

People Moving in the Context of Environmental Change: The Cautious Approach of the European Union

Monika Mayrhofer

Ludwig Boltzmann Institute of Human Rights, Vienna, Austria
monika.mayrhofer@univie.ac.at

Margit Ammer

Ludwig Boltzmann Institute of Human Rights, Vienna, Austria

Abstract

With growing evidence that environmental factors are becoming more and more important in driving migration, many different actors have taken position on so-called ‘environmental migration’ in recent years. Lately, also the European Union (EU) started to approach this topic. While it is still far away from offering a self-standing policy on the issue, the EU has started a process of deliberation with the publication of a Commission Staff Working Document (CSWD) in April 2013. This article provides an overview of the related policy process and analyses which rationales are shaping it. It further pursues a stocktaking exercise with regard to existing EU asylum and migration policies and explores which roles the EU could play in the context of environment-related migration and displacement under the existing ‘repertoire’ of EU asylum and migration policy and analyses it in light of the newly published CSWD. The paper concludes that the Commission takes in its CSWD a very cautious approach and that the policy process was shaped by similar factors as the area of asylum and migration.

Keywords

European Union – environmental migration – European Commission Staff Working Document

1 Introduction

There is growing evidence that environmental change is becoming more and more important in driving migration¹ 'specifically through its influence on a range of economic, social and political drivers which themselves affect migration'.² In this context many different actors, in particular researchers and international organisations (e.g., IOM, Council of Europe Parliamentary Assembly, UNHCR), have joined the debate on so-called 'environment-related migration' or 'environment-related displacement' in recent years. Although it has been recognised that environmental factors will have increasing repercussions on migration there is still no agreed terminology, concept and definition of 'environmental migration and displacement'. It has been acknowledged, though, that there exists a normative gap with regard to cross-border displacement: The existence of a normative gap was confirmed in the 'Nansen Principles on Climate Change and Displacement' (2011) which are legally non-binding recommendations resulting from the 'Nansen Conference on Climate Change and Displacement in the 21st Century', where 220 researchers, politicians, representatives of authorities, of the United Nations and NGOs gathered. Given the lack of political will to establish a legally binding framework addressing this normative gap,³ in October 2012 a state-driven approach,

1 R. Black, S.R.G. Bennett, S.M. Thomas and J.R. Beddington, 'Migration as adaptation', 478 *Nature* (2011) 447–449. Also the Foresight Report stressed that '[t]he impact of environmental change on migration will increase in the future' (*Foresight: Migration and Global Environmental Change, Final Project Report*, London: The Government Office for Science 2011, p. 9). However, this report also concluded that 'environmental change is equally likely to prevent migration as it is to cause migration' (Foresight Report 2011, p. 12).

2 *Foresight: Migration and Global Environmental Change, Final Project Report*, London: The Government Office for Science 2011, p. 9.

3 Originally, UNHCR intended to develop together with states a 'Global guiding framework' for external displacement with regard to sudden-onset environmental disasters. At the UNHCR high-level Ministerial Meeting in December 2011, however, it turned out that only four out of the 145 governments present were willing to explore together with UNHCR at regional and sub-regional levels 'the protection gaps created by new forms of forced displacement, especially environmentally-related cross-border displacement'. The UNHCR Standing Committee had already mid-2011 declined a proposal according to which UNHCR should the lead agency constitute in a pilot programme for the protection of persons in environmental disasters (J. McAdam (2012) *The Normative Framework of Climate Change-Related Displacement*, The Brookings Institution, 3 April 2012; For Event: 'Addressing the Legal Gaps in Climate Change Migration, Displacement and Resettlement: From Sinking Islands to Flooded Deltas', p. 5, available online at: http://www.brookings.edu/~media/Research/Files/Papers/2012/4/03%20cc%20migration%20mcadam/04032012_cc_paper_mcadamj.PDF

the so-called 'Nansen Initiative', was launched. It aims at building consensus among states about how to address cross-border displacement in the context of sudden- and slow-onset disasters at national, regional and international levels. It is described as 'a state-led, bottom-up consultative process intended to build consensus on the development of a protection agenda addressing the needs of people displaced across international borders in the context of natural disasters, including the effects of climate change'.⁴ The Initiative is funded by Norway and Switzerland but also by the European Commission.⁵

Lately, also the European Union (EU) has started to respond to the interrelation of climate change, environment and migration. Yet, while several EU policies (e.g., with regard to climate change, humanitarian aid, development cooperation, foreign policy, migration) address environment-related migration/displacement in some way, the EU has no self-standing policy on this specific topic until now.⁶ Recently the EU has started a reflection process on this issue. One of the outcomes of this development is an internal paper, a Commission Staff Working Document (CSWD) on 'Climate change, environmental degradation, and migration' (accompanying the EU strategy on adaptation to climate change), published in April 2013.⁷ This document should serve

(accessed 4 February 2014)). Compare also J. McAdam, 'Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer', 23 *International Journal of Refugee Law* (2011) 15–18.

4 <http://www.nanseninitiative.org> (accessed 4 February 2014).

5 FAQ No. 14: How is the Nansen Initiative funded?, available online at <http://www.nanseninitiative.org/faqs> (accessed 4 February 2014). Over a period of two years funds are earmarked for commissioning research studies on the topic of disaster-induced cross-border displacement, convening regional and global consultations, running costs, and the final dissemination of the work done by the Nansen Initiative.

6 'At the EU level, there is currently no distinct instrument applicable to "environmentally displaced individuals"' (C. Vlassopoulos (2012), 'Climate Change and Migration: Towards a new Nexus for Policy Making in the European Union?', in: European Parliament, *Human Rights and Climate Change. EU Policy Options*, Brussels: Directorate-General for External Policies of the Union, p. 49) or the 'EU rather adapts than leads the international climate migration debate' (ICMPD, 'Climate Refugees: Legal and Policy Responses to environmentally induced migration', Study requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, Brussels (2011), p. 49). These statements represent typical assessments of EU policies on environment- or climate-related forms of migration. The view that there is so far no EU policy on such migration seems to be shared by researchers as well politicians and EU officials.

7 European Commission (2013), *Commission Staff Working Document: Climate change, environmental degradation, and migration, Accompanying the Communication 'An EU Strategy on adaptation to climate change'*, 16 April 2013 SWD (2013) 138 final (hereinafter: CSWD).

as a starting point for a discussion on the topic of environment-related migration with the Member States and for a possible development of a policy in this field.

This article enquires into the European Union's attempt to address the topic of environment-related migration and displacement. We argue that the approach taken with regard to environment-related migration and displacement is heavily influenced by factors shaping EU policy making in the area of asylum and migration. Thus, the guiding principle of policy making in this context is to contain immigration towards the EU and to avoid responsibility for persons concerned in the field of EU immigration and asylum policy in the first place. This is reflected not only by the policy process so far (Section 2) but also by the policy responses suggested by the Commission in the CSWD (Section 3).

Firstly, we will provide an overview of the agenda-setting process of the EU and discuss the main factors shaping the EU policy-process on environment-related migration and displacement and the levels involved in policy making. In doing so, we will show that environment-related migration is not only a rather low-priority item on the EU policy agenda and that the Commission is reluctant to push new policy initiatives in this field forward but also that policy responses of the EU are more likely to emerge as part of the external dimension focusing on development cooperation and humanitarian assistance. In addition, we will conclude that the discursive and narrative context shaping EU asylum and migration policies, i.e., securitisation on the one hand and the development approach on the other hand, informs also to a large extent the policy process concerning environment-related migration and displacement. Both approaches do not adequately address the protection of environment-related migrants.⁸

Secondly, we will explore whether the Commission fully exhausted the potential of existing EU asylum and migration law in its CSWD when asking whether persons affected could find protection in the EU. This stocktaking exercise is pursued since a normative gap has been traced in particular with regard to external environment-related displacement⁹ and since a new legal

8 The presented results draw from interviews carried out with representatives of the European Commission (DG HOME, DG CLIMA and DG DEVCO), members of the European Parliament, a representative of the UNHCR Bureau in Brussels and a representative of the NGO ECRE.

9 The protection gap was recognised also in the Nansen Principles (Principle No. IX stresses that '[a] more coherent and consistent approach at the international level is needed to meet the protection needs of people displaced externally owing to sudden-onset disasters' and that states '[...] could develop a guiding framework or instrument in this regard.')

framework does not seem – in particular at a global level – feasible anytime soon. Until states can agree on new frameworks, existing legal instruments should be used¹⁰ and further developed through their interpretation. It is against this background that also a review of existing EU instruments seems worthwhile.¹¹ We conclude in Section 3 that the Commission could have interpreted in particular the EU Qualification Directive (including the Recast) in such a way that at least some of the persons affected who manage to arrive in the EU are covered by subsidiary protection status; apart from that it could have suggested – based on the competences after the Treaty of Lisbon – the introduction of a new form of EU protection. Looking at the approach suggested by the Commission in its CSWD with regard to migration as adaptation or the role of the EU in its external relations, it becomes evident that the main goal of an evolving EU policy on environment-related migration is to keep migration out of the EU instead of providing for protection within the EU.

2 The Struggle over Setting the EU Agenda concerning People Moving in the Context of Environmental Change

2.1 *First Initiatives to Address Movement in the Context of Environmental Change at EU Level*

A diagnosis often made is that so far there is no EU policy on environment-related forms of migration and displacement. This view is correct provided one looks for a coherent policy resulting in a well-structured legal and normative framework that addresses movement in the context of environmental change. However, environment-related forms of migration and displacement have been a topic of discussion at EU level for a while and a multitude of institutions and actors are involved in shaping the process of defining the issue at stake and setting the agenda. There were several – sometimes parallel – developments

10 Similarly, Nansen Principle No. VII stipulates that '[t]he existing norms of international law should be fully utilized, and normative gaps addressed'.

11 To a certain extent this has already been undertaken by a few actors – however, with a focus on displacement and EU asylum policy: e.g., ICMFD, *'Climate Refugees': Legal and Policy Responses to environmentally induced migration*, Study requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, Brussels (2011); V. Kolmannskog and F. Myrstad, 'Environmental Displacement in European Asylum Law', 11 *European Journal of Migration and Law* (2009) 313–326; J. McAdam (2012), *Climate Change, Forced Migration, and International Law*, Oxford: Oxford University Press, p. 47.

and initiatives addressing environment-related forms of migration predating the adoption of the CSWD:

The first rather modest steps in this regard were the acknowledgement of the challenge as being relevant for the EU and the gathering of information on the issue including the commissioning of research projects and the organisation of events in order to discuss the topic with different stakeholders. The European Parliament was the first EU institution that did some groundwork in this regard. It included the issue of 'climate refugees' in its 1999 resolution on The Environment, Security and Foreign Policy, pointed out the extent of the problem¹² and warned against the direct and indirect pressures on EU policies such as immigration and justice policies, development assistance and spending on humanitarian aid and 'increased security problems for the EU in the form of regional instability in other parts of the world'.¹³ In addition, the parliament organised seminars, workshops, hearings and other discussion events.¹⁴

The European Commission (EC) also contributed to these activities of collecting information by financing research on the interrelation between environmental change and forced migration, e.g., the project 'Environmental Change and Forced Migration Scenarios' (EACH-FOR) under the Framework Programme for Research and Technological Development.¹⁵ For a short period 'environmental migration' formed a thematic priority of the European Refugee Fund (Calls for Community Actions 2008 and 2009),¹⁶ later the EC included the financing of research on migration and climate change in the area of

12 '[...] according to detailed international research collated and published by the Climate Institute in Washington, the number of "environmental refugees" now exceeds the number of "traditional refugees" (25 million compared to 22 million) and whereas this figure is expected to double by 2010 and could well rise by substantially more on a worst-case basis', European Parliament 1999, Resolution on the environment, security and foreign policy, 28.1.1999, A4-0005/99, Article J.

13 Ibid., Article I.

14 For a list of such events see CSWD, p. 6.

15 The two-year research project EACH-FOR investigated the causes of environment-related migration and the interrelation with other social, political and economic factors in Europe and 23 countries of origin. The study was conducted within the frames of FP6 of the European Commission. The Final Report was published in 2009: *Environmental Change and Forced Migration Scenarios (EACH-FOR), Specific Targeted Project. Scientific support to policies – SSP D.3.4. Synthesis Report (2009)*.

16 European Commission, *European Refugee Fund 2008–2013*. Community actions, Call for proposals 2008, 4b: 'Projects related to the study of new types of conflict and threats, including environmental damage, which may have an impact on the flows of persons seeking protection in the EU'. The Call for 2009 contains a similar wording. However, it is not apparent whether projects were granted under this heading.

development and cooperation.¹⁷ In 2007, the EC further voiced its concern about the ‘potential consequences such as forced migration and internal displacements of persons’ as a result of disputes and tensions over access to natural resources and natural disasters in its Green Paper on Adapting to climate change in Europe – options for EU action and called for the EU migration policy to ‘take the impacts of climate change into account, in particular in migration management’.¹⁸

These first steps towards acknowledgment and consultation were supplemented by a phase of ‘legal and policy inventory’, meaning that existing legal frameworks were reviewed whether and to what extent they might be applicable to deal with environment-related forms of migration. A study on ‘Climate Refugees’ written by the International Centre for Migration Policy Development (ICMPD) and commissioned by the European Parliament (Committee on Civil Liberties, Justice and Home Affairs (LIBE)), for example, did not only explore protection gaps and possible policy responses on an international level but also analysed the current EU legal and policy framework.¹⁹

During the preparation of the CSWD (2013), the EC organised expert consultations and roundtables with representatives from EU Member States and other countries, NGOs and other stakeholders such as experts from the International Organization for Migration (IOM) or the UNHCR, the UN Refugee Agency. This especially due to the fact that other international organisations such as the IOM or various UN bodies had already started to take an interest in the subject and developed expertise which could be drawn from.²⁰ In addition,

17 E.g., the Annual Action Programme 2011 of the Commission in the area ‘Development and Cooperation’ (EuropeAid): Commission Implementing Decision of 2 August 2011 on the Annual Action Programme 2011, Thematic Programme of Cooperation with Third Countries in the Areas of Migration and Asylum (budget line 19 February 2001), to be financed under the general budget of the European Union: ‘A thematic approach, identifying several thematic priorities such as [...] support to the development of research on migration, with a focus on Migration Profiles and migration and climate change.’

18 European Commission (2007), *Adapting to climate change in Europe – options for EU action*, Green Paper, SEC(2007) 849, pp. 20–21.

19 ICMPD (2011), ‘*Climate Refugees: Legal and Policy Responses to environmentally induced migration*’, Study requested by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs, Brussels.

20 See Somerville (2011) ‘Environmental migration governance: debate in the European Union’, *Migration and Global Environmental Change*, Foresight, October 2011, available online at <http://www.bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1151-pd17-environmental-migration-governance-european-union.pdf> (accessed 5 February 2014).

the EU became involved in various international fora on climate change and migration, e.g., the EC financially contributed to the Nansen Initiative mentioned above.

Another aspect of this initial phase of agenda-setting was the inclusion of environment-related forms of migration in a more thorough way. The 2008 paper on Climate Change and International Security by the High Representative for the Common Foreign and Security Policy and the EC, for instance, was assessed as being a 'more substantial intervention'²¹ in regard to developing an EU policy in this field. However, the approach adopted in the paper was limited to classifying 'environmentally-induced migration' as a 'threat' that may increase conflicts in transit and destination countries. It also assumed that Europe 'must expect substantially increased migratory pressure'. Hence, it included the recommendation to enhance EU capacities by building up knowledge, by monitoring and by providing early warning *inter alia* regarding the impact on human rights and potential migratory movements. It also called on the EU to utilize its role in multilateral leadership to promote global climate security by considering 'environmentally-triggered additional migratory stress in the further development of a comprehensive European migration policy, in liaison with all relevant international bodies'.²² A similar policy was followed in the Council Conclusion on EU Climate Diplomacy where climate change is described as a 'threat multiplier', creating migratory pressures and desertification.²³

The drafting of the CSWD (2013) was influenced by the development of the EU Global Approach to Migration and Mobility (GAMM) (2011), which is a further elaboration of the EC's Global Approach to Migration (GAM) (2005). The 2011 evaluation of GAM involved an online public consultation process by the EC (DG Home Affairs), which included a question on 'environmentally-induced migration'. Responses from representatives of EU Member States, EU

21 A. Geddes and W. Somerville, 'Migration and environmental change in international governance: the case of the European Union', 30 *Environmental and Planning C: Government and Policy* (2012) 1015–1028, at 1019.

22 High Representative and the European Commission to the European Council (2008) *Climate Change and International Security*, S113/08, pp. 5–7. It was argued that Europe would bear the consequences of global warming *inter alia* in the form of mass migration since some parts of the population of some EU neighbouring regions (e.g., Northern Africa, Middle East), which are already now affected by difficult health conditions, unemployment, social exclusion, would become more prone to the impacts of climate change. In that way internal and international migration could be triggered.

23 Council of the European Union (2011), *Council conclusions on EU Climate Diplomacy*, 3106th Foreign Affairs Council meeting, Brussels, 18 July 2011, p. 1.

authorities, NGOs, third countries and individuals were accepted. The respondents emphasised the need for more research on this matter (in particular on the possible impacts for the EU) and supported the assistance of third countries in facing this challenge. The opinions, however, differed concerning the question whether the EU should pass legislation or a policy. The respondents considered the adoption of a legislative framework to be 'premature'.²⁴ Especially respondents from the Member States raised their concerns regarding future EU legislation and asked for more research and analysis. Following this consultation, in November 2011, GAMM was adopted and promoted as the overarching framework of the EU external migration policy covering the four themes of legal migration and mobility, irregular migration and trafficking in human beings, international protection and asylum policy, and maximising the development impact of migration and mobility. The EC emphasised that '[a]ddressing environmentally induced migration, also by means of adaptation to the adverse effects of climate change, should be considered part of the Global Approach'.²⁵

The most important initiative concerning this initial phase of agenda-setting was the inclusion of a paragraph on climate change and migration into the Stockholm Programme²⁶ by the European Council in 2009. This addition points out a further need for exploring the connection between climate change, migration and development and asks the EC to carry out 'an analysis of the effects of climate change on international migration, including its potential effects on immigration to the Union'.²⁷ This served as an impetus to develop the CSWD published in April 2013. The CSWD represents the culmination of the efforts of the Commission to launch a discussion on the interlinkages between migration, environmental degradation and climate change, to provide an overview of the research and data currently available in this area and to present a compilation 'of the many initiatives of relevance for the topic

24 European Commission (2011), *Summary of Stakeholders Responses to the Public Consultation on the Global Approach to Migration*, HOME/O2/KT-CD/ARES (2011) 855778, Brussels, 22 July 2011, pp. 7–8. There were 88 responses to the survey.

25 European Commission (2011), *The Global Approach to Migration and Mobility, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, COM(2011) 743, Brussels, 18 November 2011, pp. 6–7.

26 'The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens' defines the policy priorities in the area of justice and home affairs for 2010–2014.

27 European Council (2009) *The Stockholm Programme – An open and secure Europe serving and protecting citizen*, 14449/09, JAI 679, Brussels, 16 October 2009, p. 42.

which are already being taken by the EU in various policy fields, and analyses on-going debates on policy responses at EU and international level'.²⁸

On 19 July 2013, the Council of the European Union released the Conclusions of the Council and of the Representatives of Governments of the Member States meeting within the Council on the 2013 UN High-Level Dialogue on Migration and Development and on broadening the development-migration nexus stating that 'climate and environmental degradation are already exerting an increasing influence on migration and mobility and [it] therefore considers that the linkages between climate change, environmental degradation and migration should be further explored and addressed as appropriate, in particular in the context of development cooperation, foreign policy and humanitarian assistance'.²⁹ The document calls on the EU and its Member States 'to urgently take steps to deepen knowledge and further develop policy'³⁰ in this field.

To sum up, it can be said that the initial phase was characterised by exploring the relevance of the issue for the EU, reviewing existing legal frameworks and policies, consulting with external experts and taking first steps for initiating an EU-policy. It further reveals that member states were quite reluctant to push forwards EU-legislation and that the first initiatives were developed in the context of and influenced by GAMM, the overarching political framework in the field of EU external migration policy.

2.2 *Factors Shaping the Policy Process*

The EU can be said to be in the middle of an agenda-setting process which might be described as a struggle of different institutions, actors and interests over the challenge to define the issue, competing policy frames and narratives as well as related responsibilities and competences. The following factors play a role in shaping the process:

Firstly, the complexity of the issue is hard to grasp and to translate into a distinct EU position not to speak of a coherent policy and legal framework. This challenge becomes apparent in the struggle to find a common understanding

²⁸ CSWD, p. 3.

²⁹ Council of the European Union (2013), *Conclusions of the Council and of the Representatives of Governments of the Member States meeting within the Council on the 2013 UN High-Level Dialogue on Migration and Development and on broadening the development-migration nexus*, 12415/13, Brussels, 19 July 2013, p. 6.

³⁰ Council of the European Union (2013), p. 13.

of the terms and concepts used to capture the issue.³¹ Representatives from various EU institutions were quite ambivalent on how to define environment-related migration and emphasised the difficulties to capture this multi-dimensional and elusive term, reflecting a discussion which has also been observable among academics for a while.³² Following the insights of the Foresight Report,³³ the CSWD understands environmental change as one driver of migration amongst others such as economic, social, security or political factors. The document stresses different patterns of migration depending on the nature of the environmental disruption that 'will evidently be an important determining criterion, in particular as the needs and types of flows generated by sudden-onset events are likely to differ from those generated by slow-onset processes'.³⁴ The document further emphasizes that different patterns of migration may require different policy and operational responses and refers to the problem that 'gaps in conceptualising environmentally-induced migration hamper policy-making'.³⁵ The gaps identified refer to a lack of clear-cut definitions, reliable estimates concerning the magnitude of the phenomenon, the unclear role of the environment as a migration driver and the migration impacts of environmental change on different groups of people including the potential migration routes. The CSWD acknowledges the range of definitions used in this context such as 'environmental refugee', 'environmental migrant' or 'environmental/climate displaced persons' and recognises the implications of the respective concepts on solutions and policy responses. The wording of the CSWD prefers the use of the term 'environmentally induced migrant' as a provisional and broad category 'encompassing all types of migrants moving internally and crossing international borders for reasons related to climate

31 The challenge of terminology and the 'need to clarify the terminology for displacement related to climate change and other natural hazards' was also affirmed at the Nansen Conference (The Nansen Conference on Climate Change and Displacement in the 21st Century, Chairperson's Summary, para. 21).

32 See, *inter alia*, G. Hugo (2010), 'Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific', in: J. McAdam (Ed.), *Climate Change and Displacement: Multidisciplinary Perspectives*, Oxford: HArticle Publishing, pp. 9–35; F. Renaud, J.J. Bogardi, O. Dun and K. Warner (2007), 'Control, Adapt or Flee. How to Face Environmental Migration?', *Intersections United Nations University*, no. 5/2007; F.G. Renaud, O. Dun, K. Warner and J. Bogardi, 'A Decision Framework for Environmentally Induced Migration', 49 (Suppl. 1) *International Migration* (2011) e5–e29.

33 *Foresight: Migration and Global Environmental Change. Final Project Report*, London: The Government Office for Science 2011.

34 CSWD, p. 10.

35 CSWD, p. 12.

change or environmental degradation'.³⁶ In cases of migrants moving 'as a last resort', the document relies on the term 'environmentally induced displaced person'.

Secondly, there is a considerable number of institutions, actors and levels that are involved in the agenda-setting process in the EU context. The EU discussion and assessment of environment-related migration is a rather new issue which is raised within a 'polyphonic institutional venue'³⁷ that has considerable influence on shaping the policy process. However, there is a lack of commitment to the issue. Although there is considerable interest in the subject, hardly any institution truly pushes the issue forward with the exception of external actors such as academics or international organisations. It is rather the latter that take the lead by defining the issue or actively putting it up to discussion in the EU-context. In the EP, environment-related migration ranks low on the agenda although particularly the Greens have repeatedly tried to promote the topic and the Committee on Civil Liberties, Justice and Home Affairs commissioned the above-mentioned study titled 'Climate Refugees'. Initiatives to put the topic on the agenda of other EP Committees, to include it in Committee reports or to discuss it in Committee hearings have failed so far.

Being obliged by the European Council to analyse the effects of climate change on international migration in the Stockholm Programme, the EC has invested considerable efforts and time to look at the issue and formulate the CSWD. Initially, the document was drafted under the leadership of the Home Affairs Directorate of the Commission (HOME) in collaboration with DG Climate Action (CLIMA), DG Development and Cooperation – EuropeAid (DEVCO) and DG Humanitarian Aid and Civil Protection (ECHO). However, during the final stage HOME and DEVCO jointly contributed most to the drafting process. This transfer and share of responsibilities also reflect a shift or broadening of the framing of the issue, from an exclusive perception of environmental change 'as evidence of a potential threat to the EU's common migration and asylum policy'³⁸ to environment-related migration as an issue of development cooperation.

The drafting process of the document provides several important insights: Firstly, a coherent EU policy towards environment-related migration seems to

36 CSWD, p. 15.

37 C. Vlassopoulos, 'Climate Change and Migration: Towards a new Nexus for Policy Making in the European Union?', in: European Parliament, *Human Rights and Climate Change. EU Policy Options*, Brussels: Directorate-General for External Policies of the Union 2012, p. 64.

38 Geddes and Somerville (2012), at 1020.

be difficult to achieve as the issue requires the involvement of several DGs of the Commission, each having a different approach to the topic. DG HOME is primarily concerned with tackling 'migration as an internal EU security issue',³⁹ its main focus being on the internal dimension of migration such as immigration, asylum issues, internal security, Schengen and visas or organised crime and human trafficking. Although DG HOME also has an international affairs unit, this body mainly covers similar issues – i.e., responding to security challenges and managing migration flows – yet, the focus is on the collaboration with countries outside the EU.⁴⁰ In contrast, DG DEVCO's mandate comprises the drafting of EU development policies and the communication with third countries in this regard. DEVCO's stance concerning migration is a different one, emphasising the contribution migration has to offer for development and recognising migration as 'a powerful vehicle for boosting development in both countries of origin and destination'.⁴¹ However, this approach is also informed by internal considerations as they aim *inter alia* to tackle the root causes of migration and to curb migration flows towards the EU.⁴² Finally, DG CLIMA's objective is to apply climate mainstreaming to different EU policies. This also potentially refers to policies on migration. Yet, concerning environment-related migration the unit keeps a low profile in comparison to DG HOME and DG DEVCO, even though in the end it was DG CLIMA which formally led the process because the CSWD was adopted as part of an EU Strategy on adaptation to climate change.⁴³

Secondly, the drafting process of the CSWD reveals that the Commission is rather reluctant to push the topic much further. On the one hand, there are controversial issues at stake, such as asylum and migration. On the other hand, environment-related migration is classified as a rather insignificant topic for EU action compared to other problems such as the economic crisis. According to the interviews with representatives of the EC, the ambitions concerning the drafting of the CSWD were not very high from the outset. Moreover, they even dropped during the drafting process: while initially the document was

39 Vlassopoulos (2012), at 64.

40 See DG HOME, International Affairs, available online at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/international-affairs/index_en.htm (accessed 13 June 2013).

41 European Commission (2013) *Maximising the Development Impact of Migration*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2013) 292 final, Brussels, 21 May 2013, p. 2.

42 Vlassopoulos (2012), at 61.

43 CSWD, p. 1.

planned as a Communication (which is a political document, in the majority of cases aimed at proposing or initiating legislation), it was later only drafted as a Staff Working Document (an internal and technical paper). The interviewees described the paper as a 'lowest status policy document', a 'reflection paper' or 'food for thought'⁴⁴ to discuss with external stakeholders or Member States. Against this background, there is no indication that any specific or innovative EU policy concerning environment-related migration will emerge anytime soon. What the Commission has been doing so far is rather putting together and reviewing existing policies and instruments and considering whether there is an added value for a distinct EU policy in this field. The initiatives and the process suggest that only incremental and less controversial policy changes such as in the field of development cooperation will emerge rather than new instruments or concepts.

Another dimension of the institutional setting relates to the Member States. Only very few of them already have legislation in place applicable also to environment-related forms of migration⁴⁵ and therefore are more forward looking to and open-minded about EU policy initiatives in regard to environment-related migration. Overall, however, the willingness to push forward or even reopen some instruments in the field of asylum is very limited. This impression is reinforced by the vague statement of the Environment Council meeting in Luxembourg on 18 June 2013 which took note of the CSWD and recognised that it can provide a useful basis for on-going and future work on adaptation. Yet, it recalled that adaptation is also an important challenge for 'external relations, in particular as regards cooperation and development'.⁴⁶

Thirdly, the issues of migration and climate change have been on the European agenda for a while. However, they have been addressed and discussed as two separate topics for a long time. Compared to the field of migration and asylum, EU environmental policy is 'a relatively mature area of EU activity'⁴⁷ with a broad focus, adopting primarily a regulatory approach with a huge impact on the national level and being quite popular amongst the public.⁴⁸

44 Interviews with representatives of DG HOME, 20 March 2012, and DG DEVCO, 3 May 2013.

45 ICMPD (2011) *Climate Refugees: Legal and Policy Responses to environmentally induced migration*, Study requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, Brussels, pp. 55–59.

46 Council of the European Union (2013) *Conclusions on an EU strategy on adaptation to climate change*, Environment Council meeting, Luxembourg, 18 June 2013.

47 A. Geddes and A. Jordan, 'Migration as adaptation? Exploring the scope for coordinating environmental and migration policies in the European Union', 30 *Environment and Planning C: Government and Policy* (2012) 1029–1044, at 1032.

48 *Ibid.*, at 1032–1033.

The EU policy on migration and asylum is a rather recent development. Only since the adoption of the 1997 Amsterdam Treaty have the areas of asylum and immigration been transferred from the former intergovernmental Justice and Home Affairs pillar to the European Community pillar and has the Schengen Convention been integrated into the EU framework. Although the EU's migration and asylum policy has developed quite dynamically since then, the EU's legal and policy framework in these areas is still far from being a 'fully-fledged'⁴⁹ framework compared to those of the Member States. On the contrary, it is described as being flawed by 'its ambiguity and dispersed focus'⁵⁰ and by its dominant concern with restricting migration. Initiatives launched by the Commission to adopt binding commitments, for example in the field of economic migration, have so far failed due to the resistance of the Member States.⁵¹ Although the interrelation between environment and migration has been mentioned in previous EU documents as outlined above, the CSWD is the first document solely dedicated to bringing these two topics together.

Fourthly, EU policy on environment-related migration has an internal and external dimension. The internal dimension refers to migration into the territory of the EU while the external dimension relates to the incorporation of migration and asylum policies into external relations with third countries. The 1999 European Council in Tampere laid the foundation for integrating EU migration and asylum policy issues into external relations policy by defining core elements of a common EU asylum and migration policy. This approach included partnerships with countries of origin, a common European asylum system, fair treatment of third country nationals and the management of migration flows. Since then the external dimension of migration and asylum policy has grown rapidly in importance. Due to the fact that since the 1970s the main imperative of EU Member State policies on migration has been to 'limit or manage immigration and refugee flows into their territory'⁵² this principle to a large extent has also informed EU policy-making on migration and asylum. As EU officials realised that immigration restrictions such as border controls alone were only of limited use in putting this principle into practice,

49 A. Weinar (2011), 'EU Cooperation Challenges in External Migration Policy', *EU-US Immigration Systems 2011/02*, Robert Schuman Center for Advanced Studies, San Domenico di Fiesole (FI): European University Institution, pp. 1–2.

50 Ibid.

51 S. Lavenex and R. Kunz, 'The Migration-Development Nexus in EU External Relations', 30 *Journal of European Integration* (2012), 439–457, at 444.

52 C. Boswell, 'The "external dimension" of EU immigration and asylum policy', 79 *International Affairs* (2003) 619–638, at 619.

they increasingly aimed at trying to prevent immigration in the first place by addressing the root causes of migration in third countries⁵³ and by transferring classical migration control instruments outside of the EU.⁵⁴ These instruments included border control, measures to combat illegal migration, smuggling and trafficking or capacity-building of asylum systems and migration management systems to sending or transit countries. Since the Tampere European Council, the externalisation of EU migration policy has evolved quickly and has prominently been included in GAM as well as GAMM. GAM was designed as 'a comprehensive framework for tackling migration concerns as part of the external dimension. [...] It includes repressive and preventive measures of migration control [...]'.⁵⁵ Thus, while both the internal as well as the external dimension of migration are addressed in the CSWD, the external dimension of migration is prioritised in the document.

Fifthly and closely connected with the fourth point, the issue of an EU policy on environment-related migration is raised within a discursive and narrative context which has profoundly shaped EU migration and asylum policy and has also considerably influenced the EU's policy process concerning environment-related migration: both the securitisation of migration as well as migration as a tool for development. The first refers to the perception of immigration primarily as a threat to national security. The 'birth date' of the European Community's/EU's focus on immigration as a security problem is said to be the signing of the Schengen agreement on 14 June 1985.⁵⁶ Since then, immigration into the EU is perceived as primarily having negative consequences, therefore implying a social, economic and also cultural threat to the population. As a consequence of widespread public fears about mass (irregular) immigration,⁵⁷ the European Member States and the EU have pursued a 'restrictive, control-oriented approach' with the main objective of curbing and preventing migration towards the EU not only by tightening the European borders but also by externalising border controls towards third countries. However, another discursive frame has evolved recently and gained influence in EU policy making in the field of migration and asylum policy. The so-called 'development

53 S. Castles, 'Why migration policies fail', 27 *Ethnic and Racial Studies* (2004) 205–227, at 218.

54 Boswell (2003), at 622.

55 N. Abdelkhalik, 'Externalising migration policy: The European Union's "Global" Approach', *Mercury*, E-paper No. 4 (September 2010), at 5.

56 G. White (2011), *Climate Change and Migration*, New York, NY: Oxford University Press, p. 66.

57 H. de Haas, 'The Myth of Invasion: the inconvenient realities of African migration to Europe', 29 *Third World Quarterly* (2008) 1305–1322, at 1309.

approach to migration' was introduced as a response to the crisis of the strictly security-oriented focus of EU migration and asylum policy, which had serious flaws in regard to human rights issues, and due to the increasing emphasis on migration as a positive contribution to development in the international discourse.⁵⁸ Yet, this positive perception of migration as an incentive and driver for development in sending and receiving countries through, e.g., remittances is only one side of the coin. Integrating migration and asylum considerations in development policies is also said to be used to strengthen control over migration and to decrease migration pressure towards European countries.⁵⁹ 'Despite a changing rhetoric, the main focus of recent initiatives is still on the aspect of immigration control and proposals for measures pertinent for development remain not only vague but also non-committal and discretionary.'⁶⁰ As indicated above, EU policy making on environment-related migration is influenced by both considerations. At least in the beginning, it was exclusively coined as a danger and threat that would enhance migration pressure towards the EU. Only recently, there has been a remarkable shift towards framing it more and more as a development issue as well. Especially in the CSWD the development approach has been given high priority. It is principally considered as 'a matter for the EU development and humanitarian aid policies'⁶¹ which is also reflected by the emphasis on the importance of migration as adaptation in this document.

3 Persons Moving in the Context of Environmental Change: The Approach of the Commission Compared with the Potential of EU Norms/ Competences under Existing EU Asylum and Migration Policies

This chapter will explore the question whether the Commission in its CSWD has fully exhausted the potential of EU norms/competences. It will be assessed whether and to what extent existing EU instruments of the internal dimension of EU asylum and migration policy, in particular the Qualification Directive,⁶²

58 S. Lavenex and R. Kunz, 'The Migration-Development Nexus in EU External Relations', 30 *Journal of European Integration* (2012) 439–457, at 449–450.

59 Vlassopoulos (2012), at 61.

60 Lavenex and Kunz (2012), at 452–453.

61 CSWD, p. 35.

62 The Recast of the Qualification Directive (Directive 2011/95/EU, OJ L337, pp. 9–26) repealed Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the

the Temporary Protection Directive,⁶³ and work immigration rules, could provide a sufficient basis for an obligation of EU Member States to receive and provide a status for persons moving in the context of environmental change. This is juxtaposed with the views taken in the CSWD. A similar approach is taken with regard to the external dimension of EU asylum and migration policy.

3.1 *Temporary Protection*

Temporary protection⁶⁴ serves as an instrument to tackle urgent protection needs during a 'mass influx' until individual asylum applications can be handled.

The Commission rightly noticed in its CSWD that the Directive would 'leave [...] wide room for manoeuvre, in the form of open definitions of key words, such as "mass influx".⁶⁵ Temporary protection could be of relevance for persons moving in the context of environmental change, in particular since the definition of 'displaced persons' is broader than the one with regard to subsidiary protection (see below). Under the Temporary Protection Directive, displaced persons are defined as third country nationals (or stateless persons) who had to leave their country or region of origin, or were evacuated after a call of international organisations, and cannot return safely and permanently. This

qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L304, pp. 12–23) as of 21 December 2013 and had to be fully transposed by EU Member States by December 2013.

- 63 Council Directive 2001/55/EC of 20 July 2001 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, 7 August 2001, OJ L212, pp. 12–23.
- 64 Article 2 lit a of the Temporary Protection Directive defines 'temporary protection' as 'a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection'.
- 65 Article 2d Temporary Protection Directive: "mass influx" means arrival in the Union of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Union was spontaneous or aided, for example through an evacuation programme'.

includes persons fleeing areas threatened seriously by systematic or widely spread human rights violations.⁶⁶

Even though the definition in the Temporary Protection Directive looks sufficiently broad to cover certain persons moving in the context of environmental change, there exist several obstacles in making use of this form of protection:

Firstly, in order to trigger the application of the Directive, a decision by the Council (qualified majority) upon proposal by the Commission on the existence of a 'mass influx of displaced persons' must exist.⁶⁷ So far this mechanism has not been activated, not even in the context of the 'Arab spring'⁶⁸ or the Syrian civil war.⁶⁹ It seems – given the political climate – unlikely that the Council will determine the existence of a 'mass influx' in the context of environmental change or disasters.

Secondly, this form of protection is not applicable if individual persons or small groups of persons leave their homes. In this vein, also the CSWD regards temporary protection 'appropriate after severe rapid-onset disasters (such as floods), when masses flee from the area affected but when the possibility of them returning in the short or medium term remains open.'⁷⁰ Thus, persons moving individually or in small groups would not be covered.

3.2 *Subsidiary Protection Status*

The EU Qualification Directive regulates eligibility and status not only of a refugee but also of a beneficiary of 'subsidiary protection' if protection on the basis of the Geneva Refugee Convention (GRC) is not possible. The Directive is the first supranational codification of a specialist complementary protection regime based on general human rights obligations, in particular on the principle of non-refoulement. At the European level, the ECtHR has developed this principle in its case law since the *Soering* case, in particular based on

66 Definition in Article 2 lit c Temporary Protection Directive.

67 Article 5 Temporary Protection Directive.

68 M. Martin, *Statewatch Analysis: 'A radically changing political landscape in the Southern Mediterranean'? The Dialogue for Migration, Mobility and Security with the Southern Mediterranean countries*, Statewatch News Online (July 2011).

69 ECRE argues that '[t]he lack of definition or concrete guidance as to what constitutes a mass influx or imminent mass influx may be one of the reasons why the Directive's system of temporary protection was never triggered'. ECRE (2014), *ECRE Submission to the European Commission Consultation on the Future of Home Affairs Policies: An Open and Safe Europe – What Next?*, p. 5.

70 CSWD, p. 19.

Article 3 ECHR.^{71, 72} The principle is also relied on in cases of socio-economic deprivation⁷³ since socio-economic rights are difficult to enforce.

Whereas it is meanwhile clear that persons moving in the context of environmental change will only under very exceptional circumstances qualify as a refugee⁷⁴ (which is also the position taken in the CSWD),⁷⁵ this is less clear-cut with regard to the applicability of the principle of non-refoulement and at EU level of 'subsidiary protection'. Many persons moving in the context of environmental change face difficult living conditions in the country of origin due to the impacts of natural disasters or climate change (e.g., flooding, drought), often in combination with general poverty, i.e., situations of socio-economic deprivation. The CJEU in Luxembourg has not yet explicitly taken position on

71 M.-T. Gil-Bazo (2006), *Refugee status, subsidiary protection, and the right to be granted asylum under EC law*, New Issues in Refugee Research: Research Paper No. 136, p. 1.

72 The principle of non-refoulement prohibits states to remove a person to a country if substantial grounds have been shown for believing that the person would face a real risk of being subject to arbitrary deprivation of life (treatment prohibited in particular under Article 2 ECHR (right to life), Article 1 Protocol Nos. 6 and 13 ECHR (abolition of death penalty)) or prohibition of torture, inhuman or degrading treatment or punishment (Article 3 ECHR) in the receiving country (K. Wouters (2009), *International Legal Standards for the protection from refoulement*, Antwerp: Intersentia, pp. 187ff). This jurisprudence is based on 'the idea that [...] it is not the behaviour of the state of destination that is being adjudicated but that of the state whose authorities order the expulsion or deportation. Thus, it is the sending state that acts inhumanely and violates its obligations if and when, despite being aware of the danger, it sets a key element in the chain of events leading to torture, ill-treatment or death.' (W. Kälin and N. Schrepfer (2012), *Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches*, UNHCR Legal and Protection Policy Research Series, available online at <http://www.refworld.org/pdfid/4f38a9422.pdf> (accessed 4 February 2014), p. 35, emphasis omitted).

73 For a comprehensive overview of the challenges in the context of refugee claims based on socio-economic deprivation see M. Foster (2007), *International Refugee Law and Socio-Economic Rights*, Cambridge: Cambridge University Press.

74 Researchers and UNHCR argue that the GRC could be applicable only if the state is targeting certain groups on account of a GRC ground and puts them at a disadvantage, which reaches a certain level of severity. So far no case is known in which a state has granted refugee status under such circumstances (McAdam (2012), at 47). For the position of UNHCR compare, e.g., UNHCR (2009), *Climate change, natural disasters and human displacement: a UNHCR perspective*, Geneva: UNHCR; UNHCR (2011), *Summary of Deliberations on Climate Change and Displacement*, Bellagio Expert Roundtable, 22–25 February 2011. See also Kälin and Schrepfer (2012), at 31–34: they conclude that 'present refugee law provides little protection for persons displaced across borders by the effects of climate change' (p. 34).

75 CSWD, p. 17.

the question whether and under what conditions such persons, if returned to the country of origin, could be covered by the concept of 'subsidiary protection' and thereby benefit from a clearly regulated status in the (Recast) Qualification Directive. A few scholars, however, have provided input on this question.⁷⁶ They mostly argue that persons finding themselves in Europe could face, upon return, the risk of a situation of 'inhuman or degrading treatment'.

The following analysis will assess whether the Commission's view in the CSWD, according to which the Qualification Directive (2004/83/EC) would 'not include environmental degradation nor climate change amongst the types of serious harm which can lead to granting such protection',⁷⁷ is reasonable. The analysis will conclude that while this statement in the CSWD is not completely wrong, a more in-depth consideration would come to the conclusion that some persons moving in the context of environmental change (who are already present in an EU Member State or at least at their borders or in their territorial waters) could benefit from subsidiary protection status.

3.3 *The Definition of a Person Eligible for 'Subsidiary Protection'*

The EU Qualification Directive (also the Recast) defines a 'person eligible for subsidiary protection' as 'a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person [...], if returned to his or her country of origin, [...] would face a real risk of suffering serious harm as defined in Article 15, [...] and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country'.⁷⁸ According to Article 15 of the Directive and the Recast, '[S]erious 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.' For persons moving in the context of environmental change only lit b seems to be of relevance, i.e., serious harm in the form of 'inhuman or degrading treatment in the country of origin'⁷⁹ – except for the case that environmental factors aggravate or induce violent conflicts (e.g., resources over conflicts).

76 In particular McAdam (2012); Kolmannskog and Myrstad (2009).

77 CSWD, p. 18.

78 Article 2 lit e Qualification Directive, Article 2 lit f Recast of the Directive.

79 The wording of Article 15c clearly speaks of an 'armed conflict', the notion of which was also clarified by the CJEU in its judgment *Diakité* (CJEU, *Diakité*, C-285/12 (30 January 2014)).

Coming back to the CSWD, the Commission correctly mentions that environmental degradation or climate change are not explicitly mentioned in Article 15 of the Directive as a form of ‘serious harm’. It is equally true that the wording of Article 15 does not leave room for additional types of ‘serious harm’ than the three types provided in lit. a – c.⁸⁰ However, it still needs to be asked whether the removal of a person to a country affected by environmental degradation or environmental disasters can pose a risk to be submitted to ‘inhuman or degrading treatment [...] in the country of origin’.⁸¹ Thus, not the cause of possible ill-treatment is to be looked at, but the potential effect of a certain situation on the individual person upon return.

3.4 *Removal to a Country Affected by the Impacts of Environmental Change: A ‘Serious Harm’?*

In the following it will be argued that some persons moving in the context of environmental change could be covered by subsidiary protection (Article 15(b) of the (Recast) Directive, ‘inhuman or degrading treatment in the country of origin’),⁸² but only under very strict requirements.

Article 15(b) of the (Recast) Directive uses the same notion as in Article 3 ECHR: ‘inhuman or degrading treatment’. However, the CJEU follows an independent interpretation of secondary norms, including the notion of ‘serious harm’, which takes account of fundamental rights.⁸³ In *Elgafaji*, the Court

80 This becomes clear when reading an earlier draft of the Qualification Directive, in which Article 15(b) (later Article 15(d)) provided that ‘serious harm’ could – additionally to the other three grounds – also consist of ‘violation of human rights, sufficiently severe to engage the Member State’s international obligations’ (‘human rights paragraph’). However, this provision was deleted during the drafting process and not replaced. This has – according to McAdam – ‘dramatically reduced the scope of the Directive’ since it ‘allowed for the greatest development of the human rights-refugee law nexus, providing flexibility for addressing new situations arising in international law and relevant developments in the jurisprudence of the European Court of Human Rights.’ McAdam rightly pointed out that ‘[...] it is likely that ‘inhuman or degrading treatment or punishment’ will become the focal point for seeking to broaden the Directive’s scope, [...]’. She criticised that the exclusion of ‘known protection categories from the ambit of the Directive’ would ‘simply recast [...] the class of non-removable people with an ill-defined legal status.’ (McAdam (2007), at 83).

81 Article 15 lit b Qualification Directive.

82 The provision remains also in the Recast Directive the same.

83 In *Elgafaji*, the CJEU stressed that the content of Article 15(c) of the Directive must be interpreted ‘independently’, but ‘with due regard for fundamental rights, as they are guaranteed under the ECHR’ but that the content of Article 15(c) was different from that of Article 3 ECHR (CJEU, *Elgafaji*, C-465/07, para. 28). In *Diakité* the Court stressed that

noted that ‘Article 15(b) of the Directive [...] corresponds, in essence, to Article 3 of the ECHR’,⁸⁴ which means that the CJEU may go in its jurisprudence beyond the standard of the ECtHR.⁸⁵ It also needs to be borne in mind that the CJEU has in its jurisprudence on the Qualification Directive followed an ‘effective protection’-oriented approach in some cases,⁸⁶ i.e., focusing on the individual needs. In interpreting Article 15(b) of the (Recast) Qualification Directive, account must be taken of international human rights obligations,⁸⁷ EU primary law as well as general principles of EU law,⁸⁸ the latter including

the notion of ‘armed conflict’ in Article 15(c) has a wider meaning than in international humanitarian law, since it serves a different purpose and since the EU legislature wanted to provide wider protection (CJEU, *Diakité*, paras 21, 23, 24ff). The meaning and scope of this notion in the Directive must be ‘determined by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part’ (*Diakité*, para. 27).

84 CJEU (Grand Chamber) *Elgafaji v. Staatssecretaris van Justitie*, C-465-07 (17 February 2009), para. 28.

85 The CJEU certainly cannot go below the Article 3 ECHR-standard since it must take primary EU law, in particular the CFR, into account (Article 52(3) CFR stipulates that ‘[i]n so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention’ but that [t]his provision shall not prevent Union law providing more extensive protection.’)

86 It focused on ‘effective protection or assistance’ in *El Kott* (para. 60) or with regard to the ‘safe third country’-concept (n.s., para. 102, a third country can only be considered safe where GRC and ECHR are ratified but their provisions also observed in practice).

87 Article 78 TFEU demands that the policy on asylum and subsidiary protection complies with the GRC and ‘other relevant treaties’ as well as the principle of non-refoulement. The EU treaties contain an explicit clause according to which EU legislation does not suspend Member States’ obligations under public international law (Article 351 TFEU, formerly Article 307 TEC). According to the CJEU any measure has to be interpreted in accordance with the Member States’ human rights obligations as they also form part of the general principles of Community Law (Article 6 (3) TEU Lisbon). Constant jurisdiction since CJEU, *Stauder* (12 November 1969).

88 Compare CJEU, *El Kott*, C-364/11 (19 December 2012), para. 43 (similar CJEU, *Y and Z*, C-71/11 and C-99/11 (05 September 2012), para. 48): ‘Directive 2004/38 must, [...], be interpreted in the light of its general scheme and purpose, and in a manner consistent with the Geneva Convention and the other relevant treaties referred to in Article 78(1) TFEU. As is apparent from recital 10 in the preamble thereto, the directive must also be interpreted in a manner consistent with the rights recognised by the Charter (reference to Y and Z, para. 48).’ Similar CJEU, *B. and D.*, C-57/09 and C-101/09 (09.11.2010), para. 78. Compare also S. Peers (2011), *EU Justice and Home Affairs Law*, Oxford: Oxford University Press, p. 329. Compare also recital 10 in the preamble to Directive 2004/83 (referring in particular to the

the fundamental right under Article 3 ECHR and the case-law of ECtHR.⁸⁹ With regard to EU primary law, the Charter of Fundamental Rights (CFR) has the same legal value as the Treaties;⁹⁰ in interpreting Article 15(b) of the (Recast) Directive provisions on human dignity (Article 1), the prohibition of refoulement (Article 19), the right to asylum (Article 18) but also on rights of specific groups such as children⁹¹ are of great relevance. The Court stated in *CIMADE* – relying indirectly on human dignity⁹² – that Member States had to provide for minimum reception conditions as long as an asylum seeker actually was on their territory regardless of the technical responsibility for the asylum claim⁹³ and ‘that asylum seekers may not be deprived, even for a temporary period of time, of the protection of the minimum standards concerning respect and protection of human dignity.’⁹⁴ The right to asylum⁹⁵ could be of relevance in interpreting Article 15 of the Directive since it is argued that the right comprises also the concept of subsidiary protection.⁹⁶ In the following,

provisions on human dignity and the right to asylum in the FRC; the Recast adds in recital 16 Articles 7, 11, 14, 15, 16, 21, 24, 34 and 35 FRC.

- 89 Since the European Union is obliged to accede to the ECHR (Article 6(2) TEU Lisbon), in the future also the conduct of the EU itself (and of Member States implementing EU law) can be scrutinized by the ECtHR. The Commission also assesses the possibility of an EU accession to the GRC and its Protocol.
- 90 Article 6(1) TEU Lisbon. The Charter is binding for the EU but also its Member States when they are implementing Union law (Article 51 CFR).
- 91 Article 24 CFR provides, among others, that children shall have the right to such protection and care as is necessary for their well-being and that in all actions relating to children, the child’s best interests must be a primary consideration. This article has – according to the binding explanations relating to the Charter (2007/C 303/17; binding according to Article 6(1) TEU) – to be interpreted in line with the UN Convention on the Rights of the Child.
- 92 ‘Human dignity is inviolable. It must be respected and protected’ (Article 1 CFR) is of great relevance when it comes to basic needs of people who are not able to take care of themselves. It is ‘not only a fundamental right in itself but [...] the real basis of fundamental rights’ (Charter Explanations, OJ 2007, C 303/17).
- 93 CJEU, C-179/11 (27 November 2012) *CIMADE and GISTI*, para. 42.
- 94 B. Zalar, ‘Comments on the Court of Justice of the EU’s Developing Case Law on Asylum’, 25 *International Journal of Refugee Law* (2013) 377–381, at 381, referring to CJEU, *CIMADE*, C-179/11 (27 September 2012), para. 56.
- 95 Article 18 FRC states: ‘[T]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union [...]’.
- 96 M.-T. Gil-Bazo, ‘The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union’s Law’, 27 *Refugee Survey Quarterly* (2008) 33–52, at 50.

the jurisprudence of the ECtHR is therefore analysed – bearing in mind that the CJEU may go beyond the standard set in Article 3 ECHR.

3.5 *The ECtHR's Approach in Interpreting 'Inhuman and Degrading Treatment'*

Looking at the jurisprudence of the ECtHR, it cannot be ruled out that – despite the lack of jurisprudence of the Court on this particular matter – persons moving in the context of environmental change are covered by the non-refoulement principle.

In the ECtHR's jurisprudence regarding the principle of non-refoulement, a distinction can be made between cases where the risks emanate from intentional acts or omissions of the state or other actors in the receiving country (i.e., the country of origin)⁹⁷ (e.g., *Soering v. UK*, *Saadi v. UK*) and those 'where the source of the risk [...] in the receiving country stems from factors which cannot engage [...] the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article [...]'⁹⁸ (*D. v. UK*),⁹⁹ such as 'a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.'¹⁰⁰ In the second category of cases Article 3 ECHR may only apply in *exceptional cases* and a *very high factual threshold* is necessary¹⁰¹ in order to qualify as 'inhuman or

97 Compare ECtHR, *D. v. UK*, no. 30240/96 (2 May 1997), para. 49: 'intentionally inflicted acts of the public authorities in the receiving country or [...] those of non-State bodies in that country when the authorities there are unable to afford him appropriate protection'. See also ECtHR, *N. v. UK*, no. 26565/05 (27.05.2008), para. 43: '[...] intentional acts or omissions of public authorities or non-State bodies, [...]'].

98 ECtHR, *D. v. UK*, para. 49. See Kälin and Schrepfer (2012), at 35f.

99 Mr. D was a terminally ill person, who suffered from AIDS in the final stages and who received treatment in the UK which enabled him to live a life in dignity. In his country of origin he had no family ties; apart from that, in his country of origin no social assistance or treatment regarding AIDS was available. The ECtHR ruled that a removal to his country of origin would constitute inhuman treatment, in particular since the removal would inevitably lead to his death under most distressing circumstances. This jurisprudence was affirmed in the Grand Chamber case *N. v. UK* (2008).

100 ECtHR, *N. v. UK*, para. 43.

101 ECtHR, *D. v. UK*, para. 53. In ECtHR, *N. v. UK* (para. 42), the Court repeated that '[t]he decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment [...] are inferior [...] may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling.' The Court further explained that in *D.* 'the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of

degrading treatment’ – even a considerable reduction in the life expectancy due to the removal is not sufficient *per se*.¹⁰² Thus, the high threshold is linked to the non-intentional behaviour of public authorities in the receiving state. This approach has been criticized in academic literature for several reasons, in particular because it runs contrary to a ‘human rights-approach’ which would focus on the individual’s protection needs.¹⁰³ Looking at the jurisprudence of the CJEU, it could be argued that this court has in some cases taken a different approach focusing on actual or effective protection of the individual (see above).

Some scholars argue that the approach taken in *D. v. UK*¹⁰⁴ could be of relevance for persons moving in the context of environmental change to be covered under Article 3 ECHR¹⁰⁵ because the situation of Mr D. ‘could be compared to cases of natural disasters, where people would be sent back to a life threatening situation (e.g., because the disaster has not ended yet or due to secondary hazards) or to a situation where they would not get any humanitarian assistance or where such assistance would be clearly insufficient and inadequate.’¹⁰⁶ Another scholar, McAdam, however, argues that the approach taken in the case *D. v. UK* would not be ‘the most relevant’ for these persons,¹⁰⁷

origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.’ The Court also stressed (para. 43) ‘that it should maintain the high threshold set in *D. v. the United Kingdom* [...]’ since ‘in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.’

102 ECtHR, *N. v. UK*, para. 43.

103 McAdam (2012), at 72, with reference to the English Court of Appeal in *RS (Zimbabwe) v. Secretary of State for the Home Department* [2008] EWCA Civ 839, para. 31: ‘[...] since there is only one legal test for Article 3, assessment of harm should not depend ‘on whether the ‘lack of sufficient resources’ in the receiving State occurs as a consequence of some malign influence by that State or because of benign matters. The effect on the individual is the same in either case and it either reaches the threshold set by the ECtHR or it does not.’ As a matter of human rights law, this is the correct approach.’ Mantouvalou criticises that ‘*N. v. UK* constitutes a statement that the dignity of the poor and needy foreigner amongst us does not carry equal worth to ours, who are privileged enough to live in affluent communities and who are not prepared to make an effort to rescue them, even at a relatively low cost’ (V. Mantouvalou, ‘*N. v. UK*: No Duty to Rescue the Nearby Needy?’, 72 *The Modern Law Review* (2009) 815–843, at 827ff).

104 *Supra*, note 99.

105 E.g., Kälin and Schrepfer (2012), at 35ff; Kolmannskog and Myrstad (2009).

106 Kälin and Schrepfer (2012), at 36.

107 J. McAdam (2012) *Climate Change, Forced Migration, and International Law*, Oxford: Oxford University Press, p. 66.

because the risk of ill-treatment emanated from the withdrawal of support/treatment provided to a person in a bad state of health by the sending state in combination with the general situation in the receiving country. The latter argumentation seems more convincing since the focus in *D. v. UK* is on 'the (cessation of) treatment by the returning State' and not on 'the likely treatment' in the destination country which was regarded to be not sufficient to qualify it as 'inhuman or degrading'.¹⁰⁸

This jurisprudence of the ECtHR has been complemented by two other recent judgments which are of interest in our discussion: To begin with, in *Sufi and Elmi v. UK*¹⁰⁹ the risk for the individuals affected emanated from the difficult humanitarian situation in the receiving country Somalia, which resulted from drought but also the behaviour of parties to the conflict in the receiving country. In contrast to *D. v. UK*, the ECtHR established – due to the involvement of actors of the country of origin – an obligation of the receiving state and therefore a violation of Article 3 ECHR. Even though a drought played a role in this case, the actions of the conflict parties (i.e., the emanation of the risk of actors in the receiving country) were crucial in this case. Applying this approach to persons moving in the context of environmental change it derives that they would face the problem to establish that the receiving state is responsible for the situation, most likely of socio-economic deprivation. The *Sufi and Elmi* judgment must be also criticised since the argumentation is based on the behaviour of certain actors in the receiving country – and not on the action of the sending state and its likely repercussions on the individual upon return.¹¹⁰

108 In the case *D. v. UK* (para. 53), the Court did not regard the conditions in the receiving country *per se* as 'inhuman or degrading' – it was rather the *sending country's* withdrawal of medical treatment as well as removal to circumstances where such treatment could not be continued for which the receiving state could not be held responsible: '[...] The Court also notes [...] that the respondent State has assumed responsibility for treating the applicant's condition since August 1994. He has become reliant on the medical and palliative care which he is at present receiving and is no doubt psychologically prepared for death in an environment which is both familiar and compassionate. Although it cannot be said that the conditions which would confront him in the receiving country are themselves a breach of the standards of Article 3 (Article 3), his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment. [...]' See also McAdam (2012), at 66–67.

109 ECtHR, *Sufi and Elmi v. United Kingdom*, Nos. 8319/07 and 11449/07 (28 June 2011).

110 As explained above, the jurisprudence is based on 'the idea that [...] it is not the behaviour of the state of destination that is being adjudicated but that of the state whose authorities order the expulsion or deportation. Thus, it is the sending state that acts inhumanely and violates its obligations if and when, despite being aware of the danger, it sets a key element in the chain of events leading to torture, ill-treatment or death.' (Kälin and Schrepfer (2012), at 35, emphasis omitted).

It is possible that the CJEU would take another path than the ECtHR (see above, focus on actual or effective protection).

The second judgment which is noteworthy in our context is *M.S.S. v. Greece and Belgium*¹¹¹ where the risk emanated from the vulnerability of a person in combination with difficult general living conditions ('extreme material poverty') in the receiving (EU) country Greece. This judgment could have implications for *any* removal to 'awfully bad' socio-economic conditions.¹¹² The main uncertainty in this regard relates to the question whether it is essential for the determination of a violation of Article 3 ECHR that the EU Reception Directive and/or implementing national law was breached since the Court stressed the obligations of Greece under EU law to provide decent reception conditions.¹¹³ In case the breach of the Reception Directive is not integral to the breach of Article 3 ECHR in relation to living conditions,¹¹⁴ then the finding against Belgium could have implications for *any* removal to face absolute poverty abroad, in particular if the applicant is faced with official indifference, dependent on the state and has a pre-existing vulnerability. This, however, 'would require substantial evidence of the likely fate of the individual', as was available in *M.S.S.*¹¹⁵ Looking at the situation of persons moving in the context of environmental change, this interpretation of the Court's case law could cover some of these persons under Article 3 ECHR if a vulnerability of the person (e.g., due to age, state of health, ...) is combined with bad living conditions

111 ECtHR (Grand Chamber), *M.S.S. v. Belgium and Greece*, No. 30696/09 (21 January 2011).

112 G. Clayton, 'Asylum Seekers in Europe: *M.S.S. v. Belgium and Greece*', 11 *Human Rights Law Review* (2011) 758–773, at 766. Clayton argues that 'the finding that Belgium breached Article 3 by exposing MSS to these [living] conditions is profoundly important in establishing that Article 3 when applied to socio-economic conditions may have extra-territorial effect'.

113 Clayton argues that even though the Court made it 'plain that it regarded these provisions [directive and regulations which form the CEAS] as relevant to the delivery of Convention rights' (Clayton (2011), at 771), it was 'not really clear from the Court's judgment' whether the breach of the Reception Directive was not only influential but also 'critical to finding of a breach of Article 3' (p. 767).

114 For a reasoning in this regard see Clayton (2011), at 767–769. She argues that otherwise the Court would 'introduce [...] a test of legality into Article 3 which is inappropriate' since the 'only question in relation to Article 3 is whether a minimum level of severity of suffering was reached in order to trigger the application of Article 3' and since this would imply a different standard of human rights in Contracting States that are not members of the EU. Thus, if the obligations under EU and national law are viewed as critical, also here the 'responsibility' of the receiving state for the situation in its country is at stake.

115 Clayton (2011), at 767–769.

and ‘most extreme poverty’ in the receiving country together with the long uncertainty and the complete lack of a perspective of amelioration.

To sum up, there exists no case law of the ECtHR on cases where the conditions in the receiving state *per se* would suffice to constitute ‘inhuman or degrading treatment’.¹¹⁶ However, looking at the Court’s case law, it seems that – even though a mere lack of basic supplies in the destination country by itself would hardly lead to the qualification of ‘inhuman or degrading treatment’ – this could be the case if survival upon return is not possible. McAdam emphasizes that ‘a distinguishing feature that makes the lack of such services particularly deleterious on the applicant [...] would appear to be necessary’.¹¹⁷ Thus, movements in the context of environmental-related impacts have the ‘potential [...] to be covered under ‘inhuman or degrading treatment’ [...]’.¹¹⁸ With regard to Article 15(b) of the Directive, it is argued that it would not exclude cases of person facing poor conditions upon return such as absence of water, food or basic shelter.¹¹⁹

A question raised in academic literature is also whether persons moving in the context of environmental change were excluded during the drafting process of the Qualification Directive. In this regard, discussions held during the drafting of Article 15 reveal that ‘consideration was also given as to whether certain environmental, [...] triggers might justify subsidiary protection’.¹²⁰ The Council of the EU stressed that it wanted to cover only man-made situations and not natural disasters.¹²¹ However, McAdam convincingly argues that this

116 See also Kälin and Schrepfer (2012), at 36.

117 McAdam (2012), at 76.

118 McAdam (2012), at 103ff.

119 McAdam (2012), at 77ff. McAdam excludes solely cases, in which the argumentation is based on the withdrawal of treatment (*D. v. UK*), from the scope of application of Article 15(b) of the Directive. However, if arguing in line with other scholars viewing the ECtHR case *D. v. UK* as the relevant approach for persons moving in the context of environmental change, the wording of Article 15(b) Qualification Directive would pose a major challenge.

120 McAdam (2007), at 55, referring to Note from Presidency to Asylum Working Party, Discussion Paper on Subsidiary Protection 13167/99 ASILE 41 (19 November 1999).

121 Council of the European Union, Presidency Note to Strategic Committee on Immigration, Frontiers and Asylum: 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, 12148/02, 20 September 2002, p. 7: ‘By using the wording “acts or treatment” it is ensured that only man-made situations, and not for instance situations arising natural disasters or situations of famine, will lead to the granting of subsidiary protection.’

does not foreclose the possibility that treatment resulting from such situations could amount to inhuman or degrading treatment [...].¹²² Other authors argue that climate change is in any case ‘man-made’ and that the extent of environmental disasters is – as a rule – dependent on human factors. Apart from that, it is argued that the drafters of the Qualification Directive were not aware of the scientific opinions regarding climate change and its repercussions.¹²³

Also the reasoning in the CSWD regarding the appropriateness of subsidiary protection must be brought into question. The Commission argued that subsidiary protection would not seem ‘appropriate’ as in cases of slow-onset environmental degradation, people would ‘tend to seek support for finding an alternative livelihood and earning a living rather than seeking refugee-type protection’ so that ‘[n]either the aim nor the content of refugee-type protection would appear to be ‘appropriate’ [...]’. With regard to this aspect, the CSWD does not acknowledge that slow-onset environmental degradation may, after some time, lead to forced forms of migration. Moreover, the CSWD argues that because of its long-term character, subsidiary protection would also not be ‘appropriate’ in the case of rapid-onset events leading to temporary displacement. However, subsidiary protection does not necessarily have to be regarded as a long-term protection since cessation is envisaged if the conditions for granting do not longer exist.¹²⁴

To sum up, persons moving in the context of environmental change could be covered under Article 15(b) of the (Recast) Directive either if they face absolute poverty (complete lack of food, water and housing) upon return or if they would belong to a vulnerable group and be confronted with a difficult socio-economic situation upon return.

3.5.1 Obstacles for Persons Moving in the Context of Environmental Change in Accessing Subsidiary Protection in the EU

Even though persons moving in the context of environmental change may be covered under Article 15(b) Qualification Directive, there exist several obstacles to making use of this form of protection:

Firstly, the Qualification Directive applies only to persons who are present in the territories of EU Member States or at least at their borders or – starting

¹²² McAdam (2012), at 103f.

¹²³ Kolmannskog and F. Myrstad (2009). They argue that environmental disasters are related with vulnerability and actions or omissions of different actors before, during and after a natural risk.

¹²⁴ Article 16 Qualification Directive and Article 16 Recast of the Directive.

with July 2015 – also in the territorial waters of Member States.¹²⁵ Persons moving in the context of environmental change (would) most likely face the same challenges as (other) persons in need of international protection in *accessing EU territories* (e.g., the need for visa, the existence of carrier sanctions or strengthened border control) and most of them would probably have to ‘resort to irregular means to enter or stay on the territory of the Member States’.¹²⁶ Still, EU asylum policy must ‘ensure that the Union is seriously committed to respecting the standards set out by international law, [...]’, i.e., granting effective protection (see above, in particular Article 18 FRC).¹²⁷ Secondly, for the question whether a person qualifies for subsidiary protection, a future-oriented risk forecast must be undertaken.¹²⁸ Therefore, persons who left their country of origin after an environmental event or process cannot claim subsidiary protection if the situation in the country of origin has eased in the meantime. This means that it is primarily the hypothetical situation upon return

125 See Article 2h Recast Qualification Directive and Asylum Procedures Directive: The Asylum Procedures Directive (2005/85/EC) applies only to ‘applications for asylum made in the territory, including at the border or in the transit zones of the Member States, [...]’. (Article 3(1)) and to applications for subsidiary protection if Member States use a procedure in which asylum applications are examined both as applications on the basis of the GRC and as applications for subsidiary protection (Article 3(3)). The Recast of the Directive 2013/32/EU (which repeals Directive 2005/85/EC as of July 2015) stipulates that the Directive applies all applications for international protection which were made in the territorial waters of the Member States (Article 3 (1)). Neither the Asylum Procedures Directive nor the Recast apply to ‘requests for diplomatic or territorial asylum submitted to representations of Member States’ (Article 3(2) old and new version of the Directive).

126 Peers (2011), at 295–297. EU asylum law is linked to EU visa policy (the list of States whose nationals need visas contains many ‘refugee-producing countries’), EU rules on external border controls, EU law on irregular migration, EU external relations policy and development policy. EU law on irregular migration comes into play ‘as regards attempts to ensure that persons never reach EU Member States’ territory, the criminalization of the smuggling of persons, and the EU’s desire to ‘externalize’ its policies on irregular migration’. Apart from that, in the asylum seeker’s country of origin ‘the Community’s development policy often addresses refugee issues explicitly through funding programmes and clauses in development policy agreements with third States’ and the ‘EU has elaborated a policy designed to assist neighbouring or transit States with large number of refugees on their territory, with a view to discouraging the refugees from contemplating travel onwards to the EU’.

127 K. Lenaerts, ‘The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice’, 59 *International and Comparative Law Quarterly* (2010) 255–301, at 288ff.

128 Wouters (2009), at 25.

of a person which matters when assessing whether somebody is eligible for subsidiary protection – and not so much a difficult situation in the past.

Thirdly, the non-refoulement principle would ‘not allow for pre-emptive movement where conditions are anticipated to become dire, and thus would not assist people trying to move before the situation became intolerable.’¹²⁹

Fourthly, the situation leading to ‘inhuman or degrading treatment’ must cover the whole country of origin or it has to be at least unreasonable for the person concerned to move to safe area and settle down there (international protection alternative).¹³⁰

Given the strict requirements under which persons moving in the context of environmental change could benefit from subsidiary protection status and/or the obstacles just listed, a new legal provision could be advisable. The EU would possess competences to adopt a new legal instrument under Article 78 TFEU which it has not made use during the second phase of harmonisation.¹³¹

3.6 *Environment-Related Migration as an Adaptation Measure: Labour Migration to the EU?*

The CSWD clearly views migration as an adaptation strategy.¹³² It states that the facilitation of well-managed mobility and labour migration from environmentally degraded areas could represent an effective strategy to reduce environment-related displacement and that voluntary migration would be ‘far more likely to produce benefits for both receiving and sending communities

129 McAdam (2012), at 76.

130 The Qualification Directive allows Member States not to grant subsidiary protection ‘if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country’ (Article 8 Qualification Directive). Article 8(1) Recast Directive stipulates that ‘[...] Member States may determine that an applicant is not in need of international protection if in a part of the country of origin, he or she: (a) [...] is not at real risk of suffering serious harm; or (b) has access to protection against [...] serious harm [...]; and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there.’ Compare also jurisprudence of the ECtHR *Saleh Sheekh vs. Netherlands*, no. 1948/04, 11 January 2007, para. 141.

131 ICMPD (2011), ‘*Climate Refugees: Legal and Policy Responses to environmentally induced migration*, Study requested by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs, Brussels, p. 53.

132 It argues that ‘migration has the potential to contribute to adaptation in a number of ways’, which ‘should be fully exploited [...]’. Migration would be ‘increasingly also recognised as a legitimate adaptation strategy in its own right’. The CSWD, however, also mentions that the relationship between migration and adaptation in communities of origin should be subject to further research.

than displacement'.¹³³ It becomes evident, however, that the CSWD is having rather mobility and labour migration within the 'developing world' in mind, i.e., migration within countries and regions of origin, than migration towards the EU. The document refers explicitly to the promotion of 'mobility within states (e.g., rural-urban migration)', and to 'international migration, in particular between developing countries in the same region'.¹³⁴ Moreover, in its conclusions, the CSWD stresses that 'addressing environmentally induced migration is principally a matter for the EU development and humanitarian aid policies'. Thus, it is not regarded as a pressing issue for EU immigration policy.

The CSWD does not specifically refer to the possibility of labour immigration towards the EU. The Commission mentions that future initiatives on labour migration and mobility should be better targeted towards regions at risk of environmental degradation and build on experience gained with labour migration schemes implemented by the EU and its Member States as well as non-EU countries; the most successful examples of schemes promoting migration as adaptation are – according to the CSWD – set up as 'ordinary' labour migration schemes.¹³⁵ With regard to the fostering of well-managed international mobility and better organization of legal migration, the CSWD refers to the Global Approach to Migration and Mobility (GAMM), e.g., promoting circular migration schemes.¹³⁶

The reason for this hesitance to explicitly mention labour migration towards the EU is easy to trace. Even though the Treaty on the Function of

133 CSWD, p. 26, with reference to Foresight 2011. Where persons in communities affected by environmental degradation have the freedom to migrate to areas where economic opportunities are available, the likelihood to remain 'trapped' in a highly vulnerable situation or ending up displaced in regions with no hosting capacity is reduced.

134 CSWD, p. 28. The Commission mentions in this context that a 26 million EUR initiative to promote the implementation of the ECOWAS 1980 Free Movement Protocol was launched.

135 An example referred to in the CSWD is the Temporary and Circular Labour Migration agreement between Spain and Colombia and the New Zealand labour migration policy for Pacific islands. The former had a strong migration and development component, targeted communities affected by recurring environmental disruptions including droughts and floods. A project (2006–2009), funded under EU AENEAS programme, aimed at strengthening the development effects for the migrant workers' communities of origin. One of the criteria for selecting communities of origin was their vulnerability to natural disasters.

136 Synergies would exist with the experience gained by the EU through the implementation of the migration and development pillar of the Global Approach to Migration and the Global Approach to Migration and Mobility (GAMM, COM (2011) 743 final).

the European Union (TFEU) after the Treaty of Lisbon speaks of a 'common immigration policy',¹³⁷ Member States still have the final say in determining how many third country nationals are allowed to enter in order to seek work.¹³⁸ Hence, it is up to the Member States whether persons (including those affected by environmental degradation) can make use of migration as an adaptation mechanism by immigrating to EU Member States for work purposes. In general, the EU law harmonisation process in the area of work immigration has proved particularly difficult.¹³⁹

At EU level, so far only modest steps have been taken to harmonise the entry and residence of certain categories of workers. The so-called 'Blue Card Directive', adopted in 2009, regulates entry, residence and a common special

137 Article 79(1) TFEU.

138 Article 79(5) TFEU: '[...] shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.'

139 Even though the Commission had initially – right after the entry into force of the Treaty of Amsterdam and the Tampere Council – high ambitions in this field (in 2000 the European Commission proposed to harmonise labour migration of third country nationals and to develop a common framework for the admission of workers from third countries, and to grant them the same rights as EU nationals), it became clear that Member States are not interested in ceding sovereignty with regard to work immigration. Therefore the 2005 Policy Plan on Legal Migration (European Commission, *Communication on a policy plan on legal migration*, COM (2005) 669 final, p. 6) followed a less ambitious approach. The Commission proposed that admission could be conditional on the existence of a work contract and on the 'economic needs test'. It suggested a general framework directive (which should guarantee certain rights to all third-country nationals legally employed to be extended to all workers admitted to a Member State but not yet entitled to long-term residence status; it should further address the question of recognition of qualifications and introduce a single application for a joint work/residence permit) as well as four specific directives concerning specific groups of (paid) workers covering entry and residence conditions: highly skilled workers; seasonal workers; intra-corporate transferees (ICTs); remunerated trainees. The EU's action with regard to migration policy has been according to Pascouau 'imbalanced' since gaining powers for legal harmonisation in the Amsterdam Treaty: EU legislation on border management, visa and irregular migration is described as 'substantial' whereas 'legal migration issues, in particular admission for work purposes, are not addressed in a detailed and coherent manner'. EU rules on work immigration would in most cases 'leave significant margins of manoeuvre to the member states' leaving 'primary responsibility for dealing with admission issues to the member states.' (Y. Pascouau (2013) *EU immigration policy: act now before it is too late*, Commentary European Policy Centre (EPC) 20 June 2013, available online at http://www.epc.eu/documents/uploads/pub_3602_eu_immigration_policy.pdf (accessed 23 March 2014)).

procedure regarding third country nationals taking up highly qualified employment.¹⁴⁰ It might be of relevance only to a small fraction of persons moving in the context of environmental change since probably only few persons would fulfil the conditions laid down in the Directive, in particular the condition that the ‘gross annual salary [...] shall not be inferior to a relevant salary threshold [...] which shall be at least 1,5 times the average gross annual salary in the Member State concerned.’¹⁴¹ After lengthy negotiations, in 2014 finally the ‘Seasonal Migrant Workers’ Directive’¹⁴² was adopted. It regulates the conditions for entry and residence of seasonal workers including a joint permit.¹⁴³ This Directive could be of relevance for persons who wish to make use of work migration as an adaptation strategy and who are willing to return every year to their country of origin.¹⁴⁴ However, when it comes to human rights of migrants it falls short of providing sufficient guarantees. The UN Special Rapporteur on the Human Rights of Migrants criticised that ‘the number of visas issues [sic] under this programme will remain at the discretion of member States’ and ‘that it does not provide any long-term solutions and may in fact lead to migrants ending up with irregular status if they overstay their visas.’¹⁴⁵ The Directive does not allow for a status change and does not provide for the entry of family members. The Rapporteur warned that the EU ‘must prioritize the development of effective programmes for working visas in low-skilled sectors, such as seasonal agricultural work, [...]’ and that ‘opening legal channels of entry to the European Union may prove to be more efficient and less costly than punitive measures, and may also contribute to a reduction in irregular migration’.

140 Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155/17–29.

141 Article 5(3) Council Directive 2009/50/EC.

142 Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94, 28/03/2014, pp. 375–390.

143 Criteria for admission include the existence of a work contract or a binding job offer specifying a salary of a minimum level; a valid travel document; sickness insurance; evidence of having accommodation; sufficient resources during the stay to maintain him/herself without having recourse to the social assistance system of the Member State (Article 5).

144 The permit would allow the holder to reside for a maximum of between five and nine months within a twelve months-period after which return is obligatory (Article 14(1) of the Directive); re-entry is to be facilitated by Member States at least once (Article 16).

145 Report of the Special Rapporteur on the human rights of migrants, Regional study: management of the external borders of the European Union and its impact on the human rights of migrants, A/HRC/23/46, 24 April 2013, para. 73.

To sum up, the recently adopted Seasonal Workers' Directive might be help in making migration work as an adaptation mechanism. However, there remain several challenges from a human rights point of view.

3.7 *The EU as a Supporter for Regions of Origin? The External Dimension of EU Asylum and Migration Policy*

As acknowledged by the CSWD, many, if not most, persons moving in the context of environmental change are likely to stay in their country or region of origin. It is assumed that increasing environmental change will lead to a reduction of resources necessary for mobility. Environmentally-displaced persons staying in the region of origin will add to the large refugee and IDP population living in the 'developing world'.¹⁴⁶

Already today, the EU supports regions and countries of origin and transit in their efforts to assist and protect displaced persons, in particular refugees. The CSWD mentions as a possible role for the EU – apart from the provision of support in emergency response to sudden-onset disasters (humanitarian assistance) – the support of the provision of durable solutions for persons who are displaced permanently or on a longer-term. The CSWD stresses that 'if adequately adapted' some of the EU initiatives supporting sustainable solutions for displaced people (which currently do not address environment-related displacement) could 'serve as a useful model to apply to environmentally induced displacement'.¹⁴⁷

Regional Protection Programmes (RPPs) are a rather new concept introduced by a Communication in 2005 now forming part of GAMM.¹⁴⁸ They aim at strengthening the protection capacity of third countries and the support of provision of durable solutions to refugees. RPPs in particular comprise projects for the amelioration of the general protection situation, the asylum procedure, reception conditions, but also projects for the hosting community as well as a (voluntary) resettlement component.¹⁴⁹ It seems sensible to enhance the

146 UNHCR (2013) *Global Trends 2012*, Geneva: By the end of 2012 there were approx. 45.2 million persons forcibly displaced persons including 28.8 million internally displaced persons (IDPs). Four fifths of the worldwide refugee population are hosted by 'developing countries'.

147 CSWD, p. 30.

148 RPPs form part of one of the pillars of GAMM (i.e., international protection and asylum policy). The other pillars relate to irregular migration and trafficking, legal migration and mobility, maximising the development impact of migration and mobility.

149 European Commission, *Communication of the Commission to the Council and the European Parliament on Regional Protection Programmes*, COM(2005) 388, 1 September 2005. Pilot projects of RPPs were implemented in transit countries in Eastern Europe or regions of

protection capacity of host countries of environmentally-displaced persons. However, the following challenges must be borne in mind when applying RPPs to environment-related displacement: Firstly, RPPs are a ‘framework of cooperation’¹⁵⁰ but do not provide for a normative framework upon which protection is granted. In order to cover all environmentally-displaced persons, arguably the existing normative asylum frameworks would need to be amended. Secondly, RPPs have so far had – due to restricted flexibility, lack of funding, insufficient coordination with other areas such as humanitarian assistance and development – only a very limited impact.¹⁵¹ UNHCR and ECRE have criticised that RPPs do not constitute ‘programmes’ – not even to speak of a ‘policy’ – but rather a list of projects with very limited funding from the development budget, in particular when compared to funds provided in the context of EU humanitarian assistance.¹⁵² In this context, it is doubtful whether it is advisable to expand such a concept to other types of needs.¹⁵³ Thirdly, it must be cautioned against relying too heavily on the external dimension. It has been argued in the context of refugee protection – which to a certain extent might be also true for environment-related displacement – that refugees should not be confined to areas where effective protection cannot be guaranteed since durable solutions will not always be available in regions of origin or transit for all individuals in need of protection.¹⁵⁴ It must be questioned whether

first reception (Great Lakes Region) and extended. In 2011, new RPPs started in eastern North Africa (Egypt, Tunisia and Libya) and the Horn of Africa (European Commission, *Report from the Commission to the European Parliament and the Council, Third Annual Report on Immigration and Asylum (2011)*, COM (2012) 250, 30 May 2012, p. 16). For 2014, the Commission planned the setup of a Regional Development and Protection Programme in the Middle East (European Commission, *Communication from the Commission to the European Parliament and the Council, 4th Annual Report on Immigration and Asylum (2012)*, COM(2013) 422 final, 17 June 2013, p. 13).

150 Interview with a representative of ECRE, 19 March 2012, Brussels.

151 Report from the Commission to the European Parliament and the Council, *First Annual Report on Immigration and Asylum (2009)*, COM (2010) 214, 6 May 2010, p. 8.

152 Interview with representatives of ECRE and UNHCR, 19 and 21 March 2012. Only the resettlement component will be covered by DG HOME funds as of 2014. Furthermore, the interviewees criticised that clear definitions of ‘protection’ or ‘region’ were lacking and that RPPs would be a ‘repackaging’ of projects, which had already existed before.

153 Interview with representative of UNHCR Brussels, 21 March 2012.

154 E. Haddad, ‘The External Dimension of EU Refugee Policy: A New Approach to Asylum?’, *43 Government and Opposition* (2008) 190–205, at 204. Haddad cautions that working with countries of origin are also based on ‘a desire to control refugee flows’ (p. 203).

RPPs can lead to a transformation of the hosting areas into 'safe havens'.¹⁵⁵ In this regard, another component of RPPs, resettlement, becomes particularly important. So far resettlement has hardly played a role given the lacking or low commitments of EU Member States.¹⁵⁶

The CSWD also mentions that the EU could play a role with regard to supporting 'planned relocations' (as a last resort) on a voluntary basis.¹⁵⁷ It argues that the facilitation of relocation could be important in preventing 'potential unorganised displacement', in particular for so-called 'trapped populations' or 'persons in communities severely affected by environmental degradation but lacking the resources to either adapt or migrate'.¹⁵⁸ The CSWD also regards relocation as an option for countries risking to be 'inundated by sea water or becoming environmentally unsustainable due to desertification'. Finally, relocation is seen as an option after displacement to 'lighten the burden on host communities'.¹⁵⁹ In this context, the Commission suggests that the 'EU should [...] consider supporting countries severely exposed to environmental stressors to assess the path of degradation and design specific preventive internal, or where necessary, international relocation measures when adaptation strategies can no longer be implemented'.¹⁶⁰ The CSWD refers to the experience of the EU and its Member States with regard to their own resettlement programmes which could be useful 'in supporting non-EU countries' efforts to use relocation in managing environmentally induced migration.¹⁶¹ Thus, a potential role of the EU is seen in developing preventive internal, or if necessary, international relocation measures. However, the wording chosen ('non-EU countries' efforts to use relocation') suggests that the CSWD is rather referring to relocation undertaken by non-EU Member States.

155 J. Crisp (2003), *Refugee Protection in Regions of Origin: Potential and Challenges*, Migration Policy Institute. Crisp questions already back in 2003 – before the concept of RPPs has officially been introduced – whether the transfer from domestic asylum systems to overseas development budgets of industrialised states can lead to a 'speedy transformation of such troubled locations into havens of peace, safety and economic growth'.

156 GAMB, however, envisages '[a]n enhanced resettlement component' to be added to each RPP (COM(2011) 743, p. 18).

157 The CSWD refers with regard to the definition of 'relocation' to the Foresight study ('the movement of people, typically in groups or whole communities, as part of a process led by the state or other organisation, to a predefined location').

158 CSWD, p. 31.

159 CSWD, p. 31.

160 CSWD, p. 31.

161 CSWD, p. 31.

4 Conclusion

The EU has started to deliberate on the challenges posed by environmental change with regard to migration and displacement and potential roles of the EU in this regard. The publication of the CSWD – an internal working document – in April 2013 set the stage for further discussions with Member States and other actors.

However, studying the CSWD, it becomes obvious that the main factors shaping policy making in the area of asylum and migration also influence the approach taken with regard to environment-related migration and displacement in the CSWD. The document discusses and frames environment-related migration and displacement primarily as an external migration issue affecting mainly the policy fields of development cooperation and humanitarian aid. This approach has been linked in the past with the wish to curb immigration towards the EU and the avoidance of responsibility in the first place. The CSWD conveys the impression that the EU does not regard itself as a ‘region of reception’ for persons moving in the context of environmental change. While acknowledging that the environment constitutes an important factor for driving migration – as a last resort or as an adaptation mechanism –, the Commission stresses that migration flows towards the EU are ‘unlikely to be substantial’.¹⁶² Thus, development cooperation and humanitarian aid policies are identified as the main EU policy areas concerned in addressing environment-related migration.¹⁶³

The externalisation of migration underlines that ‘protection is something that the EU can more easily help make available outside the Union’.¹⁶⁴ Protection is ‘exported in order to maintain security inside’. In that way ‘the desire to increase control and security inside and the fostering of a more liberal, humanitarian approach outside’¹⁶⁵ becomes possible.

The CSWD proposes measures and promotes instruments which are in many cases non-committal and vague and likely to be less controversial in the discussions with the Member States. More delicate issues such as the usage of instruments of EU asylum policy for environment-related displacement are touched upon but not discussed in an adequate manner. In this vein, an important existing instrument of the EU asylum policy, the EU Qualification

162 CSWD, p. 11.

163 CSWD, p. 35.

164 Haddad (2008), at 200.

165 Haddad (2008), at 202.

Directive, is not regarded as a basis for protection for persons moving in the context of environmental change to the EU. Instead, a restrictive interpretation of the Qualification Directive is applied, making a discussion with the Member States not necessary.

Immigration to the EU (as adaptation) is not explicitly discussed which certainly has to do with the difficult process of harmonising rules on work immigration and the fact that Member States have – according to the primary law bases in the TFEU – the right to control the number of workers to be admitted to their labour markets. Nevertheless, the TFEU clearly speaks of a ‘common immigration policy’ – and in this context the Commission would have been in the position to put this issue forward. Thus, the European Commission pursued a very cautious approach when drafting the CSWD because it did not fully exhaust the potential of existing legal norms and competences.

The wording and content of the CSWD and the omission to launch more controversial ideas could be described as ‘preemptive obedience’ of the Commission towards the Member States. The political will of Member States to recognise another group of persons in need of protection in EU asylum instruments or to open up labour markets appears to be weak. This impression is supported by interviews conducted with representatives of the EP and the EC.

The argument frequently used to justify the focus on the external dimension – also mentioned in the CSWD – is the fact that environment-related migration will primarily occur ‘in the developing world, with migrants moving either internally or to countries in the same region.’¹⁶⁶ However, also four fifths of the worldwide refugee population stay within the regions of origin – and still, there is a need (and international obligation) for the ‘developed world’ to have asylum systems and reception capacities in place. Many persons displaced *inter alia* by environmental factors – in particular those who cannot return permanently or long-term – have similar protection needs as refugees or persons qualifying for complementary forms of protection. The combination of population growth, the increase in the quantity and intensity of environmental hazards and insufficient adaptive capacity will put more and more pressure on regions of origin. It is against this background that also the EU is well advised to prepare a meaningful contribution towards sharing the ‘burden’ of regions of origin.

166 CSWD, p. 35.

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