need of protection even though he or she does not arrive in a “mass influx” situation. Furthermore, it does not cater for people who need to stay longer or permanently. Reconstruction after a natural disaster often takes longer than the maximum period of three years of temporary protection in the Directive. In the USA, which has a different system of temporary protection, people from Honduras and Nicaragua received temporary protection after Hurricane Mitch struck in 1998. Some are still residing in the country on a temporary basis almost ten years after the disaster struck. At some point humanitarian and compassionate considerations require more permanent residence status.

Subsidiary protection and the ban on inhuman or degrading treatment

The Common European Asylum System also establishes international protection based on human rights obligations. According to article 2(e) of the Qualification Directive, an applicant may receive

author of this paper. The text is binding only in Finnish and Swedish. The text in Swedish reads: “Tillfälligt skydd kan ges en utlänning som är i behov av internationellt 4/301skydd och som inte tryggt kan återvända till sitt hemland eller sitt permanenta bosättningsland på grund av att en väpnad konflikt eller någon annan våldssituation eller en miljökatastrof har lett till massflykt från landet eller dess närområden.”

subsidiary protection if he or she faces “a real risk of suffering serious harm” as defined in article 15.³¹ article 15 includes torture or inhuman or degrading treatment or punishment. Again the negotiation documents indicate Member States’ intention of excluding EDPs.³² The European Parliament, however, claimed that EDPs “equally need protection.”³³

Although the drafters departed from a strong human rights approach, the current article 15 is still based on the 1950 European Convention of Human Rights and Fundamental Freedoms. Indications of how article 15 should be interpreted can therefore be found in the jurisprudence of the European Court of Human Rights (ECtHR). In human rights law, *non-refoulement* is an absolute and general ban on returning a person, independent of conduct or status, to places where they risk certain rights violations. The jurisprudence of the ECtHR is very developed in this area and focused on the absolute ban on torture, inhuman or degrading treatment or punishment (article 3). Because this right has a special position in the Convention and the jurisprudence of ECtHR, it is common for a violation of socio-economic rights such as the right to an adequate standard of living, health or to be free of hunger, to be re-characterized as a form of inhuman or degrading treatment.³⁴

.....
31 Directive 2004/83/EC.

32 Council of the European Union, 2002. *Presidency note*. 12148/02. Available at <http://register.consilium.europa.eu/pdf/en/02/st12/12148en2.pdf>. Cited in Kolmannskog, V. and Myrstad, F., 2009, fn 27.

33 Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs, Rapporteur: Jean Lambert, European Parliament, 2002. *Report on the proposal for a Council directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*. COM (2001) 510 – C5-0573/2001 – 2001/0207(CNS). Cited in Kolmannskog, V. and Myrstad, F., 2009, fn 23.

34 Human rights treaties and monitoring bodies have not given the same weight to economic, social and cultural rights as they have to civil and political rights. This has led to the development of the “integrated” or “holistic” approach, which sees civil and political rights as having inherent socio-economic elements. See Mantouvalou, V., 2005. “Work and Private Life: *Sidabras and Dziautas v. Lithuania*.”, 30 *European Law Review* 573; and *Airey v. Ireland* (1979–80) 2 EHRR 305, §26; both cited in McAdam, J., 2011(a). fn 150 and 151.

“ Climate change and natural disasters can have adverse effects on human rights even where the home state is willing to protect individuals. ”

It is clear that climate change and natural disasters can have adverse effects on human rights even where the home state is willing to protect individuals (as opposed to cases discussed above).³⁵ The Office of the High Commissioner for Human Rights makes several links, such as between increased food insecurity and right to be free from hunger, increased water stress and right to safe drinking water, sea-level rise and flooding and right to adequate housing.³⁶

Some of the jurisprudence on “inhuman treatment” could support protection for EDPs. Inhuman treatment must attain “a minimum level of severity” and involve “actual bodily injury or intense physical or mental suffering.”³⁷ Importantly, for the present context, it does not need to be deliberate.³⁸ The ECtHR has made clear that the assessment of the minimum level of severity is relative and conditions can be considered cumulatively: “it depends on all the circumstances of the case.”³⁹

In the case of *D. v. the UK*, the ECtHR considered that returning an HIV-infected person to St. Kitts would amount to “inhuman treatment”, *inter alia* due to the lack of sufficient medical treatment, social network, a home or any prospect of income.⁴⁰

35 Humphreys, S. (ed), 2010. *Human Rights and Climate Change*. Cambridge University Press.

36 UN Doc A/HRC/10/61 (n 14) Annex.

37 *Pretty v. the UK* (2002) 35 EHRR 1, §52; *Ireland v. the UK* (1979–80) 2 EHRR 25, §167.

38 *Labita v. Italy* (2008) 46 EHRR 1228, §120, cited in McAdam, J., 2011(a), fn 137.

39 *N. v. the UK* (2008) EHRR 453 §29.

40 *D. v. the UK*, application no. 30240/96, judgment of 2 May 1997.

Although rather exceptional in substantiating non-removal on socio-economic conditions, the case still carries some weight.

Similarly, one could argue, that particularly vulnerable people should be protected against return to areas affected by major disasters. In such cases homes and vital infrastructure are often destroyed or damaged hindering the provision of basic services such as clean water, electricity and food. The policy consideration of not opening the gates too wide for asylum, dictates that any applicant would continue to need to show individual risk.⁴¹

Although considering such protection under discretionary leave and “severe humanitarian conditions” rather than a subsidiary protection obligation, a UK asylum policy instruction clarifies that “there may be some extreme cases (although such cases are likely to be rare) where a person would face such poor conditions if returned – e.g. absence of water, food or basic shelter – that removal could be a breach of the UK’s article 3 obligations.”⁴²

There may be an interesting dynamic between the development of domestic law and practice and jurisprudence of the ECtHR in fleshing out how article 3 can apply to environmental displacement cases. As in refugee law, one could argue for contextual and dynamic interpretation of human rights law. Such interpretation is in accordance with the “evolutive interpretation” of the ECtHR.⁴³ This is also supported by the Council of Europe

41 Recital 26 in the final directive proposed by Germany clarified that “risks to which a population of a country or a section of the population is generally exposed normally do not create in themselves an individual threat which would qualify as serious harm.” Cited in Kolmannskog, V. and Myrstad, F., 2009, fn 31. This qualifier is all the more likely in light of the notion that Europe risks being flooded by climate change refugees.

42 *Asylum Policy Brief: Discretionary Leave*. Available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/discretionaryleave.pdf?view=Binary>.

43 See landmark judgment *Tyrer v. UK*, application no. 5856/72, judgment of 25 April 1978.

Parliamentary Assembly's Committee on Migration, Refugees and Population. In a recent report they encourage Member States "to interpret and apply the obligation of *non-refoulement* under articles 2 and 3 of the European Convention of Human Rights in an inclusive manner and grant complementary or temporary protection to environmental migrants."⁴⁴

“ Today, only Finland and Sweden have provisions explicitly granting protection to people who cannot return because of an environmental disaster. ”

Today, only Finland and Sweden have provisions explicitly granting protection to people who cannot return because of an environmental disaster. They do not consider this as part of their EU obligations. A recent proposition to the Finnish Immigration Law clarifies that EDPs should be regulated under a new paragraph 88(a) on "humanitarian protection", so that paragraph 88 on "alternative protection" more precisely reflects the EU Qualification Directive.⁴⁵ Those who cannot return due to environmental disaster "shall" receive humanitarian protection. This is not a discretionary provision. The intention was merely to separate the category of EDPs out from the category of people who benefit from the EU Qualification Directive provision.

44 Council of Europe Parliamentary Assembly, Committee on Migration, Refugees and Population, 2008. *Environmentally Induced Migration and Displacement: A 21st Century Challenge*, COE Doc. 11785, 23 December 2008.

45 Förvaltningsutskottets betänkande 26/2008 rd, Ogranskad version 1.0 FvUB 26/2008 rd - RP 166/2007 rd, Regeringens proposition med förslag till lagar om ändring av utlänningslagen och av vissa lagar som har samband med den. Available at http://www.eduskunta.fi/faktatmp/utatmp/akxtmp/fvub_26_2008_p.shtml. Cited in Kolmannskog, V. and Myrstad, F., 2009, fn 36. See also the Finnish Immigration Law, Utlänningslag 30.4.2004/301.

The Swedish Immigration Law deals with EDPs in the provision that is otherwise tailored on article 15 of the Qualification Directive.⁴⁶ Chapter 4 Section 2 includes an individual who "is unable to return to the country of origin because of an environmental disaster" in the category "person otherwise in need of protection."⁴⁷ The Swedish *travaux préparatoires* emphasise that disasters will normally result in a temporary need for protection and that only sudden disasters are included as "environmental disaster."⁴⁸ Furthermore, since this is a substitute protection, it is a prerequisite that there is no internal flight alternative, an area within the home state that the applicant could move to in safety.⁴⁹ To this date the provision has not been applied, but a potential problem of big numbers is addressed: there is a possibility to restrict the application of the law if Sweden's absorption capacity is overwhelmed, but this should only occur in "an exceptional situation" since one should first seek to solve the problem through international cooperation – the European cooperation is particularly mentioned.⁵⁰

In general, the laws on subsidiary or complementary protection are largely tailored around the concept of return. Both Kälin and Kolmannskog have advocated for a test of the permissibility, feasibility and reasonableness of return to protect EDPs.⁵¹ In cases of slow-onset disasters it would not be so much a question of why someone left initially, but rather whether the gradual degradation has reached a critical point where they cannot be expected to return now. Some provisions such as the Swedish, explicitly exclude these cases, but in principle they can also be included.

46 Utlänningslag 29.9.2005/716.

47 Unofficial translation by the author of this paper. The Swedish text reads: "Med skyddsbehövande i övrigt avses i denna lag en utlänning som i andra fall än som avses i 1 § befinner sig utanför det land som utlänningen är medborgare i, därför att han eller hon [...] 3. inte kan återvända till sitt hemland på grund av en miljökatastrof".

48 SOU 1995:75 p147.

49 Prop. 1996/97:25 pp. 100-101.

50 Prop. 1996/97:25 pp. 102-103.

51 See Kolmannskog, V., 2008(b); Kolmannskog, V., 2009; and, Kälin, W., 2010, p. 98.

Each case would include a concrete examination of the particular circumstances, similar to how individual asylum applications are dealt with now.

Non-refoulement

At a minimum the principle of *non-refoulement* may provide some basic protection. The principle in article 33(1) of the 1951 Refugee Convention stipulates a prohibition of expelling or returning (“*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 social group or political opinion.” As already mentioned, this fundamental principle has counterparts in human rights law, and article 21 in the Qualification Directive concerns *non-refoulement* according to all “international obligations.” Since *non-refoulement* only entails that individuals cannot be returned in certain cases, not any obligation to grant them a particular status, these people may be left in a status limbo.

Non-refoulement based on article 3 of the European Convention may provide protection against return even in cases where article 15 of the Qualification Directive does not provide a protection status. Furthermore, article 15 does not provide protection against all violations of the right to life. It merely protects against death penalty, execution and indiscriminate violence and cannot be directly applicable to EDPs. However, the ECtHR has confirmed that *non-refoulement* applies to article 2 and the right to life in general. The Office of the High Commissioner for Human Rights makes a link between extreme weather events and the right to life.⁵² A link between a healthy environment and the right to life has been acknowledged in both the International Court of Justice⁵³ and the ECtHR.⁵⁴

52 UN Doc A/HRC/10/61 (n 14) Annex.

53 *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia)* 1997 ICJ 92 (Separate Opinion of Judge Weeramantry) §A(b).

54 See *Önerlydiz v Turkey*, application No 48939/99, judgment of 30 November 2004 and other cases with analysis in Loucaides, L.G., 2007. Environmental Protection through the Jurisprudence of the European Convention on Human Rights. In: Loucaides, L.G., *The European Convention on Human Rights: Collected Essays*. Martinus Nijhoff, p. 169.

In *Budayeva and others v. Russia* the ECtHR found a breach of the right to life because the authorities had not acted adequately in preventing a mudslide.⁵⁵ A case could perhaps be made for *non-refoulement* to a situation where the government will not protect against environmental harm. Eventually, *non-refoulement* may also be interpreted to mean that a person cannot be returned to a situation where he or she runs such a risk, regardless of the government’s will to protect. However, there have been no successful cases of *non-refoulement* based solely on article 2 so far. The article is generally raised with article 3, and if a violation of the latter is found, then the analysis of article 2 typically falls away.⁵⁶ But we may see some development in this jurisprudence over time. In addition, countries could arguably apply the *non-refoulement* of refugee law (which includes protection of life) by analogy. Here as well we may see an interesting dynamic between the development of domestic law and practice and jurisprudence of the ECtHR.

There are some examples of the application of *non-refoulement* or similar considerations of a “softer”, discretionary character in situations of natural disaster. For example, “UNHCR’s call for suspension of return to the areas affected by the December 2004 tsunami, though not based on a legal obligation, was well respected.”⁵⁷

Discretionary leave to stay

In less extreme cases European states could use their sovereign discretion to grant leave to stay on humanitarian grounds. What such status entails of rights varies from country to country. We find relevant practice in both EU and non-EU countries.

55 *Budayeva and others v. Russia*, applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment of 30 March 2008.

56 *Z. and T. v. the UK*, application no. 27034/05, judgment of 28 February 2006 and other cases cited in McAdam, J., 2011(a), fn 104 and 105.

57 ExCom, 2005. “Providing International Protection Including Through Complementary Forms of Protection”, *Refugee Survey Quarterly* 25(1). Cited in Kolmannskog, V. and Myrstad, F., 2009, fn 43.

Paragraph 38(2)-c on humanitarian asylum in the new Norwegian Immigration Law, states that social or humanitarian aspects of the return situation can be grounds for granting permits to stay. In the *travaux préparatoires*, which generally are given much weight in Norwegian jurisprudence, the Ministry of Immigration recognises the need to be able to grant (possibly temporary) residence permits to applicants who come from an area affected by a humanitarian disaster, such as after a natural disaster.⁵⁸ According to Kälin, even though Swiss asylum law does not expressly mention natural disasters, legislation on temporary and subsidiary protection can be interpreted so as to include EDPs.⁵⁹

As already mentioned, the UK also opens for such protection. It is worrisome, however, that the UK is trying to avoid entrenching socio-economic deprivation as an inherent part of “inhuman or degrading treatment” by distinguishing between article 3 “protection” under subsidiary protection and “non-protection” under discretionary leave to stay.⁶⁰ That protection cases are channelled into more arbitrary processes is of course the inherent danger with discretionary leave to stay provisions. Denmark has granted temporary humanitarian residence permit based on the so-called survival criteria.⁶¹ The permit has been granted in particular cases to single women and families with young children from areas where the living conditions are considered to be extremely difficult, for example due to famine.⁶² From 2001 to 2006 there was even a presumption that families with young children should not be returned to Afghanistan due to the drought. This practice was adjusted and eventually

58 Odelstingsproposisjon 75, 2006-2007 7.6.3.3. p. 157, referring to §38(2)c). Cited in Kolmannskog, V. and Myrstad, F., 2009, fn 48.

59 Kälin, W., 2010, p. 100. This was his conclusion of an inter-departmental roundtable discussion arranged by the Swiss Ministry of Foreign Affairs on 13 January 2009.

60 McAdam, J., 2011(a), p. 41.

61 Danish Ministry of Refugees, Immigrants and Integration, 2008. Notat om Integrationsministeriets praksis for meddelelse af humanitær opholdstilladelse efter udlændingelovens § 9 b, stk. 1. 2 September 2008, p. 11.

62 Udlændingeloven 24.8.2005/826 § 9 b, 1.

included landless people who came from areas where there was a lack of food and who would be in a particularly vulnerable position upon return. The following case will illustrate how this can work in practice for an individual asylum seeker.

“ That protection cases are channelled into more arbitrary processes is the inherent danger with discretionary leave to stay provisions. ”

The case of Ali Hussein

Ali Hussein fled Afghanistan as a teenager and came to Denmark in 2003.⁶³ While he himself gave other reasons for fleeing home, Ali was granted a temporary humanitarian residence permit due to the drought in the Uruzgan province where he came from. When discussing environmental displacement, policy-makers sometimes object that so far their asylum systems have not had to deal with any EDPs so they don't see why they need to adapt them now. In the Norwegian *travaux préparatoires* this is stated quite bluntly by the Ministry when rejecting a suggestion from the Directorate of Immigration to explicitly include this group in the law.⁶⁴ However, the law and legal processes don't always truthfully reflect reality. What reasons an asylum seeker gives for applying for protection will naturally be coloured by what narratives he or she knows are accepted. If someone is fleeing drought and conflict, he or she will often know that the conflict must be highlighted to get

63 Much of the information about this case has been gathered from articles in local newspapers and blogs such as Søren Sohn. Alis venner. *Århus Stiftstidende*, 15 February 2008. Available at <http://stiften.dk/skanderborg/alis-venner>; and, Ali Hussein har fået asyl Den afganske flygtning kan nu blive i Ry. *asyl-kids* [blog], 24 November 2008. Available at <http://www.freewebsite-service.com/asyl-kids/Simpelt%20forum.php?id=3640>.

64 Odelstingsproposisjon 75, 2006-2007 7.6.3.3. p. 157, referring to §38(2)c).

protection.⁶⁵ In the case of Ali Hussein, the Danish authorities considered that the drought, rather than the conflict and other aspects of the situation, was crucial, and Danish law and practice provided the possibility of protection based on this. As mentioned, there is a danger that protection cases are channelled into more discretionary processes. The case also illustrates how slow-onset disasters may be included, and that it may make more sense to focus on the concept of return than initial reasons for fleeing, when providing protection. Regardless of why Ali initially left Afghanistan and how advanced the drought at that time, the authorities considered that he should not presently be returned due to the drought.

based on the Immigration Law article 7(2), a subsidiary protection provision based on the EU Qualification Directive. A decisive factor now was that Ali belonged to a minority that experienced difficulties in the country particularly in relations to Taliban. Apart from illustrating how long and tragic the route for asylum seekers may be in Europe, the case of Ali clearly illustrates the issue of multi-causality as well as the weaknesses of any temporary and discretionary mechanism to deal with cases like this. On a more optimistic note, the case also shows how the public can support an asylum seeker and successfully influence asylum policy and decisions for better or for worse.

“ The case of Ali clearly illustrates the issue of multi-causality as well as the weaknesses of any temporary and discretionary mechanism. ”

Ali arrived as an illiterate but made progress with school and integrated well in the local community of Ry. On 8th November 2007 the authorities decided that Ali had to return since the drought had passed. After pressure from local friends of Ali, the deadline for him to leave was postponed. There was much criticism of the decision that he had to leave, including from high-level politicians. On 23rd January 2008 the Minister for Integration explained that the practice of granting humanitarian residence permit to Afghans from drought-affected areas had changed so Ali had to go back. The case was taken to *Flygtningenævnet*, the Immigration Appeal Board. Finally, on 4th September they granted Ali permanent residence

.....
⁶⁵ See findings from East-Africa in Kolmannskog, V., 2010. Climate Change, Human Mobility, and Protection: Initial Evidence from Africa. *Refugee Survey Quarterly*, Vol. 29, pp. 103-119.

Conclusion and final remarks

Europe can build its own jurisprudence and proper understanding of refugees as including certain groups of EDPs. Europe can provide temporary, subsidiary or discretionary protection for other EDPs. Europe as a whole, but also individual European countries, can play an important role in developing this protection. In addition, expansion of legal labour migration could give some people the option of choosing migration before they are forcibly displaced, assist the people in the place of origin and supply Europe with human resources for certain types of work – although this last argument is not so strong in times of financial recession. Finally, since most of the EDPs are likely to remain within their country of origin or region, complementing EU external strategies and adaptation efforts are important.

It is important to interpret law with a view to the ever-changing environment that it has to be applied in. This calls for contextual and dynamic interpretation. But there is also a risk with unclear law and discretion, namely that we are too much at the mercy of the few who are tasked to interpret and apply it. This is particularly a challenge in the field of immigration law because of the volatile political situation and shifting feelings toward refugees and immigrants. Therefore we cannot settle completely with merely using unclear, existing provisions and discretionary leave to stay to address environmental displacement. There is a need to clarify or even create new law. The Finnish legislation and the concept of return could be looked more into and possibly used as a model. Initiatives can be taken at the national, regional and international levels. At the regional level, we have the Common European Asylum System. At the international level, a natural host is the UNHCR. The organisation recently invited states and experts to the Bellagio conference to discuss how to proceed on this matter, and the Norwegian government is hosting an international conference on climate change and displacement in June 2011.

The current political climate for asylum seekers in Europe must be kept in mind when considering what will there is to expand protection for EDPs. The politics and moral sentiment also influence implementation of law and access to protection. For example, Europe already has elaborated asylum legislation but many potential asylum seekers are stopped from ever arriving to file an application through visa regimes, security forces and agreements with transit countries. Access may become even harder if the potential numbers of legitimate asylum seekers increase. This is a problem beyond law. It is a hot topic in politics, especially during economic downturns. It is also a fundamental matter of moral sentiment. We need public communication, information and sensitisation on the topic of climate change and displacement. Hopefully, the interdependence and connectivity shown by global environmental changes spark new compassion and solidarity.