

Migration and Disaster-Induced Displacement: European Policy, Practice, and Perspective

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Abstract

Over the last decade, a series of devastating natural disasters have killed hundreds of thousands of people, displaced millions, and decimated the built environment across wide regions, shocking the public imagination and garnering unprecedented financial support for humanitarian relief efforts. Some suggest that disaster migration must be supported by the international community, first as an adaption strategy in response to climate-change, and second, as a matter of international protection.

This study surveys the current state of law as it relates to persons displaced by natural disaster, with a specific focus on the 27 member states of the European Union plus Norway and Switzerland. Its findings show that a few express provisions are on the books in Europe and that there is reason to believe that judicial and executive authorities may interpret other, more ambiguous, provisions to encompass the protection needs of disaster-displaced individuals. Few, if any, of these provisions have been engaged for this purpose, but a number of recent European developments with respect to disaster-induced displacement merit further scrutiny.

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Foreword

The world has no systematic way to address migration induced by natural disasters. There are limited migration channels for those separated from close family members or threatened with violent persecution. But if your life is destroyed by an earthquake, hurricane, flood, or drought in a poor country, no clear legal system allows you to move to another country for that reason.

We saw this gaping hole in international law once again after the catastrophic 2010 earthquake in Haiti. Over 150,000 people were immediately killed; countless families and the economy were destroyed. If even a small fraction of that harm were done by violent conflict in Haiti, a substantial but limited number of Haitians would have the opportunity to migrate to better life in the United States and other countries that welcome refugees. But because the disaster was natural, essentially all who attempted to leave Haiti because of the quake were simply met with a tightened blockade.

In 2011, the Center for Global Development published a detailed review of all the existing opportunities in U.S. law and administrative rules to complement the disaster relief effort by fostering international mobility for Haitians. The authors were Royce Murray, a lawyer, and Sarah Williamson, an expert on post-disaster humanitarian relief. For several months after the study's release, Murray and Williamson worked with me to utilize one of the policy opportunities they identified: to add Haiti to the list of countries eligible for the United States' largest low-skill work visa program, the H-2 visa.

In January 2012, we succeeded: at our request the U.S. government made Haiti eligible for H-2 visas. This admirable step could end up injecting hundreds of millions in remittances into the Haitian economy, an important boost to the relief and recovery effort. It marks one of the only times in recent decades when new international migration was allowed because of a natural disaster.

Could there be opportunities for similar ad hoc measures by migrant-destination countries other than the United States, while the world waits for a more systematic solution in international law?

We asked Michael Cooper to address this question for several migrant-destination countries in Europe. Cooper is a human rights advocate and humanitarian aid worker with a J.D. from Georgetown Law and 20 years of experience in numerous emergency responses. In this paper he reviews European legal provisions that could potentially and partially address international migration induced by natural disasters. The text covers European Union-level policy as well as the national policies of 15 E.U. members and 2 non-members.

He finds scattered provisions that could be used, but concludes: "the reality is that few, if any, of these provisions have actually been engaged for this purpose." We hope that this authoritative and wide-ranging review of policy precedents and opportunities across Europe will stimulate creative thinking about how to use, or build on, current law.

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Executive Summary

Over the last decade, a series of devastating natural disasters have killed hundreds of thousands of people, displaced millions, and decimated the built environment across wide regions, shocking the public imagination and garnering unprecedented financial support for humanitarian relief efforts: the Indian Ocean Tsunami (2004), Cyclone Nargis in Myanmar (2008), the Haitian Earthquake (2010), and Tōhoku Earthquake and Tsunami in Japan (2011) provide a representative sample, along with further deadly earthquakes in Kashmir, Pakistan (2005), Sichuan, China (2008), Bam, Iran (2003), and Gujarat, India (2001). In 2003, a sweltering heat wave killed more than 52,000 people in Europe,¹ while another in Russia killed 55,000 in 2010.² Again, these are just the highlights.

While such natural disasters are not entirely unprecedented,³ their intensity and frequency have alarmed policy-makers. One U.N. official characterized the onslaught of devastating disasters as the “curtain raiser” on a “new normal.”⁴ During the last two decades, recorded disasters have doubled from roughly 200 to more than 400 per year,⁵ and some ninety percent of all disasters today are climate-related. In addition to seismological events, such as earthquakes, scientist fear that, because of climate-change, we will see an increase in extreme weather events, which are linked not only to severe storms, blizzards, hurricanes, and cyclones, but also to floods, landslides, forest fires, and insect infestations.⁶ Disasters displace people—sometimes driving them across international borders—and migration experts worry about a growing “protection gap,”⁷ which, given our increased awareness of global warming, seems now both deeper and wider.

Accordingly, some suggest that disaster migration must be supported by the international community, first as an adaption strategy in response to climate-change, and second, as a

¹. Janet Larsen, *Setting the Record Straight: More than 52,000 Europeans Died from Heat in Summer 2003* (EARTH POL’Y INST. July 28, 2006), http://www.earth-policy.org/plan_b_updates/2006/update56 (accessed May 1, 2012).

². Wiebke Lass et al., *Avoiding the Avoidable: Towards a European Heat Waves Risk Governance*, 2(1) INT. J. DISASTER RISK SCI. 1, 3 (2011).

³. Camillo Boano, Roger Zetter & Tim Morris, *Environmentally Displaced People: Understanding the Linkages between Environmental Change, Livelihoods and Forced Migration*, 5 (Forced Migration Policy Briefing 1, Nov. 2008) (recalling, for example, the three million people who fled the 1930s Dust Bowl and 700,000 who fled the 1927 Mississippi Delta flood).

⁴. Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, Opening Remarks at the Dubai International Humanitarian Aid and Development Conference and Exhibition “DIHAD 2008 Conference” (Dubai, Apr. 8, 2008), <http://reliefweb.int/report/world/opening-remarks-sir-john-holmes-usg-humanitarian-affairs-and-erc-dihad-2008-conference> (accessed Apr. 30, 2012).

⁵. *Id.*

⁶. KENNETH HEWITT, *REGIONS OF RISK: A GEOGRAPHICAL INTRODUCTION TO DISASTERS*, 55 (1997).

⁷. See U.N. High Comm’r for Refugees, *Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches*, (Feb. 2012) available at <http://www.unhcr.org/refworld/docid/4f38a9422.html> (accessed May 1, 2012).

matter of international protection.⁸ In addition, to the extent that international migrants enhance the social and economic development of their home countries (through financial and social remittances), advocates also promote migration as a humanitarian response that may complement, yet certainly never replace, other humanitarian interventions.⁹

This study surveys the current state of law as it relates to persons displaced by natural disaster, with a specific focus on Europe, and to be more precise, on the 27 Member States of the European Union (plus two non-EU Member States, namely Norway and Switzerland). The purpose is to provide a relatively comprehensive overview of relevant law and policy, in the European context, at the international, regional (EU), and national levels, while highlighting the some of the interaction between these three legal spheres.

As a preliminary matter, we delimit the inquiry by carefully considering the scope of the phrase, “natural disaster,” challenging some common assumptions. The study then examines, in turn, the role of several international instruments, select European Union Directives, the 1951 Refugee Convention, and finally, national alien acts and regulations (or their country-specific equivalents). Along the way, the survey considers, to some extent, relevant constitutional provisions, case law, policy statements, and past practice.

The study focuses attention on the European Union’s Qualification Directive, as well as its Temporary Protection Directive, which experts often point to as one instrument that may, in theory, provide a degree of protection to persons displaced by natural disaster. Researchers generally base this claim on little more than the fact that the TPD targets a “non-exhaustive” list of potential beneficiaries. We examine this claim more closely. As for national laws and regulations, a broad range of secondary sources provided a road map by which to access primary sources for further evaluation. Ultimately, the study identifies relevant provisions or developments in some seventeen countries, fifteen European Union Member States, plus Norway and Switzerland.

This may, at first, seem to indicate considerable European legislative and political activity with respect to disaster-induced displacement, but that is wishful thinking. In fact, our findings show that while a small handful of express provisions are “on the books,” in Europe, and we have reason to believe that judicial and executive authorities may interpret other, more ambiguous, provisions to encompass the protection needs of disaster-displaced individuals, the reality is that few, if any, of these provisions, whether implicit or express, have actually been engaged for this purpose. Nonetheless, a number of recent European developments with respect to disaster-induced displacement merit further scrutiny.

⁸. *Id.*

⁹. See Royce Bernstein Murray & Sarah Petrin Williamson, *Migration as a Tool for Disaster Recovery: a Case Study on U.S. Policy Options for Post-Earthquake Haiti* (Ctr. Global Dev. Working Paper No. 255, June 2011), available at http://www.cgdev.org/files/1425143_file_Murray_Williamson_disaster_recovery_FINAL.pdf.

On the Nature of “Natural” Disaster

Earthquakes, hurricanes, tsunamis, blizzards, floods, tornadoes, mudslides, volcanic eruptions—such extreme events reaffirm the notion that ours is, indeed, a living planet. These and similar hydrological, biological, geological, and meteorological events present powerful examples of what are quintessentially natural phenomena. Yet—perhaps due to the sheer scale of death and destruction they inflict—we tend to conceive of such “freak” events as anomalies, extraordinary events somehow outside the boundaries of normal, indeed, abnormal. We characterize these aberrations as acts driven by “external agents”¹⁰—acts of God. Ironically, on some level, we perceive natural disasters as “unnatural.” What then transforms an otherwise natural *event* into a natural *disaster*?

Hewitt suggests that, “A natural force is not dangerous in itself but becomes so in relation to human activities and human *values*.”¹¹ When a spontaneous natural event takes human life—or destroys those elements of the material world to which humans attach economic, social, or cultural value—an otherwise perfectly natural occurrence is transformed into a natural disaster. The “significance” attributed to such events varies “with the way their impacts are evaluated.”¹² Thus, to some degree, disaster is a function of human values.

Disaster also reflects the choices we make; that is to say, disaster is a function of human *volition*. Our choices play a role both in generating and exacerbating the impact of natural forces associated with disaster.¹³ Often, the causal link is clear, for example, where villagers deforest a hillside, creating the conditions for a subsequent mudslide. At other times, the link is more elusive, as with climate change-related events where, with respect to any given event, it is very difficult to establish climate change as the “but-for” cause.¹⁴

Nonetheless, some evidence indicates that climate change will increase not only the frequency, but also the intensity of natural disasters.¹⁵ Indeed, recent evidence strongly suggests that the problem is at least twice as bad as we had thought. Fresh analysis predicting future acceleration of the water cycle “by as much as 20 percent” constitutes “an ominous finding” that may herald increasingly extreme weather conditions that dry out “important

^{10.} See HEWITT, *supra* note 6, at 55.

^{11.} *Id.* at 58 (emphasis added).

^{12.} *Id.* at 59.

^{13.} *Id.*

^{14.} The “but-for cause” is a tort law concept also known as the “actual cause,” “cause in fact,” or “factual cause;” a “but-for cause” is that “cause without which the event could not have occurred.” BLACK’S LAW DICTIONARY 234 (8th ed. 2004).

^{15.} D. GUHA-SAPIR ET AL., THIRTY YEARS OF NATURAL DISASTERS 1974-2003: THE NUMBERS 13 (2004). Note that some have argued for a more people-centered approach to risk assessment and prediction focusing “on the prediction of impacts rather than on the prediction of the frequency and magnitude of extreme events.” U.N. Framework Convention on Climate Change, Subsidiary Body for Scientific and Technological Advice, *Report on the Workshop on Climate-Related Risks and Extreme Events: Note by the Secretariat*, U.N. Doc. 3FCCC/SBSTA/2007/7, ¶ 15 (Sept. 19, 2007).

agricultural areas” and inundate already wet regions with “torrential rains and floods.”¹⁶ Yet, as illustrated by the mudslide example above, the role of human agency goes beyond climate change and the mere expansion of our collective carbon footprint. Disasters implicate a broad range of decisions we make with respect to technology, agriculture, urban planning, consumption, etc. In short, disaster comes not because the earth shook, but rather because humans chose to build upon the fault line.¹⁷

Similarly, disaster is a function of technological *variables* that humans interject into the equation. Often such variables compound existing natural hazards, thereby creating a mix of causal factors that together catalyze or intensify disaster. Sometimes, a human variable serves as the trigger;¹⁸ at other times, a natural hazard plays this role.¹⁹ For example, humans triggered the 2010 *Deepwater Horizon* oil spill, which, for a period at least, despoiled the Gulf of Mexico.²⁰ Conversely, nature triggered the 2011 Tōhoku earthquake and tsunami, which begat the ensuing crisis at Fukushima Daiichi Nuclear Power Plant.²¹ In some cases technological failure triggers ecological disaster, while at other times, ecological disaster triggers technological failure. So, while it cuts both ways, when natural hazards collide with technological variables introduced by humans, the results can be devastating, overwhelming even the most advanced societies. With respect to the Tōhoku disaster, Ireland’s Minister of Foreign Affairs observed that,

Japan is probably the best equipped country in the world to deal with major disasters of this kind. Nevertheless, the fact that it has been obliged to deal with three major emergencies simultaneously—an earthquake, a tsunami and a nuclear crisis—has meant that its response capacity has been pushed to the limit.

^{16.} Justin Gillis, *Study Indicates a Greater Threat of Extreme Weather*, N.Y. Times, Apr. 26, 2012, at A5; see also Paul J. Durack et al., *Report: Ocean Salinities Reveal Strong Global Water Cycle Intensification During 1950 to 2000*, 336 (6080) SCIENCE 455 (Apr. 27 2012).

^{17.} With respect to earthquakes, the “archetype of natural hazard,” Hewitt points out that “Actual destruction is always dependent upon the presence and character of human settlement and land uses.” HEWITT, *supra* note 6, at 197, 230. See also, *Counting the Cost of Calamity*, ECONOMIST, Jan. 14, 2012, at 54 (asserting that “a growing share of the world’s population and economic activity is being concentrated in disaster-prone places: on tropical coasts and river deltas, near forests and along earthquake fault lines.”).

^{18.} *Id.* at 59.

^{19.} Anthony Oliver-Smith, *Theorizing Vulnerability in a Globalized World: A Political Ecological Perspective*, in MAPPING VULNERABILITY; DISASTERS, DEVELOPMENT & PEOPLE 10, 20 (Greg Bankoff et al. eds., 2004).

^{20.} See Editorial, *The Big Spill, Two Years Later*, N.Y. Times, Apr. 18, 2012, at A26.

^{21.} Chico Harlan, *Japan Quake: With Two Natural Disasters and a Nuclear Emergency, Recovery Begins*, Wash. Post, Mar. 13, 2011, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/12/AR2011031201452.html?hpid=topnews> (accessed June 7, 2012).

Therefore, it appealed last week to the European Union and its member states for practical and financial help.²²

Finally, disaster is a function of our *vulnerabilities*. In fact, some have gone so far as to suggest that the documented increase in natural disasters may be due less to ecological change and more to the increased vulnerability of the human population.²³ While “physical exposure” to natural hazard hotspots increases vulnerability, a “lack of adaptive capacity” is the main factor behind “hotspot[s] of human vulnerability.”²⁴ Vulnerabilities vary from one society to the next, and have a direct relationship to the character of loss. For instance, on any given day, an earthquake in Asia, with its “dense, impoverished” cities, will produce inordinate *loss of life*, while the “same” earthquake in North America, with its advanced urban-industrial infrastructure, will produce inordinate *loss of wealth*.²⁵

Evidence also suggests that even within discrete societies, the character and magnitude of loss varies from one group to the next, with disaster amplifying underlying inequities—for instance, disproportionately shortening the life expectancy of poor women relative to poor men from the same cohort.²⁶ Along with gender, wealth too closely correlates with vulnerability. Consequently, as population swells and income/asset inequality expands, the absolute number of poor among us increases, while the relative number of rich decreases, with the result that the unsafe are “becoming more vulnerable,” while “the ‘safe’ are getting safer.”²⁷

Thus, four functional relationships challenge our cultural perception of natural disasters as “natural.” First, our *values* alone characterize the scope and scale of loss. Second, our *volition* exacerbates otherwise benign hazards, exposes us to otherwise avoidable hazards, and generates new and otherwise non-existent hazards. Third, technological *variables* that humans introduce into the complex disaster algorithm tend to aggravate and compound existing natural hazards. Finally, when natural hazards do unleash their destructive powers, pre-existing socio-economic inequities manifest as *vulnerabilities* that ultimately determine both absolute and relative social outcomes and impacts.

²². TÁNAISTE & MINISTER FOREIGN AFFAIRS, *Response to the Aftermath of the Earthquake and Tsunami in Japan: Statements*, 728 Dáil Deb. col. 364 (Mar. 23, 2011), available at <http://debates.oireachtas.ie/dail/2011/03/23/00010.asp> (accessed May 1, 2012).

²³. Jane McAdam, *Climate Change Displacement and International Law: Complementary Protection Standards*, 46 n.298 (May 2011), available at <http://www.unhcr.org/4dff16e99.html> (referencing R. J. T. Klein & R. J. Nicholls, *Assessment of Coastal Vulnerability to Climate Change*, 28(2) AMBIO 182 (1999)).

²⁴. HEWITT, *supra* note 6, at 59.

²⁵. *Id.*

²⁶. See Eric Neumayer & Thomas Plümper, *The Gendered Nature of Natural Disasters: The Impact of Catastrophic Events on the Gender Gap in Life Expectancy, 1981-2002*, 97(3) ANNALS AM. ASSOC. GEOGRAPHERS 551 (2007).

²⁷. HEWITT, *supra* note 6, at 231.

This is not to say that disasters and natural hazards are somehow mere figments of the human imagination. Hewitt acknowledges that, “The physical existence of disasters establishes an agency of nature that exists independently of human perception.”²⁸ Still, “it is society that actualizes the potential” of natural hazards.²⁹ Global warming has helped us reconcile ourselves to this notion, and as our understanding of climate change expands, we are obliged to build “a new perception of disasters as of our own making.”³⁰

While the distinction between “natural” and “man-made” disaster has grown increasingly difficult to defend, the implications for displaced persons have become murky. As disasters become more complex, “the practical and the theoretical challenges in turn become more complex.”³¹ Accordingly, legal experts have begun to question, for instance, “whether it is appropriate to differentiate between displaced people who deserve ‘protection’ on account of climate change, and those who are victims of ‘mere’ economic or environmental hardship.”³² Some authors have recognized that there is, in fact, “no compelling reason to distinguish between climate-related and other natural disasters.”³³ Furthermore, setting aside situations of generalized violence and armed conflict, it seems to that there is, in fact, little theoretical basis for distinguishing between persons displaced by so-called “natural” disaster and those displaced by “man-made” disaster.

Writers frequently credit Essam El-Hannawi with introducing the (controversial) term “environmental refugee” into the lexicon well over 25 years ago.³⁴ Likewise, researchers often mention the work of Lester Brown in the early 1970s, presumably for the linkages he drew between “climate change” and population dynamics.³⁵ However, some evidence points to much earlier thinking about the relationship between climate and migration.

For instance, in 1902 George Henderson published a short, fascinating book entitled *Climate and History: the Physical Causes of the Migration of Civilizations*.³⁶ Henderson provides a

28. *Id.* at 18.

29. *Id.* at 19.

30. U.N. Int’l Strategy Disaster Reduction, *Links between Disaster Risk Reduction, Development and Climate Change: A briefing for Sweden’s Commission on Climate Change and Development*, 1 (Mar. 2008).

31. Oliver-Smith, *supra* note 19, at 10.

32. McAdam, *supra* note 23, at 9.

33. Vikram Kolmannskog & Lisetta Trebbi, *Climate Change, Natural Disasters and Displacement: a Multi-track Approach to Filling the Protection Gaps*, 92(870) INT’L REV. RED CROSS 713, 714 (Sept. 9, 2010).

34. Essam El-Hannawi, *Environmental Refugees*, 4 (Nairobi, Kenya: U. N. Env’t Program, 1985).

35. See e.g., Lester R. Brown, Patricia L. McGrath & Brian Stokes, *Worldwatch Paper 5: Twenty-Two Dimensions of the Population Problem* (Mar. 1976).

36. GEORGE HENDERSON, *CLIMATE AND HISTORY: THE PHYSICAL CAUSES OF THE MIGRATION OF CIVILIZATIONS* (1902). Photocopy on file with author and available at Katholieke Universiteit Leuven, Belgium. The reader is cautioned that while the book contains some intriguing analysis, both scientific and historical, it also reflects its time, suggesting, for instance, that “civilized man” can only develop in certain climates. See also the discussion of climate change in the Garden of Eden.

comprehensive overview of major migrations compelled by “climate changes”³⁷ over a 10,000 year period, with plenty of references to other contemporary work from the late 1800s and early 1900s, including a paper by one Professor George Frederick Wright, likewise presented in 1902, before the American Association for the Advancement of Science under the title: *‘The Climatic Changes in Central Asia, Traced to the Probable Causes to Which They are Due, or Their Bearings on the Early Migrations of Mankind.’*³⁸ Given that little evidence linking climate change to human activity existed in 1902, Henderson’s conception of the issue was somewhat different from that which prevails today. Still, Henderson clearly perceived that otherwise natural climate change drivers were “accelerated by the hand of man.”³⁹ It seems as well that even at the (second to last) turn of the century there was ample controversy about the impacts of climate change:

On this point [of astronomical change driving climate change] scientists are agreed, but there is a considerable difference of opinion as to what the changes caused by this astronomical variation must have been, and as to the degree in which temperature, atmospheric and oceanic circulations were affected; some...maintaining that it was great; others...that it must have been very slight.⁴⁰

It would be comforting to think that our analytical understanding of the relationship between climate change and migration has progressed beyond that of Henderson and Wright, but, in fact, there remains a “conceptual muddle” with respect to climate change in disaster induced displacement,⁴¹ and “as the concept is unpacked,...different analysts deploy different labels with different methodologies and different normative orientations,” leaving us in a “profound” state of disagreement on the most basic issues⁴²—including the appropriate labels required to define exactly *who* and, frankly, *what* we are talking about. The United Nations High Commissioner for Refugees (UNHCR) and others have soundly rejected the “environmental refugee” and “climate refugee” labels,⁴³ yet these appear frequently throughout the literature, alongside at least a dozen other proposed variations.⁴⁴

^{37.} *Id.* at 3.

^{38.} *Id.* at 5.

^{39.} *Id.* at 3.

^{40.} *Id.* at 13.

^{41.} GREGORY WHITE, CLIMATE CHANGE AND MIGRATION: SECURITY AND BORDERS IN A WARMING WORLD 29 (2011).

^{42.} *Id.* at 20.

^{43.} U.N. High Comm’r for Refugees, *Summary of Deliberations on Climate Change and Displacement*, 1 (Apr. 2011) available at <http://www.unhcr.org/refworld/docid/4d9f22b32.html> (accessed May 2, 2012).

^{44.} Boano et al., *supra* note 3, at 4 (citing, in addition to “environmental refugee,” “environmental migrant,” “forced environmental migrant,” “environmentally motivated migrant,” “climate refugee,” “climate change refugee,” “environmentally displaced person (EDP),” “disaster refugee,” “environmental displacee,” “eco-refugee,” “ecological displaced person,” and “environmental refugee-to-be (ERTB)”).

Authors have become increasingly creative not only in labeling the affected persons, but also in coining new phrases, such as “climigration,” to describe the phenomenon.⁴⁵

If advocates hope to advance a disaster-induced displacement agenda, the “conceptual muddle” must be resolved. This present study, however, does not engage in the struggle over semantics. Nor does this survey attempt to define a “typology of disaster,” as many works have, distinguishing, for instance, between rapid-onset and slow-onset disaster.⁴⁶ Instead, we generally use the phrase “natural disaster” in its colloquial sense, but with an imagined set of parenthesis around the word “natural,” in recognition of the fact that our analysis suggests disasters are anything but natural. Nonetheless, in those rare instances where the phrase “natural disaster” or “environmental disaster” appears in a legislative or regulatory act, assume that authorities had the more narrow meaning in mind.

European Migration and Asylum Law in Context

The European Union is a work in progress. In the wake of World War II, European leaders determined to secure a future peace, in part, through coordinated control of two resources that had fed the carnage of the 1940’s—coal and steel. The Treaty establishing the European Coal and Steel Community (the “Treaty of Paris”)⁴⁷ came into force in 1952, followed in 1958 by a treaty regarding atomic energy (EURATOM),⁴⁸ along with the Treaty establishing the European Economic Community (the “Treaty of Rome”).⁴⁹ Rome subsequently went through five substantive amendments implemented variously through the Single Europe Act (1987)⁵⁰ and the Treaties of Maastricht (1993),⁵¹ Amsterdam (1999),⁵² Nice (2003),⁵³ and Lisbon (2009).⁵⁴ Maastricht, as amended, is now officially entitled the “Treaty on European

^{45.} WHITE, *supra* note 41, at 20 (quoting Robin Bronen, *Forced Migration of Alaskan Indigenous Communities Due to Climate Change: Creating a Human Rights Response*, 68 in UNU Institute for Environment and Human Security (UNU-EHS), *Linking Environmental Change, Migration & Social Vulnerability* No. 12/2009 (Anthony Oliver-Smith & Xiaomeng Shen eds., 2009)).

^{46.} Jessica B. Cooper, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 N.Y.U. ENVTL. L.J. 480, 503 (1997-1998).

^{47.} Treaty Instituting the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 (1956) (entered into force July 23, 1952).

^{48.} Treaty Establishing the European Atomic Energy Community (EURATOM), Mar. 25, 1957, 298 U.N.T.S. 169 (entered into force Jan. 1, 1958).

^{49.} Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (1958) (entered into force Jan. 1, 1958).

^{50.} Single European Act, Feb. 17, 1986, 1987 O.J. (L 169) 1 (entered into force July 1, 1987).

^{51.} Treaty on European Union (EU), Feb. 7, 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253.

^{52.} Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1 (entered into force May 1, 1999).

^{53.} Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Feb. 26, 2001, 2001 O.J. (C 80) 1 (entered into force Feb. 1, 2003).

^{54.} Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 (entered into force Dec. 1, 2009) [hereinafter Treaty of Lisbon or Lisbon].

Union” or TEU.⁵⁵ Rome, as amended, is now known as the “Treaty on the Functioning of the European Union” or TFEU.⁵⁶ Today, the TEU and TFEU—together and as amended—provide the legal and institutional foundation of the European Union.

Prior to Maastricht, Member States coordinated a narrow range of immigration and asylum issues as a matter of public international law.⁵⁷ For instance, the EU’s Dublin Regulation, governing allocation of responsibility for the review of asylum applications, was initially a multi-lateral treaty.⁵⁸ During this pre-Maastricht era, the formal role of the European Community institutions⁵⁹ in coordinating immigration and asylum issues was “nil.”⁶⁰ Still, while Maastricht brought immigration and asylum law into the European Community framework, it nonetheless preserved the essentially “inter-governmental” nature of decision-making.⁶¹ Amsterdam, on the other hand, brought “substantial change,” transferring immigration and asylum into the “Community” process, thereby, to some degree, diminishing Members States’ sovereignty in this politically sensitive area.⁶²

As the EU developed, Member States gradually brought migration and asylum issues more fully under the supranational purview of the Union, adopting various changes in the rules governing, *inter alia*, territorial scope, decision-making procedures, jurisdiction of the courts, the legal basis for (and legal effects of) EU legislation, the legal instruments used to advance policy, the role of human rights norms and instruments, and the character and competency of various institutional players, such as the European Parliament.⁶³ While Member States have made important progress, the “harmonization” of asylum law has been among the most “complex” and “controversial” areas of EU cooperation.⁶⁴

For our purposes, there are several things worth keeping in mind with respect to the broader EU legal regime governing immigration and asylum.

^{55.} Consolidated Version of the Treaty on European Union, Mar. 30, 2010, 2010 O.J. (C 83) 13 [hereinafter TEU].

^{56.} Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

^{57.} See STEVE PEERS, EU JUSTICE AND HOME AFFAIRS LAW 297 (3rd ed. 2011).

^{58.} Convention Determining the State Responsibility for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, June 15, 1990, 1997 O.J. (C 254) 1, 2144 U.N.T.S. 435 (entered into force Sept. 1, 1997) [hereinafter Dublin Convention].

^{59.} Following the Treaty of Lisbon, “European Union” is the proper noun used to describe the European integration project.

^{60.} PEERS, *supra* note 57, at 9.

^{61.} KAY HAILBRONNER, EU IMMIGRATION AND ASYLUM LAW: COMMENTARY ON THE REGULATIONS AND DIRECTIVES 2 (Kay Hailbronner ed., 2010) [hereinafter EU IMMIGRATION AND ASYLUM LAW].

^{62.} *Id.* at 2.

^{63.} PEERS, *supra* note 57, at 4-8.

^{64.} *Id.* at 295.

First, there is a “growing interconnection between national law, EU harmonization, and international human rights obligations.”⁶⁵ Accordingly, we review here the status of persons displaced by natural disaster as a matter of 1) international law, 2) regional or “supranational” EU law, and 3) national law—highlighting some relevant linkages.⁶⁶

Second, the EU is not a legal monolith. Not all EU immigration and asylum measures apply to all EU Member States at all times. For instance, some Member States, namely the United Kingdom, Ireland, and Denmark, enjoy certain “opt-out” or “opt-in” privileges, while, at the same time, some *non*-EU members (Norway, Iceland, Switzerland, and Liechtenstein) have signed on to elements of the EU regime.⁶⁷

Finally, because of the “direct effects doctrine,” much of the EU’s supranational law also amounts to national law at the Member State level. The EU implements immigration and asylum law primarily through “Directives”—legislative acts that require Member States to accomplish specified results without prescribing exactly how those results should be achieved. While Directives do not create a private cause of action, where provisions are clear and unconditional, these legislative instruments may also have “direct effect” (*l’effet utile*), “meaning that they are applicable in national courts and could be directly invoked as part of national law.”⁶⁸

Disaster Displacement in International Law

In the European context, international law affecting persons displaced by disaster falls into four main categories: 1) international human rights law, as articulated principally in the Universal Declaration of Human Rights and related covenants and conventions, 2) uniquely European human rights instruments that are of an international character, 3) international

^{65.} *Id.*

^{66.} Because it goes beyond the scope of our present research, we do not consider here the potential role of bilateral treaties made between EU Members States and third countries, such as the so-called “readmission agreements,” nor do we consider the “mobility partnerships” made between the EU and other nations. Neither do we consider the EU’s international development policies and funding, another venue through which the Union addresses issues related to climate change, natural disasters, and disaster-induced displacement. Likewise, EU rules regarding which Member State bears responsibility for adjudicating a specific applicant’s asylum claim, reception conditions for those seeking international protection, so-called “safe country of origin” rules, asylum procedures, laws and policies regarding irregular migration, and the EU effort to “externalize” its irregular migration policy, along with EU border control, data, and visa policy, all of which play a role. See PEERS, *supra* note 57, at 295-96. Many of these rules and policies further deter not only migrants, but also would be asylum-seekers and others in need of international protection, with the ultimate effect that fewer persons in need of protection ever have the merits of their claim assessed. Therefore, while our research does not directly address these issues, the reader should not discount their effect on the choices available to persons vulnerable to disaster-induced displacement.

^{67.} See PEERS, *supra* note 57, at 312-14 (analyzing complex opt-out/opt-in rules along with other factors that affect the territorial scope and temporal application of EU immigration and asylum law).

^{68.} *Id.* at 8. The “direct effects doctrine” holds for treaties as well, meaning certain treaty provision have the force of law even without national implementing measures. See RALPH H. FOLSOM, EUROPEAN UNION LAW IN A NUTSHELL 95-104 (7th ed. 2011).

refugee and asylum law, and, finally, 4) soft law, most specifically the Guiding Principles on Internal Displacement.

International Human Rights Law

Currently, there are few, if any, international institutions and no international legal instruments that directly address the phenomenon of disaster-induced displacement.⁶⁹ This is not to say, however, that those displaced by natural disaster or environmental degradation have no rights. On the contrary, as human beings, disaster migrants enjoy the full range of fundamental rights that the rest of us enjoy, including norms and provisions that may have specific application for their particular circumstances.⁷⁰

The Universal Declaration of Human Rights sets out the broad foundation of international human rights law. The General Assembly proclaimed the Universal Declaration in 1948 “as a common standard of achievement for all peoples and all nations...”⁷¹ While it was not initially conceived as a legally binding instrument, the Declaration has established the underlying normative framework for international human rights law, and many consider at least certain provisions of the Universal Declaration to be binding as a matter of customary international law, for instance, the prohibition against torture.⁷²

Article 13(2) of the UDHR declares that, “Everyone has the right to leave any country, including his own, and to return to his country.” More to the point, article 14 declares that, “Everyone has the right to seek and to enjoy in other countries asylum from persecution.” However, article 14 provides “only a right to *seek* asylum, and to enjoy it if it is granted; there is no right to be *granted* asylum; there is no obligation on any state to grant it.”⁷³ Furthermore, the right recognized by the Declaration “is only a right to seek asylum from oppression, not a right to seek and enjoy refuge from grinding poverty, from civil war, from

^{69.} Susan Martin, *Climate Change, Migration, and Governance*, 16 GLOBAL GOVERNANCE 397, 403 (2010).

^{70.} *Id.*

^{71.} Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) pmbl. (Dec. 10, 1948) [hereinafter UDHR].

^{72.} See e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2nd Cir. 1980). “For although there is no universal agreement as to the precise extent of the ‘human rights and fundamental freedoms’ guaranteed to all by the [U.N.] Charter, there is at present no dissent from the view that the guaranties include, at a bare minimum, the right to be free from torture. This prohibition has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights...which states, in the plainest of terms, ‘no one shall be subjected to torture.’”

^{73.} Louis Henkin, *Introduction: Refugees and Their Human Rights*, 18 FORDHAM INT’L L.J. 1079, 1079 (1994-1995) (emphasis added).

natural disasters.”⁷⁴ In fact, article 13(2) sets forth “only half a right—a right to leave, not a right to be received, to enjoy haven or to resettle.”⁷⁵

Nonetheless, articles 13 and 14 are relevant, on a normative level, to the emerging discourse regarding disaster-induced displacement, as are other provisions of the UDHR. For instance, as we shall see below, the Universal Declaration’s prohibition against torture and other cruel, inhuman or degrading treatment or punishment⁷⁶ is relevant to the issue of disaster displacement given its incorporation into the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).⁷⁷

Likewise, the Universal Declaration recognizes “the right to life, liberty and security of person,”⁷⁸ as well as a prohibition against “arbitrary interference” with privacy and family,⁷⁹ both of which correspond to relevant ECHR provisions and case law. Finally, the UDHR recognizes a range of economic and social rights, including, *inter alia*, the right to a standard of living adequate for health and well-being, along with the right to food, clothing, housing, medical care, social services, and the right to security in the event of “circumstances beyond [one’s] control.”⁸⁰ Jessica Cooper suggests that, “The comprehensive language of these provisions can be interpreted as setting broad environmental standards and creating an implicit human right to freedom from life-threatening and otherwise intolerable environmental conditions.”⁸¹

The principle of nondiscrimination espoused in the UDHR is relevant as well, ensuring that, everyone is entitled to the rights and freedoms set forth therein, “without distinction of any kind,” such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth “or other status.”⁸² Such fundamental economic and social rights may, and, indeed, must play a role in shaping any future international legal regime designed to address admission of persons displaced by disaster.

Nonetheless, the Universal Declaration is generally insufficient as a basis for the protection of international migrants, and even less sufficient as to forcibly displaced migrants, such as those uprooted by natural disaster.⁸³ At any rate, beyond issues related to the status,

^{74.} *Id.*

^{75.} *Id.*

^{76.} UDHR, *supra* note 71, art. 5.

^{77.} Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights or ECHR].

^{78.} UDHR, *supra* note 71, art. 3.

^{79.} *Id.* art. 12.

^{80.} *Id.* art. 25(1).

^{81.} Cooper, *supra* note 46, at 6.

^{82.} UDHR, *supra* note 71, art. 2.

^{83.} Roger Zetter, *Protecting People Displaced by Climate Change: Some Conceptual Challenges*, in CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVES 131, 132 (Jane McAdam ed., 2010) [hereinafter CLIMATE CHANGE AND DISPLACEMENT].

admissibility, or, at least, non-removability of disaster victims, human rights also play an important role with respect to the content of the rights accorded to disaster migrants once they are subject to the jurisdiction of a destination state, whether they came to that state via regular or irregular channels.⁸⁴

The rights set forth in the UDHR—again, generally considered nonbinding—have been broadly transposed into two international covenants—the International Covenant on Civil and Political Rights⁸⁵ and the International Covenant on Economic Social and Cultural Rights.⁸⁶ While these two instruments *are* legally binding, the rights transposed are set in more conservative legal language that affords a scope considerably less sweeping than the declarative language of the UDHR would otherwise suggest. The ICCPR does not speak specifically of asylum. Rather, article 12(2) says simply that, “Everyone shall be free to leave any country, including his own.”⁸⁷ Nonetheless, the United Nations Human Rights Committee⁸⁸ has ruled that the ICCPR “contains an implicit protection against removal to face treatment which would amount to a breach of standards set out in the Covenant.”⁸⁹ All EU Member States have ratified, or in some cases acceded to, the ICCPR and the ICESCR, as have Norway and Switzerland, whose provisions relevant to disaster-induced displacement are also discussed below.⁹⁰

Natural disasters and climate change-related outcomes implicate additional human rights conventions and norms as well.⁹¹ For instance, the 1954 Convention Relating to Stateless

^{84.} Louis Henkin, *Introduction: Refugees and Their Human Rights*, 18 Fordham Int’l L.J. 1079, 1079-80 (1994-1995) (emphasis added).

^{85.} International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

^{86.} International Covenant on Economic Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

^{87.} ICCPR, *supra* note 85, art. 12(2).

^{88.} The U.N. Human Rights Committee has a degree of competence in supervising application of the ICCPR. *See id.* art. 41.

^{89.} PEERS, *supra* note 57, at 317.

^{90.} United Nations Treaty Collection, available at http://treaties.un.org/Pages/DB.aspx?path=DB/MTDSG/page1_en.xml (click “Status of Treaties” and then “CHAPTER IV” (Human Rights) for individual country ratification, accession, and succession records, as well as relevant reservations, understandings, and declarations) (status as at June 6, 2012, 05:05:27 EDT).

^{91.} In addition to the ICCPR and ICESCR mentioned elsewhere, the United Nations Office of the High Commissioner for Human Rights [OHCHR] has identified specific human rights implications with respect to other legal and normative instruments, including, but not limited to the Convention on the Rights of the Child (Nov. 20, 1989) 1577 U.N.T.S. 3 [hereinafter CRC]; Convention on the Rights of Persons with Disabilities, Convention on the Elimination of All Forms of Discrimination against Women (Dec. 18, 1979) 1249 U.N.T.S. 13; International Convention on the Elimination of All Forms of Racial Discrimination, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Charter of the United Nations, and Declaration on the Right to Development, United Nations Declaration on the Rights of Indigenous Peoples. *See* OHCHR, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, ¶ 70, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009).

Persons⁹² may be applicable, especially with respect to so-called “sinking islands.”⁹³ Notwithstanding, UNHCR has urged decision-makers and thought leaders to emphasize “the legal presumption of continuity of statehood” and avoid “the notion that such states will “disappear” or “sink,” thereby surrendering their international legal personality.”⁹⁴

Neither the U.N. Framework Convention on Climate Change nor the Kyoto Protocol specifically addresses the issue of protection for persons displaced by climate change,⁹⁵ although it has been suggested that certain concepts developed in those documents, and in environmental law more broadly, may provide useful reference points in addressing disaster-induced displacement, such concepts including, *inter alia*, “intergenerational equity and justice” and the “precautionary principle.”⁹⁶

Regardless of what the human rights implications may be, the U.N. High Commissioner for Human Rights has pointed out that, at least in the climate change context, the diminished or compromised enjoyment of human rights may be difficult to characterize as a legal violation for three reasons. First, because of “complex causal relationships,” a direct link between the carbon emissions of a specific country and consequent deleterious effects is difficult to “disentangle;” second, because extreme weather events are, in fact, multi-causal in nature, it is “impossible” to disaggregate that portion of the harm “attributable to global warming,” and third, because the harm associated with climate change is often prospective in nature, whereas legal culpability for human rights violations generally addresses harm retrospectively.⁹⁷

International Human Rights Protection in Europe

There are three principal sources of human rights protection with specific relevance to the European Union, 1) the Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the “European Convention on Human Rights” or simply the ECHR,⁹⁸ 2) the Charter of Fundamental Rights of the European Union,⁹⁹ and 3) general

⁹². Convention relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117 (entered into force June 6, 1960).

⁹³. See e.g. Jane McAdam, ‘Disappearing States’, *Statelessness and the Boundaries of International Law*, in CLIMATE CHANGE AND DISPLACEMENT *supra* note 83, at 105-129.

⁹⁴. U.N. High Comm’r for Refugees, *Summary of Deliberations on Climate Change and Displacement*, 2, 7 (Apr. 2011) available at <http://www.unhcr.org/refworld/docid/4d9f22b32.html> (accessed May 2, 2012).

⁹⁵. Zetter, *supra* note 83, at 132.

⁹⁶. See OHCHR, *supra* note 91, at ¶¶ 89-91.

⁹⁷. See *id.* at ¶ 70.

⁹⁸. European Convention on Human Rights, *supra* note 77.

⁹⁹. Charter of Fundamental Rights of the European Union, Dec. 12, 2000, 2000 O.J. (C 364) 1 (XX) (adopted Dec. 7, 2000) [hereinafter Charter].

principles of European Union law.¹⁰⁰ This legal framework is set forth in article 6 of the Treaty on the European Union,¹⁰¹ which 1) incorporates the Charter of Fundamental Rights into EU law, giving it “the same legal value as the [founding] Treaties,”¹⁰² 2) imposes an obligation on the European Union to accede to the European Convention on Human Rights,¹⁰³ and 3) declares that, “Fundamental rights, as guaranteed by the [ECHR], and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the [European] Union’s law.”¹⁰⁴

The “general principles” provision of article 6 confirms long-standing European Court of Human Rights (ECtHR) case law, which case law also suggests that protections afforded under “general principles of EU law” are, at least in some instances, broader than protections afforded under the ECHR alone.¹⁰⁵ Arguably, the right to asylum is among the general principles of EU law, given recognition of this right in the national constitutions of several Member States.¹⁰⁶ At any rate, European Union institutions must interpret EU asylum law “while respecting the [Refugee] Convention and the other relevant treaties,”¹⁰⁷ including the European Convention on Human Rights.

The European Convention on Human Rights was adopted in 1950 under the auspices of the Council of Europe, an entity whose membership includes 47 European nations,¹⁰⁸ as compared to only 27 nations that are Member States of European Union. All EU Member States are also members of the Council of Europe and States Parties to the ECHR.¹⁰⁹

Consequently, within the European Union, the ECHR operates on several levels. First, the ECHR is a treaty, binding between sovereign nations as a matter of international law; second, the ECHR is “an integral part” of Member States’ domestic law,¹¹⁰ third, the European Court of Justice (ECJ) has ruled that at least certain provisions of the ECHR (e.g.

^{100.} PEERS, *supra* note 57, at 96.

^{101.} TEU, *supra* note 55.

^{102.} *Id.* art. 6 (1).

^{103.} *Id.* art. 6 (2).

^{104.} *Id.* art. 6 (3).

^{105.} PEERS, *supra* note 57, at 97 (but see discussion regarding possibility that, because not all Member States have ratified them, the fourth and seventh protocols of the ECHR may not form part of general principles of EU law, such protocols including, *inter alia*, provisions on “freedom of movement,” “prohibition of expulsion of nationals,” “prohibition of collective expulsion of aliens,” and “procedural safeguards relating to the expulsion of aliens.”).

^{106.} *Id.* at 98.

^{107.} Joined Cases C-175 & 176 & 178 & 179/08 *Abdulla and Others v. Ger.* ¶ 53, 2010 E.C.R. I-01493.

^{108.} Council of Europe, available at <http://www.coe.int/web/coe-portal> (accessed June 7, 2012).

^{109.} FOLSOM, *supra* note 68, at 1. See also Council of Europe, <http://www.coe.int/web/coe-portal> (accessed June 7, 2012).

^{110.} Council of Europe, Rec(2006)6 of the Committee of Ministers to Member States on Internally Displaced Persons of 5 April 2006, ¶ 11 (adopted by the Committee of Ministers at the 961st meeting of the Ministers’ Deputies) (emphasis added).

article 3), together with relevant European Court of Human Rights case law, operate as a source of “the general principles of European Union law;”¹¹¹ fourth, the ECHR provides a normative framework that further informs the development of customary international law, by which Member States are bound,¹¹² and fifth, following EU accession as mandated by the Treaty of Lisbon and the TEU, the ECHR will one day become binding on the EU itself, as a legal person, and thereafter binding on Member States—not only as a matter of international law, but also as a matter of regional EU law.

The ECHR is relevant to the plight of disaster-induced displacement because in its case law, the European Court of Human Rights has interpreted certain provisions of the Convention in a manner that may support future claims on behalf of persons affected by natural disaster. For instance, though the case did not involve displaced persons crossing an international border, in *Budayeva and Others v. Russia*,¹¹³ the ECtHR found a violation of ECHR article 2 (the right to life) where authorities “failed to implement land-planning and emergency relief policies while they were aware of an increasing risk of a large-scale mudslide.”¹¹⁴ The burden on the State in such cases must be reasonable, taking into account the State’s “priorities and resources.”¹¹⁵ The burden would be lower to the degree that the risk is “natural, as opposed to man-made,” and higher to the degree that the risk is susceptible to mitigation as well as to the extent that the risk generates recurring effects in a discrete area, that is, to the degree that the calamitous effects are predictable.¹¹⁶

The right to life is non-derogable and raises a *non-refoulement* obligation.¹¹⁷ Accordingly, article 2 ECHR may also serve as a prohibition against removal, though no case has relied exclusively upon the provision for this purpose. Rather, where the Court prohibits removal, it typically does so based on article 3, which prohibits torture or inhuman or degrading

^{111.} PEERS, *supra* note 57, at 323.

^{112.} As a general matter, customary international law exists in that space where state practice and *opinio juris* converge. See Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 372-74, 42 VA. J. INT’L L. 365 (2001-2002). See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (defining customary international law as that which “results from a general and consistent practice of states followed by them from a sense of legal obligation.”), and STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38(I)(b) (defining international custom “as evidence of a general practice accepted as law”).

^{113.} *Budayeva v. Russia*, No. 15339/02, (Eur. Ct. H. R., 2008) available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Decisions+and+judgments/HUDOC+database/>.

^{114.} OHCHR, *supra* note 91 (referencing *Budayeva*). Authorities also failed to provide residents with adequate warning of the dangers. Note that the situation in Russia seems little improved following *Budayeva*. A July 2012 flood in Krymsk killed 171 after authorities again failed to warn the local population. Several local leaders were arrested on charges of criminal negligence. Ellen Barry, *3 Face Negligence Charges in Reaction to Russia Flood*, N.Y. Times, July 23, 2012, at A6.

^{115.} *Budayeva*, No. 15339/02, at ¶ 135.

^{116.} See McAdam, *supra* note 23, at 21.

^{117.} *Id.* at 19. The “right to life” is also found in other international human rights documents, including, *inter alia*, the UDHR (art. 3), ICCPR (art. 6), and the CRC (art. 6).

treatment of punishment.¹¹⁸ For the Court, article 3 analysis generally obviates the need for further analysis under article 2.¹¹⁹ While in theory, any human right could give rise to a non-refoulement obligation,¹²⁰ the prohibition against torture and other inhuman or degrading treatment or punishment represents the only other human right “clearly recognized in international law” as imposing a non-refoulement obligation.¹²¹ The scope of the article 3 non-refoulement obligation is particularly relevant with respect to subsidiary protection under the European Union’s so-called Qualification Directive, discussed further below.

In addition, because the Refugee Convention does not afford a right to asylum, the non-refoulement obligation is also central to the operation of that instrument, which provides that, “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”¹²² While the Refugee Convention qualifies the refoulement prohibition with certain exceptions (e.g. national security),¹²³ the prohibition inherent in ECHR article 3 is absolute and may not be subjected to any balancing test against public interests, regardless of how “undesirable or dangerous” the applicant’s activities.¹²⁴ Arguably, protection against refoulement, both in the refugee context and the human rights context, constitutes a rule of customary international law.¹²⁵ Indeed, Lauterpacht and Bethlehem have suggested that the relevant non-refoulement rules “may well...amount to *jus cogens* [i.e. a peremptory norm] of a kind that no State practice and no treaty can set aside.”¹²⁶

^{118.} ECHR, *supra* note 77, art. 3. “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

^{119.} McAdam, *supra* note 23, at 20.

^{120.} *Id.* at 17. *See also* PEERS, *supra* note 57, at 319-320 (considering extent to which ECHR articles 2, 5, 6, 8 and 13 enjoy a so-called “*Soering* effect”).

^{121.} McAdam, *supra* note 23, at 18.

^{122.} Convention relating to the Status of Refugees, July, 28 1951, 189 U.N.T.S. 137, art. 33(1) (entered into force Apr. 22, 1954). *See also* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, 19 U.S.T. 6223, art. 1 (entered into force Oct. 4, 1967) [hereinafter New York Protocol].

^{123.} Refugee Convention, *supra* note 122, art. 33(2).

^{124.} *Chahal v. United Kingdom*, App. No. 70/1995/576/662, 23 Eur. H.R. Rep. 413, ¶ 80 (1996). The refoulement prohibition in the Convention against Torture is likewise absolute: “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3(1), Dec. 10, 1984, 1465 U.N.T.S. 85, G.A. Res. 39/46, U.N. GAOR, Supp. (No. 51) at 197, U.N. Doc. A/RES/39/708, (1984) (entered into force June 26, 1987) (ratified by all EU Member States) [hereinafter CAT].

^{125.} *See* Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR GLOBAL CONSULTATION ON REFUGEE PROTECTION 89, ¶ 193-253 (Erika Feller et al., eds. 2003). *See also* Kay Hailbronner, *Non-Refoulement and “Humanitarian” Refugees: Customary International Law or Wishful Legal Thinking?*, 26 VA. J. INT’L L. 857 (1985-1986) (analyzing status of non-refoulement principle as customary international law several years before 1989 ECtHR landmark decision in *Soering v. United Kingdom*).

^{126.} *See* Lauterpacht & Bethlehem, *supra* note 125, at 89, ¶ 195.

It follows that to the extent substantial grounds can be shown for believing removal of a person displaced by natural disaster would expose that person to a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment, a State Party to the ECHR is prohibited from implementing such removal, not only as a result of the non-refoulement obligation inherent in article 3 ECHR, but also as a matter of customary international law, and possibly as a matter of *jus cogens*. The same analysis holds where removal would breach obligations under article 2 (right to life), although, again, the ECtHR rarely decides cases on article 2 grounds alone.¹²⁷

The challenge then is to demonstrate that return to an area affected by natural disaster amounts to a real risk of being subjected to arbitrary deprivation of life and/or to torture or cruel, inhuman or degrading treatment or punishment. To some extent, an individual may meet this challenge first by identifying specific disaster-related deprivations of socio-economic rights, such as the right to food, water, adequate health care, and housing, and then essentially “re-characterizing” those violations of socio-economic rights as a form of inhuman treatment.¹²⁸ Whether a State has violated an individual’s right to life under article 2 would depend, in part, upon the “severity and extent” of the socio-economic harms inflicted.¹²⁹ Further below, in the section regarding the EU Qualification Directive, we discuss the circumstances under which it may be said that a State has violated the right of a person displaced by disaster not to be subjected to torture or to inhuman or degrading treatment or punishment under article 3.

In addition to the European Convention on Human Rights, one must consider as well the Charter of Fundamental Rights of the European Union, which Member States first proclaimed on December 7, 2000,¹³⁰ but which only became binding after the Treaty of Lisbon came into force on December 1, 2009, thereby elevating the Charter to “the same legal value” as Treaties establishing the legal contours of the European Union.¹³¹

The Charter guarantees a right to asylum, “with due respect for the rules of the Geneva Convention” and its 1967 Protocol.¹³² Article 4 of the Charter also provides that, “No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or

^{127.} McAdam, *supra* note 23, at 20.

^{128.} *Id.* at 17.

^{129.} *See id.* at 20 (synthesizing relevant criteria drawn from U.N Human Rights Committee review of individual complaints alleging violation of ICCPR article 6).

^{130.} Charter of Fundamental Rights of the European Union, art. 18, 2000 O.J. (C 364) 1 (2000) [hereinafter Charter]. Note that the Charter was proclaimed a second time, on December 12, 2007 with technical (but no substantive) revisions. The Charter as proclaimed in 2000 “continues to exist as a separate legal document.” PEERS, *supra* note 57, at 99.

^{131.} TEU, *supra* note 55, art. 6 (1).

^{132.} Charter, *supra* note 130.

punishment.”¹³³ Thus, while in the ECHR the non-refoulement obligations with respect to articles 2 and 3 are implied; in the Charter those obligations are express.

Prior to the entry into force of Lisbon, a line of cases from the European Court of Justice made clear that while it had no binding legal effect, the Charter served the important role of reaffirming general principles of EU law. Peers suggests that these cases, “established, in effect, a ‘Batman and Robin’ approach to the protection of human rights in the EU legal order, with the general principles [playing] the lead role in human rights protection and the Charter performing the role of sidekick—the ‘Boy Wonder’ of the EU human rights law.”¹³⁴ Following Lisbon, the Court of Justice seems now to rely more heavily upon the Charter and less so upon the general principles of EU law.¹³⁵

As it relates to the European Convention on Human Rights, article 52(3) of the Charter says that where rights set forth therein correspond to those guaranteed by the ECHR, “the meaning and scope of those rights shall be the same” as that laid down by the Convention.¹³⁶ The provision goes on to say that Union law may also provide for “more extensive protection.”¹³⁷ That is to say, the rights set forth in the Charter are at least as broad as, if not broader than, those corresponding rights found in the ECHR.¹³⁸

Indeed, the Court of Justice has recently affirmed that, with autonomous legal effect, article 4 of the Charter prohibits EU Member States from transferring an asylum seeker to another Member State (responsible under Dublin for examining the claim) where the sending State “cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in [the receiving State] amount to substantial grounds for

^{133.} *Id.* art. 19(2).

^{134.} PEERS, *supra* note 57, at 99.

^{135.} *Id.* at 100.

^{136.} Certain provisions of Protocols 4 and 7 to the ECHR are not represented in the Charter. *See id.*

^{137.} Charter, *supra* note 130, art. 52(3).

^{138.} Peers observed that at least through September 11, 2010, the European Court of Justice had yet to address the relationship of the Charter to the general principals of European Union law, national constitutions, the ECHR, as well as to other EU/EC and international treaties. He noted, however, that following “the entry into force of the Treaty of Lisbon, the early case law [demonstrated] a tendency to refer to the Charter in practice as the sole or main source of human rights rules in the EU legal order, with more limited references to the general principals of EU law than before.” PEERS, *supra* note 57, at 100. Following Peers’ observation, the Court has made measured progress in defining these relationships. *See e.g.*, Joined Cases C-92 & 93/09, Volker und Markus Schecke v. Land Hessen, ¶ 45-92 (2010) <http://curia.europa.eu/> (comparing scope of Charter with scope of ECHR and weighing Charter obligations against general principals of EU law in context of a violation of privacy claim); Case C-434/11, Corpul Național al Polițiștilor v. Ministerul Administrației și Internelor and others, ¶ 15 (2011) <http://curia.europa.eu> (noting that Charter provisions are applicable to EU Member States *only* when they are implementing European Union law).

believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.”¹³⁹

Much of the analysis that follows with respect to disaster-induced displacement relies upon the ECHR and general principles of EU law. However, the reader should bear in mind that given at least some evidence that the Charter may be advancing to the forefront of human rights protection in the EU (and the possibility that the scope of the Charter may ultimately prove broader than that of the ECHR) the Charter could play a distinct role in any future expansion of rights-based protection for persons displaced by disaster.

Convention relating to the Status of Refugees

Under the 1951 Convention relating to the Status of Refugees, modified by the 1967 Protocol, a refugee is a person who,

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹⁴⁰

In addition to the requirement that the asylum-seeker must have crossed an international border, the refugee definition contains two further relevant elements: first, a “well-founded fear of persecution,” and second, the five grounds upon which such persecution must be based. While there is a great deal of case law and academic literature concerning the matter, there is, “no universally accepted” definition of persecution.¹⁴¹

Regardless of its characterization, persecution normally involves an act or omission by a State charged with protecting the individual.¹⁴² Where non-state actors are involved, their actions may be considered persecution, “if [the acts] are knowingly tolerated by authorities, or if authorities refuse, or prove unable, to offer effective protection.”¹⁴³ Linking a natural disaster to concrete State acts or omissions is, in itself, a significant challenge, yet the asylum-

^{139.} Joined Cases C-411 & 493/10, *N. S. v. Secretary of State for the Home Department*, ¶ 2 (2011) <http://curia.europa.eu>.

^{140.} Refugee Convention, *supra* note 122, art. 1.A(2). *See also* New York Protocol, *supra* note 122, art. 1.

^{141.} UN High Comm’r for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* ¶ 51 (reissued Dec. 2011) U.N. Doc. HCR/1P/4/ENG/REV.3, available at <http://www.unhcr.org/refworld/docid/4f33c8d92.html> (accessed Apr. 18 2012).

^{142.} *Id.* ¶ 65.

^{143.} *Id.*

seeker must go further to demonstrate as well that such acts or omissions amount to persecution based upon at least one of the five grounds set forth in the Convention.

For the disaster-displaced person, this is no easy case to make. First, those who have a well-founded fear of persecution based upon one of the five grounds—so-called, “Convention Refugees”—suffer persecution at the hands of their own government, and therefore cannot look to their government for protection and assistance, while, in contrast, most disaster victims can, and indeed do, look to their own government for protection and assistance.¹⁴⁴ In any case, one should not assume that persons displaced by disaster are without protection, for although a disaster-displaced person may cross an international border and thereby come within the jurisdiction of a foreign state, such person is, nonetheless, still entitled to the protection of his or her country of origin.¹⁴⁵

This is not to say, however, that the Refugee Convention has no application to persons displaced by disaster. UNHCR has suggested that the Convention could apply, for instance, “in situations where the victims of natural disasters flee because their government has consciously withheld or obstructed assistance in order to punish or marginalize them on one of the five grounds...”¹⁴⁶

Another example might be where the environment serves as an instrument of persecution, essentially where a state or non-state actor uses the environment as a weapon. Burning crops, poisoning wells, killing livestock—these are familiar tactics, employed by combatants and “actors of persecution” for thousands of years. Modern variations might include, for instance, the use of chemical agents “to defoliate forests and mangroves” in order “to clear perimeters of military installations,”¹⁴⁷ the torching of oil wells in a deliberate effort to despoil the environment,¹⁴⁸ or even “cloud seeding” to generate increased rainfall with the purpose of impeding enemy movement.¹⁴⁹

These specific acts, behind which there may rest some ostensible military purpose, do not necessarily constitute persecution entitling victims to refugee status. However, refugee status

¹⁴⁴. Aurelie Lopez, *The Protection of Environmentally Displaced Persons in International Law* 37 ENVTL. L. 365, 377 (2010).

¹⁴⁵. U.N. High Comm’r for Refugees, *Forced Displacement in the Context of Climate Change: Challenges for States under International Law*, 10 (May 20, 2009), <http://www.unhcr.org/refworld/docid/4a2d189ed.html> (accessed Apr. 17, 2012).

¹⁴⁶. *Id.* at 9-10 (conceding “such cases are likely to be few”).

¹⁴⁷. See Jeanne Mager Stellman et al., *The Extent and Patterns of Usage of Agent Orange and Other Herbicides in Vietnam*, 422 NATURE 681, 681 (2003).

¹⁴⁸. Following the invasion of Kuwait and in the final days of the 1990 Gulf War, Saddam Hussein ordered his retreating troops to set ablaze more than 700 oil wells, which burned uncontrollably for eight months, casting a toxic black cloud across the region. In addition, Hussein deliberately released millions of barrels of oil into the Persian Gulf creating a 9 mile long slick. See Jessica E. Seacor, *Environmental Terrorism: Lessons from the Oil Fires of Kuwait*, 10 AM. U. J. INT’L L. & POL’Y 481 (1994-1995).

¹⁴⁹. Deborah Shapley, *Weather Warfare: Pentagon Concedes 7-Year Vietnam Effort*, 184 no. 4141 Science 1059 (June 7, 1974).

may exist where persecution involves similar manipulation of the environment for the purpose of inflicting harm on a specific group, again, based upon one of the five grounds set forth in the Convention. A compelling “environment as weapon” example is Saddam Hussein’s draining of the marshes in southern Iraq as part of a systemic campaign to decimate a 5,000 year old culture shared by a loose affiliation of tribes “collectively known as the Ma’dan or Marsh Arabs.”¹⁵⁰ Where actors use the environment as a weapon of persecution (based on one of the five grounds), persons displaced by the ensuing “natural” disaster may well enjoy Convention refugee status.

Some argue that to the extent governments make policy decisions that affect the environment, and to the extent those decisions, whether intentional or neglectful, yield adverse outcomes, such “government-induced degradation is a form of persecution” as to those persons affected.¹⁵¹ Yet, even if we accept that “government-induced degradation is a form of persecution,” standing on its own, this argument is “too simplistic” from the perspective of refugee status recognition because it ignores “further qualitative elements” required under the Convention, for instance, that persecution must be based upon one of the five grounds.¹⁵² There must be some “discriminatory element” that lifts mere deprivation to the level of a rights violation that amounts to persecution.¹⁵³

A more precise statement might hold that persecution exists where “a government systemically imposes the risks and burdens of decisions impacting environmental quality on members of a particular race, religion, nationality, social group or political opinion on account of one or more of these protected factors.”¹⁵⁴ However, even where such an imposition demonstrates persecution on a protected ground, it is not clear that the resulting persecution meets the threshold required under international law.¹⁵⁵ McAdam contends that persecution remains “very much a question of degree and proportion,” and that, “[w]hether something amounts to ‘persecution’ is assessed according to the nature of the right at risk, the nature and severity of its restriction or impairment, and the likelihood of the restriction or impairment eventuating in the individual case.”¹⁵⁶ Environmental degradation will generally not meet this threshold. Consequently, the “government-induced degradation” argument is “unconvincing.”¹⁵⁷

Often, disasters contribute to social tensions that “degenerate into violent conflict,” over natural resources such as water or land, and, in turn, armed conflict generates violations of

^{150.} See Lopez, *supra* note 144, at 384-85; see also Human Rights Watch, *The Iraqi Government Assault on the Marsh Arabs: a Human Rights Watch Briefing Paper* (Jan. 2003).

^{151.} Cooper, *supra* note 46, at 486-87.

^{152.} Lopez, *supra* note 144, at 379-80.

^{153.} JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW 44 (2012).

^{154.} Christopher M. Kozoll, *Poisoning the Well: Persecution, the Environment, and Refugee Status*, 15 COLO. J. INT’L ENVTL. L. & POL’Y 271, 273 (2004).

^{155.} MCADAM, *supra* note 153, at 43.

^{156.} *Id.*

^{157.} *Id.*

human rights that amount to persecution as defined by refugee law.¹⁵⁸ To that extent, disasters may produce traditional Convention refugee flows, and, likewise, refugees may be “part of a mixed flow of persons leaving a country in the aftermath of disasters.”¹⁵⁹

Finally, one could argue that victims of natural disaster constitute a “particular social group.” Of the five grounds, “membership of a particular social group” is the ground with “the least clarity.”¹⁶⁰ Its meaning must be understood “in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.”¹⁶¹ Still, the category “cannot be interpreted as a ‘catch all’ that applies to all persons fearing persecution.” In an attempt to synthesize decades of discordant international jurisprudence, UNHCR has defined a particular social group as:

a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.

As to natural disasters—at least those triggered by government-induced environmental degradation—one commentator has proposed characterizing a social group that includes, “persons politically powerless to protect their environment.”¹⁶² However, this proposal is vulnerable to criticism on a number of fronts. First, a social group “cannot be defined exclusively by the fact that it is targeted for persecution.”¹⁶³ That is to say that a social group must be “defined by something more than the harm sought to be remedied.”¹⁶⁴ Here, one could argue that members of the putative group are not persecuted because they are politically powerless; rather, they are politically powerless because they are persecuted. Political powerlessness is not the reason for the persecution; it is the harm to be remedied. Furthermore, it would be difficult to argue that political powerlessness is an innate or immutable characteristic (we trust that it is not), or that political powerlessness is “fundamental to identity, conscience or the exercise of one’s human rights.” Accordingly, a particular social group defined as “persons politically powerless to protect their environment,” is unlikely to meet with the recognition of refugee claim adjudicators.

Finally, the *travaux préparatoires* supports our generally pessimistic outlook, indicating that drafters did not intend to extend the Refugee Convention’s application to victims of natural

¹⁵⁸. U.N. High Comm’r for Refugees, *supra* note 145, at 10.

¹⁵⁹. *Id.*

¹⁶⁰. U.N. High Comm’r for Refugees, *Guidelines on International Protection No. 2: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/02, ¶ 1 (2002).

¹⁶¹. *Id.* ¶ 3.

¹⁶². Cooper, *supra* note 46, at 524.

¹⁶³. U.N. High Comm’r for Refugees, *supra* note 160, at ¶ 2.

¹⁶⁴. Cooper, *supra* note 46, at 522.

disaster. Indeed, at a July 1951 meeting of the Conference of Plenipotentiaries, Mr. Nehemiah Robinson, the Israeli delegate, flatly stated that,

The text of sub-paragraph (2) [of article 1A—refugee definition] *obviously did not refer to refugees from natural disasters*, for it was difficult to imagine that fires, floods, earthquakes or volcanic eruptions, for instance, differentiated between their victims on the grounds of race, religion or political opinion.¹⁶⁵

No one challenged Robinson's assessment with respect to natural disasters. Thus, while one can make a case for recognizing some disaster victims as "Convention refugees," UNHCR has conceded that, "the large majority of persons leaving their countries in the context of disasters are unlikely to qualify as refugees under extant international law."¹⁶⁶

Guiding Principles on Internal Displacement

Though they constitute nonbinding "soft law," the 1998 Guiding Principles on Internal Displacement,¹⁶⁷ draw upon "binding principles found in refugee, human rights and international humanitarian law."¹⁶⁸ The Guiding Principles are relevant to disaster induced displacement for two reasons: first, because the vast majority of people displaced by natural disaster never cross an international border, and second, because the Guiding Principles expressly extend application to persons displaced by natural disaster. For the purposes of the Principles, paragraph 2 defines "internally displaced persons" as:

...persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights *or natural or human-made disasters*, and who have *not* crossed an internationally recognized State border.¹⁶⁹

The requirement that internally displaced persons must "not have crossed an internationally recognized State border" should be read in a "broad sense" to include not only those compelled to leave their home or habitual residence for another part of the country, but also those who, as a matter of necessity, traverse part of another nation to reach an alternative safe area in the country of origin, those who voluntarily or involuntarily exit the country of

^{165.} General Assembly, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the 22nd Meeting Held at the Palais des Nations, Geneva, on Monday, July 16, 1951, at 10:00 a.m.*, 6, U.N. Doc. A/CONF.2/SR.22 (Nov. 26, 1951).

^{166.} U.N. High Comm'r for Refugees, *supra* note 145.

^{167.} ESCOR, *Guiding Principles on Internal Displacement: Report of the Rep. of the Secretary-General*, ¶ 2, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998).

^{168.} Zetter, *supra* note 83, at 133.

^{169.} ESCOR, *supra* note 169, at ¶ 2 (emphasis added).

origin and subsequently re-enter, but who nonetheless cannot return to their homes or places of habitual residence (for a reason stated in paragraph 2), as well as those who voluntarily leave for another part of their country of origin, but who later cannot return to their homes or places of habitual residence “because of events occurring during their absence that make return impossible or unreasonable.”¹⁷⁰

In any event, the designation “internally displaced person” under the Guiding Principles does not establish a new legal category conferring a particular legal status. Rather, the definition is descriptive, meant to characterize those for whom certain rights are guaranteed as a function of 1) the fact that they are human, and 2) the fact that they are displaced—a position of “peculiar vulnerability” from which special needs flow.¹⁷¹ The Guiding Principles include “victims of disasters” because “experience shows that they also can, as a consequence of their displacement, become victims of human rights violations such as discrimination (e.g., because they have to move to an area where they constitute an ethnic minority), sexual and gender based violence (e.g., in overcrowded camps), or disregard of their property rights.”¹⁷²

In 2006, the Council of Europe’s Committee of Ministers recommended that, the Guiding Principles “apply to all internally displaced persons, including persons displaced from their homes or places of habitual residence due to *natural or man-made disasters*.”¹⁷³ The Ministers noted that the Principles “have gained international recognition and authority,” stressed a “willingness to implement [the Guiding Principles] in the member states’ national legislation and policy,” as well as a desire to promote and further developed the Principles as a minimum standard, beyond which more favorable standards may emerge.¹⁷⁴

Disaster Displacement in European Union Law

Here we review the Qualification Directive¹⁷⁵ and Temporary Protection Directive,¹⁷⁶ two key instruments agreed in the first phase of EU efforts to “harmonize” migration and asylum

^{170.} Walter Kälin, *Guiding Principles on Internal Displacement: Annotations*, 38 STUD. TRANSNAT’L LEGAL POL’Y 1, 3-4 (2008).

^{171.} *Id.* at 4-5.

^{172.} *Id.* at 4.

^{173.} Council of Europe, Rec(2006)6 of the Committee of Ministers to Member States on Internally Displaced Persons of 5 April 2006, ¶ 1 (adopted by the Committee of Ministers at the 961st meeting of the Ministers’ Deputies) (emphasis added).

^{174.} *See id.* pmb1.

^{175.} Council Directive 2004/83/EC of Apr. 29, 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 2004 O.J. (L 304) 12 (EC) [hereinafter Qualification Directive].

^{176.} 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, 2001 O.J. (L 212) 12 [hereinafter Temporary Protection Directive].

law across the Union. The Return Directive is also briefly considered.¹⁷⁷ Additional Directives addressing such issues as, for instance, asylum procedures,¹⁷⁸ reception conditions,¹⁷⁹ and victims of trafficking,¹⁸⁰ may, indeed, have some passing relevance to disaster-induced displacement, but they are not here subject to review.

At the outset, it should be noted that one possibly detrimental effect of the EU harmonization agenda is that to the extent migration laws and policies are harmonized at the regional level, there is a potential to diminish, at the national level, those “special historical or cultural links [that often] foster humanitarian goodwill toward people displaced by a sudden disaster.”¹⁸¹ Given Europe’s colonial history and other relationships, the significance of these links—political, linguistic, or otherwise—should not be underestimated. This is perhaps another reason why EU migration and asylum laws should be harmonized, and not simply cloned from one Member State to another.

Qualification Directive

Members States of the European Union sought to harmonize their definition of both refugee and subsidiary protection status through Directive 2004/83, adopted in April of 2004.¹⁸² The so-called “Qualification Directive,” which was “recast” in December of 2011,¹⁸³ establishes the criteria asylum-seekers must satisfy in order to have their status as

^{177.} European Parliament and Council Directive 2008/115/EC of 16 Dec. 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third Country Nationals, 2008 O.J. (L 348) 98 (EC) [hereinafter Return Directive].

^{178.} Council Directive 2005/85/EC of 1 Dec. 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 2005 O.J. (L 326) 13 (EC).

^{179.} Council Directive 2003/9/EC of 27 Jan. 2003 Laying down Minimum Standards for the Reception of Asylum Seekers, 2003 O.J. (L 31) 18 (EC).

^{180.} Council Directive 2004/81/EC of 29 Apr. 2004 on the Residence Permit Issued to Third Country Nationals Who Are Victims of Trafficking in Human Beings or Who Have Been the Subject of an Action to Facilitate Illegal Immigration, Who Cooperate with the Competent Authorities, 2004 O.J. (L 261) 19 (EC).

^{181.} MCADAM, *supra* note 153, at 107.

^{182.} Qualification Directive, *supra* note 175.

^{183.} In December 2011, the EU officially published its new “recast” Qualification Directive, which Member States must transpose into national law by December 21, 2013. The U.K., Ireland and Denmark have opted out. However, in Ireland and the U.K., the 2004 version of the Directive remains applicable. Because the 2004 Qualification Directive will remain law in two Member States, because the remaining Member States have not yet had sufficient time to transpose the recast, and because much of the secondary literature on disaster-displacement references the original Qualification Directive, we use the 2004 version as the basis for our analysis, highlighting parallel provisions in the 2011 Directive in brackets or corresponding footnotes where the numbering of individual provisions may have shifted or where a substantive variances are germane to our research. See Directive 2011/95/EU of Dec. 13, 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast), 2011 O.J. (L 337) 95 (EU) [hereinafter Qualification Directive Recast].

either a “refugee” or a “person who otherwise needs international protection”¹⁸⁴ recognized, as well as the rights enjoyed by those who hold one or the other status, which rights, controversially, differed in substance prior to the recast.¹⁸⁵

As to refugee status, the Directive says that:

‘refugee’ means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it...¹⁸⁶

The temporal limitation linking the Refugee Convention to “events occurring before 1 January 1951” is, of course, absent from the Directive.¹⁸⁷ Otherwise, the language of article 2(c) *generally* mirrors that of the Refugee Convention, with slight grammatical changes and a linguistic effort to achieve greater gender neutrality. One startling difference between the two is that the Qualification Directive limits its application to stateless persons and third country nationals (“TCNs” in Euro-speak). In other words, an EU citizen from one Member State is ineligible for refugee status in another Member State. This arguably “contravenes article 42 of the Refugee Convention, which prohibits States from limiting [via formal reservation] the personal scope of article 1 [refugee definition] or limiting the scope of article 3 [non-discrimination].”¹⁸⁸

Chapters II and III of the Directive provide “harmonized” interpretive guidance, essentially codifying years of Convention-related jurisprudence while, at the same time, resolving some historical splits between Member States in the application of the Convention for the purpose of status determination.¹⁸⁹ As such, the Qualification Directive is the first instrument to

^{184.} The recast Directive eliminates the “person who otherwise needs international protection” approach and speaks instead of “persons eligible for subsidiary protection.” *Id.* art. 1.

^{185.} Jane McAdam, *The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime*, 17 INT’L J. REFUGEE L. 461, 497-516 (2005) (highlighting distinctions between rights attached to each category and controversy therein).

^{186.} Qualification Directive, *supra* note 175, art. 2(c); Qualification Directive recast, *supra* note 183, art. 2(d).

^{187.} The 1951 Refugee Convention specifically addressed the post-World War II refugee crisis in Europe. The temporal and geographic limitations of the 1951 Convention were set aside by the so-called “New York Protocol,” which stands as a separate legal instrument, incorporating the Convention. New York Protocol, *supra* note 122, art. 1.

^{188.} McAdam, *supra* note 185, at 469-70.

^{189.} Spijkerboer has commented, for example, on the “well-known” divergent practice among Member States on the issue of “non-state actors” prior to adoption of the Directive. “In eight Member States, persecution by non-State agents [was], roughly speaking, considered persecution if the State [was] unwilling or unable to provide protection (Belgium, Denmark, Finland, Greece, Luxembourg, the Netherlands, Sweden,

provide a detailed elaboration of such concepts as “persecution” in the context of the Refugee Convention.¹⁹⁰ Analysis of Chapters II and III indicates that the 2004 Directive embraced a “relatively liberal approach,” albeit “at the expense of stronger cessation and exclusion clauses [as well as] the creation of a concept of ‘revocation’ of status.”¹⁹¹

Despite this relatively liberal approach, the Qualification Directive offers no more opportunity to address disaster-induced displacement, in the context of “refugee” status, than does the Refugee Convention itself. Arguably, the Qualification Directive offers less room given the limitation of its applicability to third country nationals and stateless persons, along with the “revocation” concept and more restrictive cessation and exclusion clauses. Therefore, as to refugee status, our analysis of the Qualification Directive parallels analysis of the Refugee Convention above; that is to say, the Directive’s provisions setting forth criteria for the qualification of refugee status do very little, if anything, to fill the protection gap engendered by disaster-induced displacement.

Thus, if relief for disaster-displaced persons is to be found in the Directive, one must look to the provisions regarding subsidiary protection status.¹⁹² To some degree, “subsidiary” protection is simply EU-speak for “complementary” protection,¹⁹³ yet in at least one respect it goes farther. At the outset, the European Union’s Qualification Directive is remarkable for the simple fact that it is the first international document to codify a shared commitment to

and the United Kingdom). In seven other Member States (Austria, France, Germany, Ireland, Italy, Portugal, Spain), some sort of involvement of the State in the country of origin [was] required.” THOMAS SPIJKERBOER, *Subsidiarity in Asylum Law. The Personal Scope of International Protection*, in *SUBSIDIARY PROTECTION OF REFUGEES IN THE EUROPEAN UNION: COMPLEMENTING THE GENEVA CONVENTION?*, 19, 29 (Daphné Bouteillet-Paquet ed., Johanne Porier trans., 2002) [hereinafter *SUBSIDIARY PROTECTION IN THE EU*].

^{190.} Kay Hailbronner & Simone Alt, *Council Directive 2004/83/EC of April 29, 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, Art. 1-10, in *EU IMMIGRATION AND ASYLUM LAW*, *supra* note 61, at 1006, 1063.

^{191.} PEERS, *supra* note 57, at 339. *But see generally* McAdam, *supra* note 185 (suggesting that the final directive falls disappointingly short of the more liberal proposal initially prepared by the Commission).

^{192.} Because the Qualification Directive commits to a “full and inclusive application of the [Refugee] Convention” (recital 2) (QDR recital 3), an application is considered under the subsidiary protection criteria only after the applicant has failed to gain recognition as a refugee, the exception to this rule being those cases where the claimant submits an application for international protection on grounds that expressly exclude the Refugee Convention. Kay Hailbronner, *Council Directive 2004/83/EC of April 29, 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, Art. 11-19, in *EU IMMIGRATION AND ASYLUM LAW*, *supra* note 61, at 1093, 1138-39.

^{193.} UNHCR has identified two broad categories of complementary protection beneficiaries: “(a) Persons who should fall within the terms of the 1951 Convention relating to the Status of Refugees or its 1967 Protocol, but who may not be so recognized by a State as a result of varying interpretations; (b) Persons who have valid reasons for claiming protection, but who are not necessarily covered by the terms of the 1951 Convention.” UNHCR, Exec. Comm. High Commr’s Programme Standing Comm., 18th Meeting, *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*. U.N. Doc. ECI/50/SC/CRP.18 (June 9, 2000), *reprinted in* 12 *Int’l J. Refugee L.* 498, 499 (2000).

subsidiary protection.¹⁹⁴ Nonetheless, the Directive does not go so far as to institute a new international protection regime *per se*; rather it codifies a wide range of diverse subsidiary protection practices found to be in use—to one degree or another and in one form or another—among all EU Member States prior to the European Council’s adoption of the Directive.¹⁹⁵ Article 2(e) 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 concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering *serious harm* as defined in Article 15, and to whom Article 17(1) and (2) [mandatory grounds for exclusion] do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;¹⁹⁶

The key question then is, “What constitutes ‘serious harm?’” Setting forth the constituent elements of the subsidiary protection definition, article 15 says that,

Serious harm consists of:

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

While the grounds established for recognition of subsidiary protection status are broader in many respects than the grounds an applicant must satisfy for recognition of refugee status, whether the grounds are broad enough to provide protection for persons displaced by natural disaster is doubtful, though there may be some room for such an interpretation.

^{194.} McAdam, *supra* note 185, at 462, 470.

^{195.} *Id.* at 464-65. *See also* Hailbronner, *supra* note 192, at 1138.

^{196.} Qualification Directive, *supra* note 175, art. 2(e) (emphasis added). Note as well article 2(f), which says that, “‘subsidiary protection status’ means the recognition by a Member State of a third country national or a stateless person as a person eligible for subsidiary protection.” *See* Qualification Directive Recast, *supra* note 183, arts. 2(f) and 2(g).

First, the list of qualification criteria under article 15 is exhaustive,¹⁹⁷ so we must work with what we have. While some have suggested that article 15(b) is the “only” subsection relevant to disaster induced displacement,¹⁹⁸ we will consider each of the subsections.

The text of article 15 was “the subject of intense debate” and suffered multiple redrafts throughout the negotiating process, with article 15(c) alone incurring at least six significant revisions.¹⁹⁹ The initial proposal for article 15(c) referenced a threat to “safety or freedom...as a result of systematic or generalized violations of...human rights.”²⁰⁰ However, in its final form, article 15(c) is expressly limited to “situations of international or internal armed conflict,” greatly reducing its flexibility to adapt to “new situations” and evolving human rights norms as expressed, in particular, through the jurisprudence of the European Court of Human Rights.²⁰¹ Thus, the relevance of article 15(c) to the phenomenon of disaster-induced displacement is limited to those situations in which there may be some nexus between armed conflict and environmental degradation or natural disaster. However, even in those cases, the existence of an “armed conflict” will be dispositive, as opposed to any incidental natural disaster-related circumstance.

In contrast to article 15(c), which stands at some distance from the European Convention on Human Rights, articles 15(a) and 15(b) fully embrace the Convention. Article 15(a) reflects not only Member State obligations set forth under article 1 of the 6th Additional Protocol to the European Convention on Human Rights (abolishing the death penalty),²⁰² but also the jurisprudence of the European Court of Human Rights which, in the celebrated *Soering* case,²⁰³ effectively established an absolute bar against refoulement with respect to persons facing the death penalty in a prospective destination country.²⁰⁴ There are no obvious links between disaster-induced displacement and the article 15(a) prohibition against the death penalty and execution. Nonetheless, as we shall see below, the *Soering* case—decided on the grounds of article 3 ECHR—is the keystone of a potentially relevant line of European jurisprudence.

^{197.} European Parliament, PE 462.422, Study of the Directorate-Gen. for Internal Policies, Policy Dep’t C-Citizens’ Rights and Constitutional Affairs, “*Climate Refugees*” *Legal and Policy Responses to Environmentally Induced Migration*, at 52 (Dec. 2011).

^{198.} MARGIT AMMER, CLIMATE CHANGE AND HUMAN RIGHTS: THE STATUS OF CLIMATE REFUGEES IN EUROPE 62 (2009) available at <http://www.udhr60.ch/report/ClimateChange-paper0609.pdf>.

^{199.} McAdam, *supra* note 185, at 474-93.

^{200.} Commission Proposal for 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, at 48 COM (2001) 510 final (Sept. 12, 2001) [hereinafter Commission Proposal for a Qualification Directive].

^{201.} McAdam, *supra* note 185, at 487.

^{202.} Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, 1496 U.N.T.S. 281, Apr. 28, 1983.

^{203.} *Soering v. United Kingdom*, App. No. 14038/88, 161 Eur. Ct. H.R. 4 (ser. A) (1989).

^{204.} Hailbronner, *supra* note 195, at 1140.

The Commission drafted article 15(b) relating to torture, inhuman or degrading treatment or punishment so as to reflect the content of article 3 of the ECHR.²⁰⁵ In its proposal, the Commission also suggested that when establishing whether an applicant qualifies for subsidiary protection under this article, “Member States should not apply a greater threshold of severity than is required by the ECHR.” That is to say, the Commission proposed that the Qualification Directive should be at least as generous as the ECHR.

This proposal caused a good deal of apprehension among Member States. The Commission was obliged to draft the Directive’s ground-breaking subsidiary protection provisions with little if any reliance “upon international treaty or customary international law,”²⁰⁶ and therefore, without a well-developed jurisprudence—such as that associated with refugee law—the subsidiary protection provisions would be susceptible to potentially far-reaching judicial interpretation. Ultimately, it is the European Court of Human Rights that proscribes the ECHR’s metes and bounds, and because the Court has arguably interpreted the European Convention, especially article 3, in a robust and liberal fashion, Member States were concerned about the implications of including, as a ground for subsidiary protection, a concept as potentially far-reaching as “inhuman treatment.”²⁰⁷

The Dutch Presidency raised the case of *D. v. United Kingdom*, in which the ECtHR held that because such action would amount to “inhuman treatment,” implementation of the United Kingdom’s decision to remove an HIV-AIDS patient to his native St. Kitts and Nevis would violate article 3 of the European Convention on Human Rights.²⁰⁸

Mr. D. was a one-time drug courier who discovered his HIV status only after serving time in a British prison for illegally attempting to enter the U.K. with £120,000 worth of cocaine. Applicant was nearing death, and it was undisputed that return to his country of origin, where he would not have adequate healthcare, family connections, housing, or social support, would reduce his already short life expectancy yet further, perhaps by more than fifty percent.²⁰⁹ This was so because of the applicant’s “very exceptional circumstances,” which circumstances included not only the applicant’s state of health, but also the inferior healthcare infrastructure and meager socioeconomic conditions that would have awaited him upon his return to St Kitts, a developing country.²¹⁰

The court took note of St. Kitt’s poor health and living conditions, which would, presumably, have had an adverse effect on applicant’s health—specifically, “a number of *serious environmental problems*, such as inadequate disposal of solid and liquid waste - especially

^{205.} Commission Proposal for a Qualification Directive, *supra* note 200, at 26.

^{206.} Hailbronner, *supra* note 195, at 1138.

^{207.} *Id.* at 1141.

^{208.} Case of *D. v. United Kingdom*, App. No. 70/1995/576/662, 24 Eur. Ct. H. R. 423, ¶ 53 (2007).

^{209.} *Id.* at ¶ 15.

^{210.} *Id.* at ¶ 54.

untreated sewage - into coastal lands and waters, resulting in coastal zone degradation, fish depletion and health problems (gastroenteritis)...”²¹¹

Nonetheless, it neither was the environmental conditions nor, in the event of return, applicant’s prospect of extraterritorial suffering in St. Kitts that constituted “inhuman treatment.” Rather, it was *the act of return itself* that constituted “inhuman treatment,” and therefore, a violation of article 3.²¹² As the Court explained, “Although it cannot be said that the conditions which would confront [applicant] in the receiving country are themselves a breach of the standards of Article 3 (art. 3), [applicant’s] removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment.”²¹³ Thus, the locus of the harm was not St. Kitts, but rather the United Kingdom, where authorities would implement the decision to return applicant. In some respects, it is easy to imagine how the Court could extend a case like *D.* to prohibit the return of disaster victims who might face similarly distressing circumstances.

In order to avoid the inclusion of such “compassionate grounds cases” as *D. v. United Kingdom* within the scope of the Directive’s subsidiary protection regime, the Dutch Presidency proposed “to limit the scope of sub-paragraph (b) by stating that the real risk of torture or inhuman or degrading treatment or punishment must prevail *in [the applicant’s] country of origin*.”²¹⁴ In addition, the Council also inserted into the Directive’s preamble a recital to the effect that,

Those third country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive.²¹⁵

This recital may well inform interpretation of article 15(b), helping to distinguish the “inhumane treatment” concept (a judicially enforceable, rights-based ground for claims of international protection) from a discretionary grant of humanitarian protection. However, one cannot therefore conclude that the concept of “inhuman or degrading treatment” adopted in the Directive is wholly distinctive from the concept of “inhuman or degrading treatment” as developed through ECtHR case law.²¹⁶ Consequently, and despite the adopted proposals, article 15(b) remains closely aligned with article 3 ECHR.

^{211.} *Id.* at ¶ 32 (emphasis added).

^{212.} HEMME BATTJES, *The Common European Asylum System*, in IMMIGRATION AND ASYLUM LAW: CURRENT DEBATES 27, 46 (Jean-Yves Carlier & Philippe De Bruycker eds., 2005).

^{213.} *Case of D.*, at ¶ 53.

^{214.} Council Presidency Note to Strategic Committee on Immigration, Frontiers and Asylum, No. 12148/02 ASILE 43 at 6 (Sept. 20, 2002) (emphasis added) [hereinafter Council Presidency Note].

^{215.} Qualification Directive, *supra* note 175, rec. 9. Qualification Directive Recast, *supra* note 183, rec. 15.

^{216.} Hailbronner, *supra* note 192, at 1142.

Nonetheless, in reading the tea leaves of prior cases, the prospects for persons displaced by natural disaster are not promising. This is so even if we assume that article 3 ECHR and article 15(b) of the Qualification Directive are entirely coextensive,²¹⁷ and, therefore, that the outer limits of relevant ECtHR's case law wholly determine the status of environmentally displaced persons under this provision of the Directive.²¹⁸

Under article 3 of the ECHR, *Soering* has come to stand for the principle that no State Party may remove an individual where such removal would expose the applicant to a “real risk of exposure to torture or inhuman or degrading treatment or punishment.”²¹⁹ Exposure to “real risk” may take the form of act or omission—for instance, where a State fails to protect the applicant from a non-State actor.²²⁰ Furthermore, and notwithstanding the extent of an applicant's otherwise reprehensible personal conduct, the article 3 prohibition is absolute.²²¹ There is “no provision for exceptions” and the Convention permits of “no derogation...even in the event of a public emergency threatening the life of the nation.”²²²

Nonetheless, inhuman treatment under article 3 must reach “a minimum level of severity” involving “actual bodily injury or intense physical or mental suffering.”²²³ Assessment of the minimum level of severity needed to reach this threshold is “relative,” and takes into account “all the circumstances of the case,” including not only objective factors that define the “treatment,” such as its duration and intensity, but also subjective factors, such as the physical and psychological consequences the treatment is likely to have on the applicant as a function of, for instance, the individual victim's “sex, age and state of health.”²²⁴ The actor's infliction of inhuman treatment need not be deliberate.²²⁵

While the ECtHR has not precluded the possibility that generalized violence may violate article 3, it seems, at least in the context of climate change, that such violence would have to

^{217.} The European Court of Justice has said that article 15(b) “corresponds, in essence” to article 3 ECHR. *See* Case C-465/07, *Elgafaji v. Staatssecretaris van Justitie*, ¶ 28, 2009 E.C.R. I-00921. By contrast, the content of article 15(c) of the Qualification Directive is distinct from that of article 3 ECHR, demanding independent interpretation, albeit with due regard for fundamental rights guaranteed under the ECHR and elsewhere.

^{218.} *See* McAdam, *supra* note 23, at 24-28 (to which our case law review is indebted).

^{219.} *Soering v. United Kingdom*, App. No. 14038/88, 161 Eur. Ct. H.R. 4 (ser. A), ¶ 88 (1989).

^{220.} *Regina v. Secretary of State for the Home Department, ex parte Bagdanavicius and another* [2005] U.K.H.L. 38 [24] (appeal taken from Eng. & Wales).

^{221.} *Chahal v. United Kingdom*, App. No. 70/1995/576/662, 23 Eur. H.R. Rep. 413, ¶ 79 (1996); *Saadi v. Italy*, App. No. 37201/06, 49 Eur. H.R. Rep. 30, 761, ¶¶ 138-39 (2008).

^{222.} *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25, ¶ 163 (1980).

^{223.} *Pretty v. United Kingdom*, App. No. 2346/02, 35 Eur. H.R. Rep. 1, ¶ 52, (2002).

^{224.} *N. v. United Kingdom*, App. No. 26565/05, 47 Eur. H.R. Rep. 39, ¶ 29 (2008). The Court goes on to say that the “suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible.”

^{225.} *Labita v. Italy*, App. No. 26772/95, 46 Eur. H.R. Rep. 1228, ¶ 120 (2008).

reach a “very high threshold.”²²⁶ Thus, given the level of severity of harm the European Court of Human Rights currently requires to establish an article 3 violation, it is “doubtful” that an applicant, based on the impacts of climate change, could substantiate a claim.²²⁷ Finally, McAdam points out that while it is frequently cited as evidence that protection claims based on adverse environmental impacts may succeed,²²⁸ *D. v. United Kingdom* remains “the *only* case in which non-removal has been substantiated on the basis of socio-economic deprivation...[and the] standard in such cases is extremely high.”²²⁹ Indeed, “since D was decided the Strasbourg court has effectively been at pains...to avoid any extension of the exceptional category of case which D represents.”²³⁰ The court decided *D*’s case not on the basis of socioeconomic factors alone, but on the basis of an “exceptional combination of factors,”²³¹ including the fact that *D* was just months, if not weeks, away from certain death due to his deteriorated health condition.

Consequently, even if we accord to article 15(b) of the Qualification Directive the full scope of application available under current article 3 ECHR jurisprudence, it seems that persons displaced by environmental disaster would still have to meet a very high hurdle. At any rate, as has been discussed above with respect to the statement of the Dutch Presidency, it seems that while Member States included article 15(b) as a reflection of commitments made under article 3 of the European Convention on Human Rights, they nonetheless, sought to limit the provision’s scope, at least in some respects.

In addition, there is further specific evidence that Member States sought to exclude victims of natural disaster. At one point, Member States had contemplated including a subsection 15(d) providing that “serious harm” would also include:

²²⁶. McAdam, *supra* note 23, at 25.

²²⁷. *Id.*

²²⁸. See, e.g., Vikram Kolmannskog & Finn Myrstad, *Environmental Displacement in European Asylum Law*, 11 EUR. J. MIGRATION & L. 313, 321-22 (2009).

²²⁹. McAdam, *supra* note 23, at 26. Note that in two recent cases the European Court of Human Rights found a violation on the basis of socio-economic deprivation. However, both cases are distinguished by the fact that deprivation resulted not from some naturally occurring illness or lack of sufficient resources, but rather from the deliberate acts or omissions of public authorities. See *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 2011 Eur. Ct. H. R. 108, available at <http://www.unhcr.org/refworld/docid/4d39bc7f2.html> (accessed July 1, 2012) (holding that Belgium violated article 3 ECHR by exposing returned asylum applicant to living conditions in Greece which in themselves constituted an article 3 breach); see also *Sufi and Elmi v. United Kingdom*, App. Nos. 8319/07 & 11449/07, 2011 Eur. Ct. H. R. 1045, available at <http://www.unhcr.org/refworld/docid/4e09d29d2.html> (accessed July 1, 2012) (holding that return to Somalia would put applicants at real risk of article 3 ill-treatment on account of dire humanitarian conditions in refugee camps). But see *R.S. (Zimbabwe) v. Secretary of State for the Home Department*, [2008] EWCA Civ. 1421, [¶ 31] (Eng. & Wales)

²³⁰. *N. v. Secretary of State for the Home Department*, [2003] EWCA Civ. 1369, [¶ 39] (Eng. & Wales), available at <http://www.unhcr.org/refworld/docid/4162a48f4.html> (accessed July 1, 2012).

²³¹. McAdam, *supra* note 23, at 26.

acts or treatment outside the scope of sub-paragraphs (a) to (c) in an applicant's country of origin, or in the case of a stateless person, his or her country of former habitual residence, when such acts or treatment are sufficiently severe to entitle the applicant to protection against refoulement in accordance with the international obligations of Member States.²³²

The intent behind proposed sub-paragraph (d) was to expand the definition of subsidiary protection to include violations of human rights other than those deriving from article 1 of the 6th Protocol to the ECHR and article 3 ECHR, which were, as we have learned, already covered under Qualification Directive articles 15(a) and (b). Thus, adopting proposed article 15(d) would have invited consideration of numerous *other* ECHR provisions as judicially enforceable grounds supporting international protection claims.²³³

With respect to proposed article 15(d), the Dutch Presidency insisted that, “By using the wording ‘acts or treatment’ it is ensured that only man-made situations, and not for instance situations arising [from] *natural disasters or situations of famine*, will lead to the granting of subsidiary protection.”²³⁴ Regardless, because a large number of Member States voiced concerns about the possible consequences of including the provision, which was “too vague and could allow a wide margin of interpretation,”²³⁵ subsection 15(d) was never adopted. Consideration and rejection of 15(d) provides further evidence that, in adopting the Qualification Directive, Member States did not intend to include victims of natural disaster within the gambit of subsidiary protection, and, in fact, arguably made, if not a deliberate, then at least an informed decision to exclude such persons.

The Directive contains other obstacles to the inclusion of disaster victims as well. For instance, recital 26 [Recast rec. 35] says that, “Risks to which a population of a country or a section of the population is generally exposed do *normally* not create in themselves an individual threat which would qualify as serious harm.”²³⁶ Of course, any natural catastrophe significant enough to generate cross-border displacement will, by definition, expose the population of a country, or a section thereof, to serious harm, at least in the colloquial sense. Theoretically, a subsection of the larger affected group (if only one or two persons) might be able to establish that certain combination of factors which rises to the level of “exceptional circumstances” required at least to bar their removal under ECHR article 3 and Directive article 15(b). Use of the word, “normally,” signals that there may be some room for

²³². Council Presidency Note, *supra* note 214, at 11.

²³³. For instance, ECHR article 6 (right to a fair trial), which the ECtHR highlighted in *Soering* as possibly supporting an inherent prohibition against refoulement. *Soering v. United Kingdom*, App. No. 14038/88, 161 Eur. Ct. H.R. 4, ¶ 113 (ser. A) (1989).

²³⁴. Council Presidency Note, *supra* note 214, at 7 (emphasis added).

²³⁵. *Id.* at 11 n.1.

²³⁶. Qualification Directive, *supra* note 175, rec. 26 (emphasis added). See Qualification Directive Recast, *supra* note 183, rec. 35.

exceptions to the rule.²³⁷ Still, recital 26 [Recast rec. 35] stands as an interpretive guidepost that further limits application of the Qualification Directive to disaster victims.

In addition, comparing definitional article 2(c) [Recast 2(d)] (refugee) with article 2(e) [Recast 2(f)] (person eligible for subsidiary protection) it is clear that the standard of proof for subsidiary protection is more restrictive. The “well-founded fear of being persecuted” test for refugee status contains both an objective and a subjective component while the subsidiary protection test—“substantial grounds...for believing that the [applicant]...would face a real risk of suffering serious harm”—contains only an objective element. In other words, when adjudicating refugee status claims, decision-makers may consider an applicant’s *subjective* fear of persecution on one of the five grounds provided in the Refugee Convention. In contrast, the dispositive factor in determining eligibility for subsidiary protection status is the decision-maker’s belief, based on *objective* facts, as to whether or not “substantial grounds” exist. The applicant’s subjective belief (or subjective fear) is inconsequential. Thus, an applicant seeking subsidiary protection status under the Qualification Directive must rise to a higher standard of proof than one seeking refugee status.

Finally, article 8(1) instructs that, as part of the assessment of an application for protection, Member States may preclude an applicant, “if in a part of the country of origin there is...no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.”²³⁸ This “internal flight alternative” provision is assessed “at the time of taking the decision,”²³⁹ not at the time the applicant fled. Whereas the 2004 Directive provided that an internal flight alternative may negate the need for international protection, “notwithstanding technical obstacles to return to the country of origin,”²⁴⁰ recast article 8 takes the better approach, providing that the need for protection may be negated only where the applicant “can safely and legally travel to and gain admittance to [the “safe”] part of the country and can reasonably be expected to settle there.”²⁴¹ This change benefits those displaced by disaster, at least to the extent that technical obstacles to return may exist under a given set of individualized circumstances.

²³⁷. Use of the word “normally” in recital 26 [QDR rec. 35] may provide a degree of flexibility allowing for the “possibility of an exceptional situation which would be characterized by such a high degree of risk that substantial grounds would be shown for believing that that person would be subject individually to the risk in question.” Hailbronner, *supra* note 192, at 1150.

²³⁸. Qualification Directive, *supra* note 175, art. 8(1). Compare with the new text in the recast Directive, which provides that, “...if in a part of the country of origin, he or she: (a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or (b) has access to protection against persecution or serious harm as defined in Article 7; 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.” See Qualification Directive Recast, *supra* note 183, art. 8(1).

²³⁹. Qualification Directive, *supra* note 175, art. 8(2).

²⁴⁰. *Id.* art. 8(3).

²⁴¹. Qualification Directive Recast, *supra* note 183, art. 8(1).

Still, taken as a whole, article 8 works against disaster migrants. The “internal flight alternative” is relevant in the context of refugee status determination because while an asylum-seeker’s well-founded fear of persecution is most often equally sustained throughout the entire territory of his country of origin, there are instances where an applicant may reasonably be expected to return to a part of his country of origin in which his safety is assured—for instance, to an area controlled by political forces other than the applicant’s persecutors. However, in the context of natural disaster, it is unlikely that a catastrophic event, especially a rapid-onset event, would affect the entire territory of a nation to the extent that the applicant may not “reasonably be expected” to return to *some* part of the territory.²⁴² The result is that the internal flight alternative would preclude from international protection virtually all persons fleeing to the EU on account of a natural disaster.

Given the cumulative effect of these obstacles, we may conclude that the European Union’s Qualification Directive does little, if anything, to fill the protection gap generated by disaster-induced displacement.

Temporary Protection Directive

Some authors have suggested that the European Union’s Temporary Protection Directive (hereinafter “TPD”) might serve to protect those displaced by natural disaster.²⁴³ However, a closer review of the Directive’s individual provisions and overriding purpose suggests such an outcome is highly unlikely, for legal, political, and institutional reasons.

The Council adopted Directive 2001/55²⁴⁴ in the aftermath of the phased conflict that raged across Yugoslavia throughout the 1990s and, more specifically, on the heels of the 1999 NATO intervention in Kosovo.²⁴⁵ Contemporary events in the Balkans provided the impetus for European efforts to establish a temporary protection mechanism. Recital 3 of the TPD preamble recalls “persons displaced by the conflict in the former Yugoslavia,”²⁴⁶ and recital 6 specifically references the European Council’s call for the Commission and Member States “to learn the lessons of their response to the Kosovo crisis...”²⁴⁷ In the

^{242.} Recast article 8 drops the “reasonably be expected” language, more precisely linking the so-called internal flight alternative to the question of whether or not there is a part of the country in which the applicant has no well-founded fear of persecution or of serious harm, or, alternatively, whether or not the person is protected from persecution and serious harm in that region.

^{243.} See, e.g., Kolmannskog & Myrstad, *supra* note 228, at 316-19.

^{244.} Temporary Protection Directive, *supra* note 176.

^{245.} See PRESIDENCY CONCLUSIONS, TAMPERE EUROPEAN COUNCIL, ¶ 16 (15 and 16 October 1999) (urging the Council, barely four months after conclusion of the NATO bombing campaign in the Balkans, “to step up its efforts to reach agreement on the issue of temporary protection for displaced persons on the basis of solidarity between Member States.”) *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00200-r1.en9.htm.

^{246.} Temporary Protection Directive, *supra* note 176, rec. 3.

^{247.} *Id.* rec. 6.

“Explanatory Memorandum” accompanying its proposal for a Council directive on temporary protection, the Commission mentioned Kosovo no fewer than 19 times.²⁴⁸ Indeed, Kosovo weighed heavily on the European polity, and experience gained during that crisis informed negotiation of the TPD.²⁴⁹ However, while the Balkans link may inform interpretation of the Directive’s purpose, the TPD is not a “Balkans Directive,”²⁵⁰ as it is structured to protect displaced persons arriving in the EU from anywhere in the world, either spontaneously or as part of an organized evacuation.²⁵¹

By its own terms, the TPD seeks to address two overriding goals: 1) “to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin,” and 2) “to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons.”²⁵² On its face, this statement of purpose is broad enough to embrace the phenomenon of disaster-induced displacement.

TPD article 2(c) defines “displaced persons” as:

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

- (i) persons who have fled areas of armed conflict or endemic violence;
- (ii) persons at serious risk of, or who have been the victims of, systematic or [generalized] violations of their human rights.²⁵³

From this definition several arguments emerge in support of the notion that the Temporary Protection Directive might benefit those displaced by environmental disaster.

^{248.} Proposal for a Council Directive on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof, COM (2000) 303 final (May 24, 2000) [hereinafter Commission Proposal for a TPD].

^{249.} Achilles Skordas, *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*, in EU IMMIGRATION AND ASYLUM LAW, *supra* note 61, at 803, 822.

^{250.} Opinion of the Economic and Social Committee on the ‘Proposal for a Council Directive on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof,’ 2001 O.J. (C 155) 21, 24.

^{251.} Temporary Protection Directive, *supra* note 176, art. 2(c).

^{252.} *Id.* art. 1.

^{253.} *Id.* art. 2(c) (emphasis added).

First, with respect to article 2(c)(i), where putative beneficiaries have fled armed conflict or endemic violence instigated or perhaps exacerbated by a natural disaster, such beneficiaries may well qualify. The links between environmental degradation, conflict, and displacement require further research.²⁵⁴ While some foresee a future world defined by climate-induced conflict, others argue that “security” is not the proper policy framework for climate migration discourse.²⁵⁵ At any rate, to the extent that some nexus between environment, conflict, and displacement does, in fact, exist, the TPD may provide protection for persons displaced by armed conflict or endemic violence set in the context of environmental disaster. However, because the link between environmental degradation and conflict is tenuous, this provision may prove of little value to claimants.

Second, with respect to article 2(c)(ii), where “systemic or generalized violations of human rights” are instigated or exacerbated in the context of an environmental disaster, beneficiaries who flee such circumstances may likewise qualify for protected status under Directive 2001/55. One may characterize human rights violations as “systemic” where there is a recurring pattern as well as a sufficient degree of organization and planning. Violations are “generalized,” where such violations are widespread and constitute a serious breach, or serious breaches, of international human rights norms; that is, to say that “generalized” violations have “both a quantitative and qualitative aspect.”²⁵⁶ Generalized violations of human rights “often occur in, during or after a natural disaster,”²⁵⁷ and to that extent, article 2(c)(ii) may prove helpful to the claimant who has suffered a qualifying human rights violation in the context of a natural disaster. However, as discussed earlier, UNHCR has argued that it may be difficult to prove such violations.

Third, and perhaps most intriguing, use of the language “in particular” to introduce articles 2(c)(i) and (ii), suggests that this list is not exhaustive. Accordingly, the Directive may extend equally to other categories of persons, for instance, disaster victims. Advocates often cite this “non-exhaustive” aspect of article 2(c) as evidence that the TPD may, in theory, provide such protection.²⁵⁸ However, as closer analysis will show, the fact that this list may be non-exhaustive does not mean that we may tack on additional groups of beneficiaries without regard to any criteria whatsoever.

Article 3(1) says that, “Temporary protection shall not prejudice recognition of refugee status under the Geneva Convention.”²⁵⁹ However, this provision indicates only that the Directive creates no legal presumption with respect to “Convention Refugee” status. This is not to say

²⁵⁴ U.N. High Comm’r for Refugees, *supra* note 94, at 9.

²⁵⁵ See e.g., JAMES R. LEE, *CLIMATE CHANGE AND ARMED CONFLICT: HOT AND COLD WARS* (2009) (prophesying world in which climate change drives conflict and security concerns); *but see* Gregory White, *Climate Change and Migration: Security and Borders in a Warming World* (2011) (arguing for the “de-securitization” of climate-induced migration discourse).

²⁵⁶ Skordas, *supra* note 249, at 828.

²⁵⁷ Kolmannskog & Myrstad, *supra* note 228, at 316-19.

²⁵⁸ European Parliament, *supra* note 197, at 54.

²⁵⁹ Temporary Protection Directive, *supra* note 176, art. 3(1).

that in determining whether to extend protection, the Council is precluded from considering, as a factual matter, whether members of the prospective beneficiary group “may” qualify for such status. Indeed, the language of article 2(c) seemingly urges the Council to undertake precisely such consideration of factual circumstances.

Article 2(c) speaks of displaced persons, “who *may* fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular...[2(c)(i) and (ii)].” While this language does not create a concrete condition, it is, at the same time, unlikely that the language simply requires that prospective beneficiaries either *may* fall within the scope of the named protection instruments or, conversely, *may not*. Such a “condition” is no condition at all, and renders the language of 2(c) superfluous, without any legal significance. An interpretation along these lines would be highly suspect because courts maintain a strong presumption that legislators do not encumber statutes with unnecessary language. In the United States, statutes are construed “so as to avoid rendering superfluous” any statutory language—a presumption overcome only in the most extraordinary circumstances.²⁶⁰ A similarly strong interpretive presumption appears in European jurisprudence, again, overcome only where not to do so would lead to absurd or abhorrent outcomes.²⁶¹

More likely, the language is meant substantively to characterize the “non-exhaustive” list that follows in 2(c)(i) and (ii). Accordingly, the subcategories under 2(c) may, in practice, expand to include other potential beneficiaries. However, the breadth of any additional subcategory is restricted by the scope of the various “instruments giving international protection.” Thus, victims of natural disaster may well be included as an additional beneficiary subcategory under the “non-exhaustive” list in article 2(c), but only to the extent that they “may” fall within the scope of other protection instruments.

Thus, arguably, the “who may fall within” language serves to create a presumption of fact²⁶² with respect to intended TPD beneficiaries, the presumption being that the factual circumstances associated with the flight of individual members of any prospective group of beneficiaries would not be unlike those circumstances associated with similarly situated individuals who qualify as refugees or persons otherwise in need of international protection.

^{260.} *Astoria Federal Savings & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991); *see also* *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2003) (interpreting word “law” broadly could render word “regulation” superfluous in clause applicable to a state “law or regulation”).

^{261.} *See* *C.R. v. United Kingdom*, App. No. 20190/92, 335C Eur. Ct. H.R. (ser. A), ¶ 40 (1995) (upholding House of Lords’ conclusion that word “unlawful” in national rape statute was mere surplusage and that giving effect to the word would contravene purpose of statute and inhibit removal of the common law fiction of marital immunity for rape, which had become anachronistic and offensive). *See generally* J. Kodwo Bentil, *Statutory Surplusage* 12 STAT. L. REV. 64 (1991).

^{262.} Distinguish a *presumption of fact*, a “rebuttable presumption that may be, but as a matter of law need not be, drawn from another established fact or group of facts,” from a *presumption of law*, a “legal assumption that a court is required to make if certain facts are established and no contradictory evidence is produced.” BLACK’S LAW DICTIONARY 1224 (8th ed. 2004).

Consequently, faced with a mass influx, the Council must, among other things, determine whether it is not unlikely that the displaced persons in issue would fall within the scope of the Geneva Convention or other international or national instruments.

To the extent that disaster victims “may” qualify as refugees or persons otherwise in need of protection, they would meet the factual presumption implied by the language of article 2(c). Conversely, if it is clear that such persons *do not* meet this factual presumption, they would not fall within the intended scope of the Temporary Protection Directive. As we have already seen, disaster victims do not easily meet the article 2(c) presumption. They do not fit readily within current protection instruments, such as the Refugee Convention.

The Directive’s *travaux préparatoires* from the Working Party on Asylum²⁶³ supports this assessment, revealing that Finnish delegates to the negotiation made an effort, during the course of several meetings in January 2001, to add “persons who have had to flee as a result of natural disasters,” to article 2(c).²⁶⁴ However, Spanish and Belgian delegates opposed the initiative, pointing out that such potential beneficiaries “were not mentioned in any international instrument on refugees.”²⁶⁵ That the Belgian/Spanish argument prevailed suggests that Member States view the scope of article 2(c) as limited by the existing protection instruments mentioned therein.²⁶⁶ At the same time, the breadth of opposition to the Finnish proposal is difficult to gauge, because, in fact, either Belgium or Spain, acting alone, could have blocked the initiative regardless of how many other Member States might have supported the proposal. This is so because, at the time of the TPD’s adoption, the Council was required to act “unanimously.”²⁶⁷

In any case, within the Working Group on Asylum, the issue of natural disaster-induced displacement was “controversial.”²⁶⁸ Nonetheless, throughout the negotiation process, there seems to have been a shared understanding that the draft directive did not, in fact, include

^{263.} On the legal basis of article K.3(2)(b) TEU (then under the “Maastricht Treaty” regime), the Commission submitted two separate proposals for a joint action on temporary protection. However, those proposals fell to disagreement on burden-sharing and, subsequently, the Kosovo crisis. Following entry into force of the Amsterdam Treaty on May 1, 1999, the Commission adopted a new proposal on the basis of article 63(2)(a) and (b) EC. The Council (JHA) debated the proposal on May 29, 2000, and then referred the draft to a Working Party on Asylum for further negotiation. See Karoline Kerber, *The Temporary Protection Directive*, 4 EUR. J. MIGRATION & L. 193, 193-194 (2002).

^{264.} Council Document 6128/01 ASILE 15, 4 (Feb. 16, 2001).

^{265.} *Id.*

^{266.} Article 2(c) references not only the Geneva Convention and other international protection instruments, but also to “national” protection instruments. Presumably, the later would include, at the least, those of then-existing EU Member States. It would seem, therefore, that, if any Member State had included provisions for the victims of natural disaster within the scope of their contemporaneous national laws, as was indeed the case, then the Spanish/Belgian argument should have carried less weight.

^{267.} Consolidated Version of the Treaty Establishing the European Community art. 67(1), Dec. 24, 2002, 2002 O.J. (C 325) 60.

^{268.} Kerber, *supra* note 263, at 196 n.20.

those displaced by natural disasters. In its opinion on the Commission's draft Directive,²⁶⁹ the Economic and Social Committee took note of the fact that "the proposal only applies to people fleeing from political situations," and went on to say that "there might also be a case for a directive providing temporary reception and protection mechanisms for persons displaced by natural disasters,"²⁷⁰ implying that the Committee did not consider disaster victims to be included in the scope of the TPD as it presently stands.

That said, some contrary evidence points in the other direction. Following adoption of the TPD, then U.K. Home-Office Minister Desmond Browne said, "The Directive that we are implementing will ensure that each European Member State plays its part in providing humanitarian assistance to people forced from their homes by war and *natural disasters* and will enable a quicker coordinated response to prevent human suffering."²⁷¹ Surmising the legislative intent of a pluralistic political body, such as the Council, is fraught with challenges because different actors come to the table with different intentions and leave the table with different interpretations as to what has been agreed. Nevertheless, the record shows that the Council actively considered and rejected the inclusion of disaster victims.

Turning to other provisions, article 22(1) compels Member States to "take the measures necessary to ensure that the enforced return of persons whose temporary protection has ended and who are not eligible for admission is conducted with *due respect for human dignity*."²⁷² Consequently, Member States may not enforce return where, for instance, circumstances associated with a natural disaster in the country of origin would compromise such return to the extent that implementation would fall some degree short of the required "due respect for human dignity."²⁷³

In addition, article 22(2) creates an obligation to "consider any compelling humanitarian reasons which may make return impossible or unreasonable in specific cases."²⁷⁴ Therefore, in individual cases, Member States must at least "consider" any compelling humanitarian reasons that militate against enforced return, where return would be rendered either "impossible or unreasonable." Presumably, such "humanitarian reasons" would go beyond concerns regarding health or the continuity of education for minors, which the Directive

²⁶⁹. Commission Proposal for a TPD, *supra* note 248.

²⁷⁰. Opinion of the Economic and Social Committee on the 'Proposal for a Council Directive on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof,' 2001 O.J. (C 155) 21, 24.

²⁷¹. Press Release, U.K. Home Office, U.K. Plans in Place to Protect Victims of Humanitarian Disasters, 1 (Dec. 20, 2004) (emphasis added).

²⁷². Temporary Protection Directive, *supra* note 176, art. 22(1) (emphasis added).

²⁷³. The "with due respect for human dignity" requirement under article 22(1) is less stringent than the "safe and durable return... with due respect for human rights and fundamental freedoms and Member States' obligations regarding non-refoulement," requirement which must be met to effect an *ad hoc* termination of temporary protection under article 6(2).

²⁷⁴. Temporary Protection Directive, *supra* note 176, art. 22(2).

addresses more fully in separate provisions.²⁷⁵ It is at least conceivable that environmental degradation or other humanitarian conditions prevailing post-disaster could render return either impossible or unreasonable, at least for a subset of the affected group.

While article 22 will not serve to admit any disaster victims under the temporary protection scheme, it may provide relief for beneficiaries whose temporary protection has ended and who are not otherwise eligible for admission in a Member State.²⁷⁶

If granted, temporary protection lasts for one year, and “may be extended automatically” by two six month periods for a maximum of an additional year.²⁷⁷ After that, if the “reasons for temporary protection persist,”²⁷⁸ the Council may decide by qualified majority, on a proposal from the Commission²⁷⁹ to extend protection for up to one year. Consequently, a given cohort may enjoy temporary protection for a maximum of three years, after which point, “the general laws on protection and on aliens in the Member States shall apply.”²⁸⁰ Presumably, “general laws,” would include not only national Member State law, but also applicable international and regional EU law as well.²⁸¹

However, the Council can terminate protection “at any time” by a qualified majority acting on a proposal from the Commission.²⁸² The Council’s discretion is limited by the fact that it must base its decision to terminate on “establishment of the fact that the situation in the country of origin is such as to permit the safe and durable return of those granted temporary protection with due respect for human rights and fundamental freedoms and Member States’ obligations regarding non-refoulement.”²⁸³ Accordingly, in a case where the Council granted protection on the basis of some non-disaster related circumstances, it would seem that a natural disaster occurring in the country of origin subsequent to the Council’s decision would prevent termination of temporary protection prior to its natural expiration if the disaster, or its aftermath, would not permit “safe and durable” return conducted with “due respect for human rights and fundamental freedoms.”

Chapter III of the Directive sets forth the obligations of Member States toward those granted temporary protection, addressing concerns related to resident permits, visas, employment, family reunification, social assistance, housing, education, medical care, etc.²⁸⁴ For the most part, the Directive speaks of the “obligations of Member States,” rather than

^{275.} Articles 23(1) & (2).

^{276.} Article 22(1).

^{277.} Article 4(1).

^{278.} Article 4(2).

^{279.} The Commission is also required to “examine any request by a Member State that it submit a proposal to the Council.” *See id.*

^{280.} Temporary Protection Directive, *supra* note 176, art. 20.

^{281.} PEERS, *supra* note 57, at 344.

^{282.} Temporary Protection Directive, *supra* note 176, art. 6(1)(b).

^{283.} *Id.* art. 6(2).

^{284.} *Id.* arts. 8-19.

the “rights of persons enjoying temporary protection” status, thus implying that protected persons have no judicially enforceable rights in relation to the Member States,²⁸⁵ although article 29 provides that individuals “excluded from the benefit of temporary protection or family reunification” may mount a “legal challenge.”²⁸⁶

Finally, with respect to disaster-induced displacement, one must consider not only the scope of the Temporary Protection Directive as a regional instrument, but also its effect on related Member State legislation.²⁸⁷ The Directive sets forth as a primary purpose establishment of “minimum standards” for giving temporary protection in the event of a mass influx of displaced persons,²⁸⁸ and asserts that, “It is in the very nature of minimum standards that Member States have the power to introduce or maintain more [favorable] provisions”²⁸⁹ for persons enjoying temporary protection.

However, while the Directive may permit more favorable provisions for those who already enjoy temporary protected status, it is doubtful that it permits Member States to extend such status to displaced persons outside the scope of article 2(c). Under the Directive, Member States may extend their Chapter III obligations (on an individual basis) to persons who, having enjoyed temporary protection, then elect to participate in a voluntary return program (such extension having effect until the date of return).²⁹⁰ Member States may also “extend temporary protection...to additional categories of displaced persons over and above those to whom the Council [has already granted status], where [those persons] are displaced *for the same reasons and from the same country or region of origin*.”²⁹¹

Beyond this, Member State discretion seems to be substantially restricted. In fact, Peers and Rogers suggest that, in tandem with other, subsequently adopted EU immigration and asylum measures, the TPD now prohibits Member States from establishing distinctive, national temporary protection schemes.²⁹² If this is indeed the case, then Member States may lack the sovereign capacity to create any new temporary protection schemes that might grant status to victims of a natural disaster. Furthermore, the Treaty of Lisbon discards the

^{285.} Kerber, *supra* note 263, at 201.

^{286.} Temporary Protection Directive, *supra* note 176, art. 29. *See also id.* at 213 (suggesting provision of mere administrative review satisfies article 29).

^{287.} The Temporary Protection Directive does not apply to persons accepted under *pre-existing* national temporary protection schemes adopted prior to the Directive’s date of entry into force on Aug. 7, 2001 (See article 33). Temporary Protection Directive, *supra* note 176, art. 3(4).

^{288.} Temporary Protection Directive, *supra* note 176, art. 1.

^{289.} *Id.* rec. 12.

^{290.} *Id.* art. 21(3).

^{291.} *Id.* art. 7(1). At least three nations, France, Greece, and Poland have provided for such extended temporary protection in accord with article 7(1). *See* EUR. MIGRATION NETWORK, THE DIFFERENT NATIONAL PRACTICES CONCERNING GRANTING OF NON-EU HARMONIZED PROTECTION STATUSES 13 (2010) (emphasis added).

^{292.} EU IMMIGRATION AND ASYLUM LAW: TEXT AND COMMENTARY 466-67 (Steve Peers & Nicola Rogers eds., 2006).

“minimum standards” approach, calling instead for a “common policy” on temporary protection,²⁹³ though revision of the TPD is not currently under consideration.

The Council has never used the Temporary Protection Directive.²⁹⁴ At the height of the Arab Spring, faced with an influx of displaced persons from Tunisia and Libya, both Italy and Malta moved to invoke Directive 2001/55.²⁹⁵ The effort failed however when the Commission declined to advance a proposal to the Council on the basis that the influx of displaced persons did not qualify as “massive.”²⁹⁶ The failure of the Commission to invoke the TPD during the decade following its entry into force—notwithstanding armed conflict in Iraq, Afghanistan, Libya, Tunisia, Syria, and elsewhere—engenders two distinct reactions.

On one hand, invocation of temporary protection is “a procedure of exceptional character,”²⁹⁷ which should not be “used to circumvent or even evade [Member State] obligations flowing from the Geneva Convention.”²⁹⁸ The absence of a Commission proposal (and Council Decision) introducing temporary protection implies that the regular, “unexceptional,” system is working. That is, other national, regional, and international protection regimes, including the Geneva Convention, are judged sufficient to address protection concerns, and the influx of displaced persons is not of such magnitude as to create a “risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation.”²⁹⁹ Indeed, this “unexceptional” regime may offer disaster victims more robust, durable protection, at least to those who qualify.³⁰⁰

On the other hand, the Directive’s dormancy highlights the “high political threshold”³⁰¹ to which invocation is subject, and consequently, the practical limit of the TPD’s utility. First, only the Commission is qualified to invoke the Directive—through a proposal to the Council.³⁰² The role of the Member States is essentially limited to lobbying the Commission, which is required only to “examine [not even to “consider”] any request by a Member State that it submit a proposal to the Council.”³⁰³ The European Parliament is marginalized, enjoying the right merely to “be informed of” any Council Decision.³⁰⁴

^{293.} TFEU, *supra* note 56, art. 78(1).

^{294.} European Parliament, *supra* note 197, at 55. Confirmed in author’s interview with senior staff members from the European Council on Refugees and Exiles (Jan. 19, 2012).

^{295.} *Id.* at 54.

^{296.} Ademola Abass et al., *UNU-CRIS, Policy Brief, No. 1, Regional Responses to the Libyan Crisis* 5-6 (Sept. 2011), available at <http://www.cris.unu.edu/Policy-Briefs.508.0.html> (accessed Apr. 9, 2012).

^{297.} Temporary Protection Directive, *supra* note 176, art. 2(a).

^{298.} Commission Proposal for a TPD, *supra* note 248, at 4.

^{299.} Council Directive 2001/55/EC, art. 2(a), 2001 O.J. 212/12 (EC).

^{300.} EU IMMIGRATION AND ASYLUM LAW: TEXT AND COMMENTARY, *supra* note 292, at 463-464.

^{301.} European Parliament, *supra* note 197, at 55.

^{302.} Temporary Protection Directive, *supra* note 176, art. 5(1).

^{303.} *Id.* art. 5(5).

^{304.} *Id.*

In addition, the Council must take its Decision as to the “existence of a mass influx of displaced persons” on the basis of so-called Qualified Majority Voting (QMV), a complex super-majority formula demanding a significant degree of support among Member States.³⁰⁵ Complicating matters further, the term “mass influx” lacks any meaningful quantitative description, ensuring that the Council will decide what constitutes a “mass influx” on a case-by-case basis, without any enforceable standard. According to the Commission, beyond the fact that “the number of people must be substantial, it is impossible to quantify in advance precisely what constitutes a mass influx. The decision establishing the existence of a mass influx will rest with the Council.”³⁰⁶ Consequently, the existence of a “mass influx” is a purely political matter.

Thus, we are left to grapple with several conclusions regarding the TPD’s application to disaster victims: 1) the Council intended the TPD to serve as an “exceptional measure” only engaged in the event of a “mass influx,” the existence of which is determined on a subjective, case-by-case basis, 2) inclusion of so-called “environmental refugees” was actively debated in the Council and rejected, 3) little evidence points to a legal interpretation broad enough to encompass disaster-induced displacement, 4) a heightened political threshold for invocation presents a significant additional hurdle to inclusion of disaster-displaced persons, and 5) past EU practice during the decade following entry into force demonstrates a highly conservative posture with respect to invoking the TPD—even in situations of armed conflict (not dissimilar to the Kosovo crisis) which represent the Directive’s *raison d’être*.

Given this assessment, one can only conclude that the Temporary Protection Directive contributes little, if anything, to filling the protection gap generated by disaster-induced displacement.

Additional Provisions of Relevance

Several other provisions found in regional European Union law may be relevant to persons displaced by natural disaster. For instance, the Treaty on the Functioning of the European Union (TFEU), provides that in the event of an “emergency situation” characterized by a sudden inflow of third country nationals, the Council—acting on a proposal from the Commission and following consultation with the European Parliament—may adopt “provisional measures” on the basis of article 78(3) TFEU (former article 64(2) EC). In theory, such powers could be engaged to protect disaster victims, although one should note that, by the terms of the treaty, any provisional measures adopted under article 78(3) shall be “for the benefit of the Member State(s) concerned,” not necessarily for the benefit of the

^{305.} Rules governing qualified majority voting appear at article 238 TFEU. See FOLSOM, *supra* note 68, at 71-72 (providing a short narrative explanation of the complex system).

^{306.} European Parliament, *supra* note 197, at 14.

third country nationals. As with the Temporary Protection Directive, the Council has never used its article 78(3) powers.³⁰⁷

In addition, under article 9 of the so-called Return Directive,³⁰⁸ Member States *must* postpone return when it would “violate the principle of non-refoulement,”³⁰⁹ and *may* postpone removal for an appropriate period, based on the specific circumstances of an individual case. When considering such individual circumstances, Member States must take into account *inter alia*, technical obstacles to return, “such as lack of transport capacity.”³¹⁰ Therefore, to the extent that transportation to a disaster affected area has been compromised, national laws harmonized under the Return Directive could provide postponement of removal. Moreover, the list of obstacles to removal is non-exhaustive, providing a large measure of discretion. Thus, Member States can, in principle, invoke article 9(2) to postpone removal of disaster victims in the specific case of an individual subject to a return decision.³¹¹ Member States may also devise more favorable provisions.³¹²

Furthermore, in a 2011 European Parliament study on environmentally induced migration, the Directorate-General for Internal Policies recommended that any future review of the Return Directive could establish criteria for defining additional cases eligible for suspension of removal, either by specifying an additional generic category under the mandatory article 9(1), “such as citizens of countries affected by a natural disaster,” or by “providing a general mechanism to define relevant categories by Decision of the Council.”³¹³

Article 10A of the Lisbon Treaty requires that Member States “shall define and pursue common policies and actions,” including those designed to “assist populations, countries and regions confronting natural or man-made disasters” through a “high degree” of cooperation in the area of international relations.³¹⁴ While internally focused, a separate “solidarity clause” requires that, “the Union and its Member States shall act jointly in a spirit of solidarity if a Member State is...the victim of a natural or man-made disaster.”³¹⁵ In addition, Lisbon requires that humanitarian aid efforts be conducted within the Union’s “external action” (i.e. foreign affairs) framework, and, at least in part, for the purpose of providing “ad hoc assistance and relief and protection for people in third countries who are victims of natural or man-made disasters.”³¹⁶ What’s more, the actions of the Union and

³⁰⁷. PEERS, *supra* note 57, at 342.

³⁰⁸. Return Directive, *supra* note 177.

³⁰⁹. *Id.* art. 9(1)(a).

³¹⁰. *Id.* art. 9(2)(b).

³¹¹. European Parliament, *supra* note 197, at 69.

³¹². Return Directive, *supra* note 177, art. 4(a).

³¹³. European Parliament, *supra* note 197, at 69. Presumably, the Council would take such decisions on an ad hoc basis. Neither current Return Directive provisions, nor the proposed amendments serve to admit individuals displaced by disaster, only, for a time, to forestall their removal. See *Id.*

³¹⁴. Treaty of Lisbon, art. 10A.2.g.

³¹⁵. *Id.* at art. 188R.1.

³¹⁶. *Id.* at art. 188 J.1.

those of Member States must “complement and reinforce each other.”³¹⁷ In short, Lisbon provides a framework for both internal and external disaster response, a framework that is arguably broad enough to address disaster-migration challenges, but yet falls short of doing so in any express manner.

At the Council of Europe, a committee dealing with refugees and migration advocated that, “Europe should assume a pioneering role in standard setting in the field of legal protection of victims of environmental displacement and develop its own provisions to protect and assist environmental migrants through regional protection programmes.”³¹⁸ Later, the Parliamentary Assembly recommended that the Committee of Ministers “draft a new Protocol to the European Convention on Human Rights enshrining the right to a healthy and viable environment,”³¹⁹ and thereby enhancing human rights protection in the context of “climate change and environmental degradation.”³²⁰ The Assembly also recommended that the Committee of Ministers “seek avenues for extending the Guiding Principles [on Internal Displacements] to include people displaced by gradual environmental degradation processes, and to consider developing similar Guiding Principles to cover the rights of those moving across international borders for compelling environmental reasons (‘external displacement’).”³²¹

European policy-makers have also demonstrated leadership in the development of the intellectual analysis needed to confront the environment/migration nexus. For instance, the European Commission sponsored an initiative to develop case studies through the Environmental Change and Forced Migration Scenarios project (EACH-FOR).³²² The two year program, which ended in 2009, developed useful in-depth case-study scenarios on more than 23 countries, along with regional overviews and other analytical products.³²³

Disaster Displacement in European National Laws

Because their recognition under international law is limited, “[m]ost environmental migrants will be unlikely to meet the legal definition of a refugee under national law.”³²⁴ However, Member States do have some freedom to expand their national *complementary protection* schemes beyond the scope of subsidiary protection available under the Qualification

³¹⁷ *Id.*

³¹⁸ Eur. Parl. Ass., Comm. on Migration, Refugees and Population, *Environmentally Induced Migration and Displacement: A 21st Century Challenge*, ¶ 119, Doc. No. 11785 (2008).

³¹⁹ Eur. Parl. Ass., *The Challenges Posed by Climate Change*, Recommendation 1883, ¶ 5 (2009).

³²⁰ Eur. Parl. Ass., *supra* note 318, at ¶ 121.

³²¹ Eur. Parl. Ass., *Environmentally Induced Migration and Displacement: A 21st Century Challenge*, Recommendation 1862, ¶ 6.5 (2009).

³²² See ENVIRONMENTAL CHANGE AND FORCED MIGRATION SCENARIOS, <http://www.each-for.eu> (accessed Oct. 17, 2012).

³²³ ENVIRONMENTAL CHANGE AND FORCED MIGRATION SCENARIOS, http://www.each-for.eu/index.php?module=d_documents (accessed Oct. 17, 2012).

³²⁴ Martin, *supra* note 69, at 405.

Directive—within limits. The Directive’s exclusion clauses, for instance, impose such limits.³²⁵ In addition, the very concept of “harmonization” may impose further limits, since it is, in essence, at odds with the notion that EU Directives in the migration and asylum area set only minimum standards.³²⁶ Nonetheless, Member States still enjoy a degree of sovereign competence with respect to the establishment of national complementary protection regimes.³²⁷ Indeed, a recent European Migration Network (EMN) study found more than 60 varieties of so-called “non-EU harmonized protection statuses” throughout the Union.³²⁸

In rare instances, national law in select European countries provides express reference to victims of natural or environmental disaster. In other countries, one may interpret certain provisions broadly enough to meet the same purpose. In either case, States typically grant such relief as a matter of discretion. Broadly speaking, relief to disaster victims under national law in EU and select non-EU countries may fall into one of several categories, some of which may overlap in specific countries: 1) constitutional asylum, 2) complementary protection,³²⁹ 3) humanitarian protection, 4) temporary protection, 5) suspension of removal (tolerated stay), 6) impossibility of return, 7) grant of a residence permit (with no particular status attached), and 8) protection against statelessness.

Statelessness has been the focus of considerable discussion in the climate change and migration discourse, most specifically with respect to the prospect of small island nations being submerged by rising sea levels, thus leaving entire populations stateless *de facto*. The likelihood of such an event—as well as the legal analysis as to whether persons thus affected would be stateless *de jure* under international law—we leave to other writers.³³⁰

Here it is sufficient to note that to the extent *de jure* statelessness may be a consequence of global warming, the EMN has found that Finland, France, Greece, Hungary, Netherlands and Spain grant categorical protection to stateless persons, while Austria, Belgium, Finland, and Germany offer other forms of protection to such persons without a grant of formal “stateless” status. In principle, stateless persons are eligible for all existing protection statuses in Austria, Germany, Ireland, Malta, Netherlands, Poland, Portugal and Sweden. The legal basis upon which European nations grant stateless status and/or protection vary. Some

³²⁵. Hailbronner, *supra* note 192, at 1139. *See also* Joined Cases C-57 & 101/09, Bundesrepublik Deutschland v. B. and D. (Nov. 9, 2010) <http://curia.europa.eu/>.

³²⁶. Note that this tension dissipated somewhat following entry into force of the Treaty of Lisbon, which dispensed with the “minimum standards” concept, calling instead for a “uniform” status of asylum and subsidiary protection. TFEU, *supra* note 56, arts. 78.2(a)-(b).

³²⁷. STEVE PEERS, *supra* note 57, at 307-12.

³²⁸. EUR. MIGRATION NETWORK, *supra* note 291, at 6.

³²⁹. In distinguishing “complementary” from “subsidiary” protection, McAdam has commented that, “If ‘complementary protection’ describes the role of human rights law in broadening the categories of persons to whom international protection is owed beyond article 1A(2) of the Refugee Convention, then ‘subsidiary protection’ is a regionally-specific political manifestation of the broader legal concept.” McAdam, *supra* note 185, at 465.

³³⁰. *See e.g.* McAdam, *supra* note 93, at 105-129.

countries grant status to stateless persons according to international legal obligations under the 1954 United Nations Convention relating to the Status of Stateless Persons,³³¹ while others, France for instance, grant status on the basis of a national policy established to reflect domestic case law decisions.³³²

Setting the issue of statelessness aside, explored further below are select European national provisions that may offer relief for persons displaced by natural disaster.

Republic of Austria

At one time, Austria provided for issuance of a residence permit to third-country nationals residing in the federal territory where the individual's case was "particularly deserving of consideration, on *humanitarian grounds*."³³³ However, amendments deleted this provision of the Settlement and Residence Act in 2009.³³⁴

Section 8 of the current version of the Act provides that, "In times of armed conflict or *other circumstances threatening the safety of entire population groups*,"³³⁵ the Federal Government may by ministerial order grant a temporary right of residence to displaced persons who can find no protection elsewhere. Under any ministerial order so issued, entry and duration of residence must be regulated "with due regard for the circumstances" of the particular case.³³⁶ The section also provides for settlement permits—issued on a group basis—where "permanent integration becomes necessary as a result of the prolonged duration of the circumstances" that initially instigated the need for protection.³³⁷

This is interesting because most discretionary provisions granting relief on humanitarian grounds address not groups, but rather individuals, who may have specific humanitarian circumstances, such as the need to complete an intended course of study or to undergo a specific medical procedure. Arguably, authorities could employ section 76 temporary protection status to assist groups of persons displaced by environmental disaster. Note,

³³¹. Convention Relating to the Status of Stateless Persons, *supra* note 92 (21 EU Members States are party to the Convention).

³³². See EUR. MIGRATION NETWORK, *supra* note 291, at 57-61.

³³³. Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich [Federal Law on Settlement and Residence in Austria] [SRA] BUNDESGESETZBLATT [BGBL] I No. 100/2005 [Federal Law Gazette] in the version BGBL I No. 31/2006 § 72(1) (2006) (emphasis added).

³³⁴. EUR. MIGRATION NETWORK, NATIONAL CONTACT POINT, THE PRACTICES IN AUSTRIA CONCERNING THE GRANTING OF NON-EU HARMONISED PROTECTION STATUSES, 21 n.52 (n.d.).

³³⁵. Federal Law on Settlement and Residence in Austria § 76(1) (emphasis added).

³³⁶. *Id.* § 76(2).

³³⁷. *Id.* § 76(3).

however, that in practice, Austria has never actually used the temporary protection provisions outlined above.³³⁸

Kingdom of Belgium

When the Council fails to trigger temporary protection at the EU level, Belgium may grant national temporary protection on a group basis. The government grants such protection in an *ad hoc* fashion via a ministerial circular, which is an administrative as opposed to a legislative instrument. While the power has been used in the past to protect those fleeing “internal turmoil,” it seems that it has never been used to protect persons displaced by disaster, and furthermore, has not been used since Directive 2001/55/EC came into force.³³⁹ However, as a bilateral political matter, authorities did decide in 2010, not to forcibly remove individuals then in Belgium due to massive flooding in Pakistan.³⁴⁰ This was not a form of temporary protection, but rather relief from removal.

The Belgian Aliens Act article 9(a) also permits individuals to apply for a residence permit under “exceptional circumstances,” essentially a form of humanitarian regularization.³⁴¹ To be clear, article 9(a), does not, however, provide that an applicant may secure a residence permit on the basis of humanitarian concerns. Rather, it permits an exception to a procedural rule that compels a foreign national to request a residence permit at a Belgium embassy or mission abroad.³⁴² The applicant is generally required to produce an identity document, and must also establish sufficient justification for applying in Belgium (rather than abroad), as well as sufficient justification for remaining in Belgium.³⁴³

What’s more, the Aliens Act does not define the criteria under which “exceptional circumstances” are qualified, which, in effect, means that the grant of any residence permit on such grounds is purely discretionary.³⁴⁴ While a ministerial instruction once provided some guidance as to how to interpret the phrase, the Conseil d’Etat annulled this instruction in 2009.³⁴⁵ Nonetheless, authorities continue to evaluate applications on the basis of criteria

³³⁸. EUR. MIGRATION NETWORK, *supra* note 291, at 31.

³³⁹. MARLEEN MAES ET AL., EU AND NON-EU HARMONIZED PROTECTION STATUSES IN BELGIUM 25 (2009) (summary updated, May 2011).

³⁴⁰. European Parliament, *supra* note 197, at 57.

³⁴¹. Loi du 15 Décembre 1980 sur l’accès au territoire, le séjour, l’établissement et ‘éloignement des étrangers, Dec. 15, 1980 [Act of December 15, 1980 on Access to Territory, Residence, Establishment and Deportation of Aliens] art. 9(a) (Belg.).

³⁴². MARLEEN MAES ET AL., *supra* note 342, at 47.

³⁴³. *Id.*

³⁴⁴. *Id.*

³⁴⁵. Raad van State [RvS] [Council of State] Dec. 9, 2009, No. 198.769, VERZAMELING VAN ARRESTEN DE RAAD VAN STATE [Arr.RvS], 2009 (Belg.).

set forth in the annulled instruction, albeit, under the rubric of discretionary powers rather than the authority of the instruction itself.³⁴⁶

Under the ministerial instruction, “exceptional circumstances,” would include, for instance, “pressing humanitarian situations.”³⁴⁷ Further instruction provides that, “as a primary principle,” pressing humanitarian situations exist where removal of the applicant would violate an international human rights treaty, in particular the UN Convention on the Rights of the Child and the ECHR.³⁴⁸ A manual outlining application of the ministerial instruction clarifies the general criteria that define a “pressing humanitarian situation:” 1) the situation must be of such a pressing nature that the person cannot free himself of it; 2) removal of the person would constitute a violation of a fundamental right with direct applicability in Belgium; and 3) further residence in Belgium is the only solution.³⁴⁹ Given the discretionary application of this interpretive framework, it is at least conceivable that authorities might interpret the phrase, “exceptional circumstances” broadly enough to include a natural or environmental disaster.³⁵⁰

Evidence for the inclination of authorities toward such an interpretation draws support from recent state practice, such as the 2010 decision relieving Pakistani flood victims from removal. In addition, relatively recent legislative developments in both houses of the Belgian Parliament point toward an acceptance of the “climate refugee” concept. For instance, the Senate adopted a 2006 socialist party resolution urging Belgium to advocate for recognition of a “réfugié environnemental” status at the United Nations.³⁵¹ While some senators had “opposed the resolution as not addressing the root causes of the problem,...none raised any technical or political difficulties.”³⁵² In 2008, legislators introduced a second resolution, this time in Le Chambre, calling for creation of an “environmental refugee” status at the U.N., as well as at the EU.³⁵³ The bill lapsed in July of 2010, as did a similar bill calling for recognition of a “climate refugee” status.³⁵⁴

^{346.} MARLEEN MAES ET AL., *supra* note 342, at 48.

^{347.} *Id.*

^{348.} *Id.*

^{349.} *Id.*

^{350.} European Parliament, *supra* note 197, at 57.

^{351.} Sénat de Belgique, Doc. 3-1556/3, *Proposition de Résolution Visant à la Reconnaissance dans les Conventions Internationales du Statut de Réfugié Environnemental* (Mar. 21, 2006), available at <http://www.senate.be/www/?Mival=/publications/viewPub.html&COLL=S&LEG=3&NR=1556&VOLGNR=3&LANG=fr>.

^{352.} MCADAM, *supra* note 153, at 105.

^{353.} Chambre de Représentants de Belgique, Doc. 52-1451/001, Proposition de résolution relative à la prise en considération et à la création d’un statut de réfugié environnemental par les Nations Unies et l’Union européenne (Proposed Resolution Relative to the Consideration and Creation of an Environmental Refugees Status by the United Nations and the European Union) (Oct. 3, 2008).

^{354.} Chambre de Représentants de Belgique, Doc. 52-1478/001, Proposition de Résolution Visant à la Reconnaissance d’un Statut Spécifique pour les Réfugiés Climatiques (Proposed Resolution for Recognition of a Specific Status for Climate Refugees) (Oct. 14, 2008).

Republic of Bulgaria

Bulgaria's Law on Asylum and Refugees uses the phrase "humanitarian status," which encompasses the concept of "subsidiary protection status" within the meaning of the EU Qualification Directive,³⁵⁵ but at the same time, "specifies a broader scope...for the purposes of international protection as compared to the regime envisioned by [the] Qualification Directive."³⁵⁶ The Law on Asylum and Refugees states that:

Humanitarian status [may] also be provided for other reasons of a humanitarian nature or on other grounds stipulated by Bulgarian legislation, as well as for reasons stipulated by the conclusions of the Executive Committee of the [United Nations High Commissioner for Refugees].³⁵⁷

This provision may provide scope for the inclusion of environmentally displaced individuals.³⁵⁸ First, UNHCR's Executive Committee has, in fact, given some recognition to environmental degradation as both a cause and consequence of displacement. For instance, the 1996 "ExCom" Conclusion recognized that,

...the underlying causes of large-scale involuntary population displacements are complex and interrelated and encompass gross violations of human rights, including in armed conflict, poverty and economic disruption, political conflicts, ethnic and inter-communal tensions and *environmental degradation*, and that there is a need for the international community to address these causes in a concerted and holistic manner,³⁵⁹

Similar references to environmentally-induced or disaster-induced displacement are found in the policy statements of the Bulgarian Ministry of the Interior, which has recognized that, "As more people try to enter the [European] Union from outside, either to escape war,

³⁵⁵. REPUBLIC OF BULGARIA, MINISTRY OF THE INTERIOR, THE PRACTICES OF THE REPUBLIC OF BULGARIA CONCERNING THE GRANTING OF NON-EU HARMONIZED PROTECTION STATUS, 7 (undated report to the European Migration Network), <http://emn.intrasoft-intl.com/html/index.html> (follow "EMN Studies" hyperlink, then follow study "09" hyperlink, then follow "03. BULGARIA National Report" hyperlink).

³⁵⁶. *Id.* at 4.

³⁵⁷. Law on Asylum and Refugees, art. 9(2) (2002) (amended through SG No. 31, Apr. 8, 2005) (Bulg.), http://eu.mvr.bg/NR/rdonlyres/BC96E947-6DF6-48F6-9872-85F94CE8FC6C/0/07_Law_Asylum_Refugees_EN.pdf.

³⁵⁸. European Parliament, *supra* note 197, at 57.

³⁵⁹. U.N. High Comm'r for Refugees, Executive Committee Conclusion No. 80 (XLVII) *Comprehensive and Regional Approaches within a Protection Framework* (1996). *See also* UNHCR, Executive Committee Conclusion No. 87 (L) *General* (1999) (recognizing need to address *inter alia* environmental degradation in areas hosting large-scale refugee populations) (emphasis added).

persecution and *natural disasters* or to carve out a better future, EU governments are developing common solutions to shared challenges.”³⁶⁰

Such statements do not constitute binding law, but the fact that Bulgaria has recognized natural disasters as one potential cause of migration into the EU may provide an indication as to how Bulgarian authorities might interpret provisions such as article 9(2) above. Likewise, while Executive Committee conclusions are not binding, the Committee provides the only authoritative global forum for the development of international refugee law standards, and therefore its conclusions exert a degree of normative influence over state law and practice.³⁶¹ Again, the fact that UNHCR has recognized the need for the international community to address “environmental degradation” along with other so-called “push factors” “in a concerted and holistic manner,” may provide the Bulgarian Ministry of the Interior support to interpret the “other reasons of a humanitarian nature” outlined in article 9(c) broadly enough to include disaster-induced displacement.

Without surrendering their existing citizenship, beneficiaries of humanitarian status may become Bulgarian citizens five years after recognition of their humanitarian status.³⁶²

Republic of Cyprus

In Cyprus, article 29 of the Refugee Law of 2000 sets forth several rules regarding discretionary deportation, providing as well for certain relief from deportation for refugees and other persons enjoying subsidiary protection status:

“No refugee or person with a subsidiary protection status shall be deported to any country where his life or freedom will be endangered or he will be in danger of being subjected to torture or inhumane or degrading treatment or punishment or persecution for reasons of sex, race, religion, nationality, membership of a particular social group or political opinion or because of armed conflict or *environmental destruction*.”³⁶³

Note, however, that this prohibition against deportation is granted only to a “refugee or person with a subsidiary protection status.” Presumably, this prohibition against deportation

³⁶⁰. REPUBLIC OF BULGARIA, MINISTRY OF THE INTERIOR, (Mar. 26, 2012), <http://eu.mvr.bg/en/Areas/Asylum/default.htm> (accessed Aug. 3, 2012) (emphasis added).

³⁶¹. VOLKER TÜRK, *The Role of UNHCR in the Development of International Refugee Law*, in REFUGEE RIGHTS AND REALITIES: EVOLVING INTERNATIONAL CONCEPTS AND REGIMES 165 (Frances Nicholson & Patrick Twomey eds., 1999).

³⁶². REPUBLIC OF BULGARIA, MINISTRY OF THE INTERIOR, *supra* note 355, at 24.

³⁶³. Refugee Law of 2000 No. 6(I), A Law to Provide for the Recognition of Refugees and for the Better Implementation of the Convention Relating to the Status of Refugees, art. 29(4) (2000) (amended through No. 112(I) 2007) (Cyprus) (emphasis added). Note that environmental destruction is *not* a criteria affording refugee status under article 3(1) Refugee Law of 2000.

would have effect only in a case in which a person who *already* enjoyed refugee or subsidiary protection status was removable on some other ground, and seems, in Cyprus at least, to serve the function of broadening the non-refoulement principle as a matter of national law.

Kingdom of Denmark

The Danish Aliens Act provides that, “Upon application, a residence permit may be issued to an alien who, in cases not falling within [the refugee and subsidiary protection provisions], is in such a position that *essential considerations of a humanitarian nature* conclusively make it appropriate to grant the application.³⁶⁴ Decisions under this provision are discretionary and may not be appealed, while applications “may only be submitted by aliens staying in Denmark who are registered as asylum-seekers,”³⁶⁵ a further significant limitation.

Despite these and other limitations, authorities could conceivably use the provision, again on a discretionary basis, to help protect applicants “from areas with extremely difficult living conditions” where risk of starvation or serious illness “in principle could have been caused by an environmental disaster.”³⁶⁶ In fact, as a matter of past practice, Denmark has granted humanitarian status to “single women and families with young children” from areas affected by drought or famine,³⁶⁷ typical so-called “slow-onset” disasters. From 2001 to 2006, the government imposed a presumption against the return of such families to drought stricken Afghanistan, and later expanded this practice to include “landless people who came from areas where there was a lack of food and who would be in a particularly vulnerable position if returned.”³⁶⁸

Under a separate section of the Act, “a residence permit may be issued to an alien if *exceptional reasons* make it appropriate...”³⁶⁹ Furthermore, under a sub-division of this section, where an asylum-seeker has been refused both refugee and subsidiary protection status, authorities *may* issue a residence permit provided “(i) that it has not been possible to return the alien...for at least 18 months; (ii) that the alien has assisted in the return efforts for 18 months consecutively; and (iii) that return must be considered futile according to the information available at the time.”³⁷⁰

^{364.} Aliens Consolidation Act No. 785 of Aug. 10, 2009, § 9(b)(1) (Den.) (emphasis added).

^{365.} *Id.* § 9(b)(2).

^{366.} NINA M. LASSEN, *Comparative Legal Study on Subsidiary Protection—Denmark*, in SUBSIDIARY PROTECTION OF REFUGEES IN THE EU, *supra* note 189, at 361, 374 (referring to a prior version of the Act under which the present provision appeared as section 9(2)(ii); *See* Aliens Consolidation Act No. 711 of Aug. 1, 2001, § 9(2)(ii) (Den.), http://www.fleksjobber.dk/LA/meddelelser/english/legislation/aliens_consolidation_act.htm).

^{367.} U.N. High Comm’r for Refugees, *supra* note 145, at 12.

^{368.} Kolmannskog & Myrstad, *supra* note 228, at 324.

^{369.} Aliens Consolidation Act No. 785, § 9(c)(1) (emphasis added).

^{370.} *Id.* § 9(c)(2).

Provisions such as this address the impossibility of return, for instance, where an individual does not have and, despite her best efforts, cannot secure a passport. However, if in a particular fact pattern, an applicant meets the statutory requirement and establishes similar obstacles to return (e.g. that return is impossible due to the nature and/or aftermath of an environmental catastrophe), then, arguably, the applicant has demonstrated eligibility under the provision.³⁷¹ Even so, any grant of a residence permit under the provision is ultimately a matter of discretion.

Republic of Finland

Finland provides victims of natural disaster with an express form of national temporary protection, which beneficiaries may enjoy for a period of up to three years.³⁷²

Temporary protection may be given to aliens who need international protection and who cannot return safely to their home country or country of permanent residence, because there has been a massive displacement of people in the country or its [neighboring] areas as a result of an armed conflict, some other violent situation or an *environmental disaster*.³⁷³

In addition, Finland provides a residence permit, on the basis of humanitarian protection, for those who cannot return to their country of origin due to an environmental catastrophe.

An alien residing in Finland is issued with a residence permit on the basis of humanitarian protection, if there are no grounds under section 87 or 88 granting asylum or providing subsidiary protection, but he or she cannot return to his or her country of origin or country of former habitual residence as results of an *environmental catastrophe* or a bad security situation which may be due to an international or internal armed conflict or a poor human rights situation.³⁷⁴

Formerly, persons displaced by environmental catastrophe received a form of so-called “alternative protection” under § 88. Amendments made in 2009 established a new § 88a on “humanitarian protection,” thereby permitting drafters to bring the former § 88 more completely in line with the EU Qualification Directive. The amendments also served to elevate humanitarian protection of environmentally displaced persons from a discretionary to a nondiscretionary matter.³⁷⁵ The *travaux préparatoires* for § 88a(1) emphasizes, “that the

^{371.} The Act initially required a three month period during which return is impossible, but this was changed to 18 months via a July 1998 amendment. See LASSEN, *supra* note 366, at 377.

^{372.} Aliens Act 301/2004, art. 109(1) (2004) (amended through 1152/2010) (Fin.).

^{373.} *Id.* (emphasis added).

^{374.} *Id.* art. 88a(1) (emphasis added).

^{375.} Kolmannskog & Myrstad, *supra* note 228, at 322.

preferred option in environmental disasters is internal relocation and international humanitarian aid, but acknowledge[s] that protection in Finland may also be necessary.”³⁷⁶

Federal Republic of Germany

In Germany, part 5 (§§ 22-26) of the Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory³⁷⁷ provides for discretionary decision-making under several provisions that appear, at first, to offer a degree of flexibility that might allow for an interpretation broad enough to address disaster-induced displacement. However, a closer look reveals that, perhaps with some notable exceptions, the degree of discretion is generally inadequate to meet such a purpose.

For instance, authorities may grant a “residence permit for a temporary stay [to a foreigner whose] continued presence in the Federal territory is necessary on *urgent humanitarian or personal grounds* or due to substantial public interests.”³⁷⁸ Such a permit may be extended, “if departure from the Federal territory would constitute exceptional hardship for the foreigner due to special circumstances pertaining to the individual case concerned.”³⁷⁹ The utility of this provision for disaster victims is limited, however, because, in their assessment, authorities may consider only reasons relating to internal domestic matters. External reasons, “such as dangers that would be incurred in the event of a return to the subject’s country of origin,” are not relevant.³⁸⁰ Therefore, the provision is directed more toward, for instance, persons who require urgent medical attention, such as an operation, or those who must attend a funeral, care for a loved one who is ill, or perhaps complete an in-country course of study or training.³⁸¹

Furthermore, in determining the presence of “special circumstances pertaining to the individual case,” individual and personal circumstances are dispositive. Circumstances that the applicant shares only as a member of a larger group of affected persons are immaterial. The applicant’s circumstances are “special” where he or she would, upon return to the country of origin, “meet with an exceptionally difficult fate that is different from the usual difficulties that would meet other [returned] foreigners...”³⁸² Because any significant

³⁷⁶. U.N. High Comm’r for Refugees, *supra* note 145, at 12.

³⁷⁷. Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet [Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory—Residence Act] Feb. 25, 2008, BGBl. I at 162 (amended to Act of July 30, 2009, BGBl. I at 2,473) (Ger.) (Part 5 deals with “Residence under International Law or on Humanitarian or Political Grounds”).

³⁷⁸. Residence Act § 25(4) (emphasis added).

³⁷⁹. *Id.*

³⁸⁰. BERND PARUSEL, GRANTING OF NON-EU HARMONISED PROTECTION STATUSES IN GERMANY: RESEARCH STUDY II/2009 IN THE FRAMEWORK OF THE EUROPEAN MIGRATION NETWORK (EMN) 32 (2010).

³⁸¹. *Id.*

³⁸². *Id.* at 33.

environmental disaster is likely to create humanitarian concerns for a broad cross-section of society, it may be difficult, on behalf of any individual claimant, to demonstrate exclusively disaster-related facts that constitute “special circumstances pertaining to the individual case concerned.” Thus, section 25(4) does not offer much relief for persons displaced by environmental disaster. In any case, section 25(4) does not provide for admission from abroad, only a “continued presence” for those already on Federal Territory who are “non-enforceably required to leave.”³⁸³

In contrast, section 22 provides for “admission from abroad...on urgent *humanitarian grounds* (emphasis added).” However, as is true under section 25(4), admission on humanitarian grounds “presupposes that the foreigner is in a particular emergency situation that urgently calls for intervention and justifies admitting this particular foreigner as opposed to other persons who are in a comparable situation.”³⁸⁴

One potentially relevant provision is the so-called, “right of residence regulation,” section 23(1), which provides that, “The supreme Land authority [i.e. Federal Länder] may order a residence permit to be granted to foreigners from specific states or to certain groups of foreigners defined by other means...on *humanitarian grounds*...”³⁸⁵ Under this section, supreme authorities of the Federal Länder may issue instructions to provide residence permits both to persons already inside Germany who are otherwise without a right of residence, as well as persons admitted from abroad.

In addition, while section 22 provides only for admission of individuals (from abroad), section 23 provides for admission of groups. The intent is to equip policy-makers with the capacity “to react quickly and flexibly to changes in the humanitarian situation in other countries.”³⁸⁶ Indeed, Länder Authorities have used the provision on a number of occasions in the past to benefit, *inter alia*, persons from Afghanistan, Bosnia and Herzegovina, Kosovo, Lebanon, Turkey, and Serbia and Montenegro,³⁸⁷ although no evidence found suggests that any instruction has issued in the context of disaster-induced displacement. Nonetheless, “the responsible authorities enjoy considerable latitude for discretion,”³⁸⁸ and utilization of the provision to protect disaster victims is feasible.

Beneficiary groups are determined as a somewhat complex matter of “political consultation and coordination” between the federal government and state authorities.³⁸⁹ Instructions

^{383.} See *id.* at 32.

^{384.} *Id.* at 25.

^{385.} Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet [Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory—Residence Act] § 23(1) Feb. 25, 2008, BGBl. I at 162 (Ger.) (amended to Act of July 30, 2009, BGBl. I at 2,473) (emphasis added).

^{386.} PARUSEL, *supra* note 380, at 26.

^{387.} *Id.*

^{388.} *Id.*

^{389.} See *id.*

issued under section 23(1) do not provide “a legal entitlement on the part of foreigners,” and may provide for the application, in part or in whole, of section 24 [Temporary Protection under EU Directive 2001/55/EC] *mutatis mutandis*.³⁹⁰ Under this highly discretionary legal regime, policymakers may fashion specific definitions of beneficiary groups, employing whatever criteria meet the political exigencies at hand.

In addition to the above, section 60(7) offers prohibition against deportation:

A foreigner *should not* be deported to another state in which a substantial concrete danger to his or her life and limb or liberty applies. A foreigner *shall not* be deported to another state in which he or she will be exposed, as a member of the civilian population, to a substantial individual danger to life or limb as a result of an international or internal armed conflict.³⁹¹

This suggests *a contrario* that the first sentence is broader than is the second in that the first encompasses non-individualized dangers, beyond the scope of an armed conflict that may apply not only to civilians, but also to non-civilians. Nonetheless, while in the second sentence, deportation is prohibited, in the first sentence the prohibition is merely discretionary. Conceivably, authorities could use the first sentence to prohibit deportation of a person displaced by disaster, where such deportation would create a substantial concrete danger to life and limb. Where danger pursuant to either sentence exposes “the population or [a] segment of the population...generally,” such danger must receive “due consideration” under a provision that provides for temporary suspension of deportation for a maximum of six months.³⁹² This temporary suspension of deportation, or exceptional leave to remain, is known as “*Duldung*.”³⁹³

Under section 60a(1), “...the supreme Land authority *may* order the deportation of foreigners from specific states or of categories of foreigners defined by any other means to be suspended in general or with regard to deportation to specific states for a maximum of six months [for reasons of international law or “on humanitarian grounds”].”³⁹⁴ Where suspension of deportation exceeds six months, section 23(1) [above] applies. In addition, authorities *must* suspend deportation of a foreigner for as long as such deportation “is impossible in fact or in law...”³⁹⁵ This would be the case for instance in an environmental disaster where “transport links have been interrupted or are absent altogether, provided that there is no likelihood of these obstacles ceasing to apply in the foreseeable future.”³⁹⁶ Foreigners are issued a certificate confirming suspension of deportation,³⁹⁷ and suspension

³⁹⁰. Residence Act § 23(3).

³⁹¹. *Id.* § 60(7) (emphasis added).

³⁹². *Id.* See also, § 60a(1) sentence 1.

³⁹³. PARUSEL, *supra* note 380, at 35.

³⁹⁴. Residence Act § 60a(1).

³⁹⁵. *Id.* § 60a(2).

³⁹⁶. PARUSEL, *supra* note 380, at 33.

³⁹⁷. Residence Act § 60a(4).

must be revoked when “the circumstances preventing deportation [cease] to apply.”³⁹⁸ *Duldung* is not a status per se and few rights attach.³⁹⁹

Finally, German law recognizes a constitutional right to asylum, at least for some applicants. Article 16a of the German Basic Law (i.e. the Constitution)⁴⁰⁰ provides that, “Persons persecuted on political grounds shall have the right of asylum.”⁴⁰¹ At its inception, this constitutional right of asylum was quite broad, and following the fall of the Berlin Wall, large numbers of refugees claiming asylum under the provision prompted an amendment narrowing the right in 1993.⁴⁰² In 2002, Hailbronner suggested that, “Persons who are forced to flee starvation or deprivation of natural resources resulting from a deliberate policy of a state or a liberation army may qualify as refugees under [article] 16a...provided that they meet the requirements of “political persecution.”⁴⁰³ However, in 2005 and 2007, further amendments implemented the Qualification Directive with the effect that the scope of protection associated with refugee status (what had been termed “little asylum” or “minor asylum”) “now exceeds that of the basic [constitutional] right to asylum by a considerable margin.”⁴⁰⁴ Because it focuses on “political” persecution, and because its scope is now narrower than protection provided by the Refugee Convention and Qualification Directive, article 16a offers little to those displaced by disaster.

While in theory some of the provisions outlined above could prove useful in addressing disaster-induced displacement, little evidence suggests that authorities have interpreted or applied the provisions in this way, and some evidence suggests that the opposite is true.⁴⁰⁵ However, in recent years, German authorities have undertaken at least some efforts to accommodate disaster victims. For instance, when UNHCR called for a suspension of deportation to areas affected by the December 2004 tsunami in Southeast Asia,⁴⁰⁶ the Germany Federal Ministry of the Interior issued an advice to the effect that Länder should

^{398.} *Id.* § 60a(5).

^{399.} See MCADAM, *supra* note 153, at 113-14.

^{400.} The German “Basic Law” was drafted on the heels of World War II with the intent that it should serve as an interim Constitution. However, the document has proven to be “remarkably enduring and has become the powerful symbol of successful democratic renewal in Germany after the collapse of the National Socialist dictatorship and—forty years later—of the East German Communist regime.” Rainer Grote, *Constitutions of the Countries of the World Online: The Federal Republic of Germany, Introductory Note*, (accessed Feb. 20, 2012), available at <http://www.oceanalaw.com/> (by subscription).

^{401.} GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNGESETZ] [GG] [Basic Law], May 23, 1949, BGBl. I § 16a (1) (Ger.).

^{402.} Gesetz zur Änderung des Grundgesetzes [Law Amending Basic Law], June 28, 1993, BGBl. I (Ger.). See PARUSEL, *supra* note 380, at 69.

^{403.} Kay Hailbronner, *Comparative Legal Study on Subsidiary Protection—Germany*, in SUBSIDIARY PROTECTION OF REFUGEES IN THE EU, *supra* note 189, at 491, 510.

^{404.} PARUSEL, *supra* note 380, at 70.

^{405.} Hailbronner, *supra* note 403, at 509.

^{406.} U.N. High Comm’r for Refugees, *Information Note: Request for the Suspension of Forced Returns to Areas Affected by the Tsunami*, (Jan. 12, 2005) available at <http://www.unhcr.org/refworld/docid/41e653294.html> (accessed Apr. 9, 2012).

not deport foreigners to a short list of UNHCR designated countries. Still, in the end, “only a few federal states enacted a deportation stop.”⁴⁰⁷

Hellenic Republic (Greece)

Greek immigration, asylum and residency law is complex, controlled by a “truly impenetrable thicket” of legislative and regulatory acts and decrees, which acts and decrees, as of 2010 at least, numbered more than sixty-five.⁴⁰⁸ Despite this labyrinth, we can identify a number of provisions potentially relevant to disaster-induced displacement.

For instance, as to the physical entry of persons onto Greek territory, the Minister of Public Order has the discretion “to allow the entry of a third country national through controlled border passages and temporary passing points [where] it is necessary due to reasons of public interest or *force majeure* or in order to facilitate the journey of a Greek vessel, which cannot continue in another way.”⁴⁰⁹ He may do so even in cases where the person seeking entry, “does not have the required documents to justify the purpose of his journey [or] the financial means...necessary for his subsistence.”⁴¹⁰

The legal term, “*force majeure*” refers to events or effects “that can be neither anticipated nor controlled,” and encompasses not only the acts of people, such as riots, strikes, and wars, but also acts of nature, such as floods and hurricanes.⁴¹¹ Accordingly, it seems that in Greece, the Minister of Public Order has the discretionary power to designate the opening of border points for the physical entry of persons fleeing an unanticipated and uncontrollable natural disaster.

In addition, third country nationals who enter with the intent to reside in Greece for only a few days—for tourism, a conference, or to attend a cultural or sports events—may be granted an extension of the period of residence, “for exceptional reasons, in particular due to *force majeure*, humanitarian grounds, professional or serious personal reasons.”⁴¹² However, it

⁴⁰⁷. Kolmannskog & Myrstad, *supra* note 228, at 323-24.

⁴⁰⁸. See Foreign Law Guide, Greece, Immigration and Emigration (Thomas H. Reynolds & Arturo A. Flores eds.) (accessed Apr. 12, 2012) <http://www.foreignlawguide.com/> (by subscription only). The editors of Foreign Law Guide suggest that the labyrinth of Greek immigration, asylum and residency law, as of 2010, is “usefully explained” by Konstantinos D. Magliveras in DIRK VANHEULE, INTERNATIONAL ENCYCLOPAEDIA OF LAWS: MIGRATION LAW (Kluwer Law Int’l).

⁴⁰⁹. Νόμος (2005:3386) [Law (2005:3386)] Είσοδος, διαμονή και κοινωνική ένταξη των υπηκόων τρίτων χωρών στην Ελληνική Επικράτεια [Entry, Residence and Social Integration of Third-Country Nationals in the Hellenic Territory], art. 8(2)(e), Εφημερίς της κυβέρνησεως της ελληνικής Δημοκρατίας [Official Gazette of the Hellenic Republic] [E.K.E.D.] 2005, A:212 (Greece) *available at* http://ec.europa.eu/ews/UDRW/images/items/docl_3645_90982253.doc (official translation).

⁴¹⁰. *Id.*

⁴¹¹. BLACK’S LAW DICTIONARY 673-74 (8th ed. 2004).

⁴¹². Law (2005:3386), art. 70(2).

seems that authorities may grant such extensions only where the individual makes a timely application to local police authorities and has “sufficient resources” to cover his or her cost of living during the extended stay.⁴¹³ Together, the Ministers of Economy and Finance, Foreign Affairs, and Public Order set the level of daily exchange currency needed to meet the “sufficient resources” requirement.⁴¹⁴

In some European countries, we argue that interpretation of the phrase “humanitarian grounds” may be broad enough to encompass disaster-induced displacement. Here, law makers have distinguished “humanitarian grounds” from *force majeure*, which stands alone as an entirely separate ground under which extension of a short-term residency stay may be justified. The distinction seems to suggest that the “humanitarian grounds” element may be associated with circumstances of a private nature, such as age, health, etc., while the *force majeure* element is associated with circumstances of a more public nature (e.g. floods, hurricanes, etc.). Note as well that what seems to be an older version of this provision limited residency extensions to six months, while the current version does not provide for any such limitation.⁴¹⁵

A foreigner may also receive a reprieve from the implementation of expulsion where it is impossible to deport him or her directly, again, “for reasons of *force majeure*.”⁴¹⁶ In this case, an older version of the same provision is somewhat broader, granting that certain authorities, “may temporarily suspend deportation *ex officio* when this is dictated [not only by *force majeure* but also] by humanitarian reasons...or public concern...”⁴¹⁷

Finally, a Presidential Decree provides separately for “leave to remain on humanitarian grounds” where an individual’s application for international protection has been rejected.⁴¹⁸

^{413.} *Id.*

^{414.} *Id.* art. 70(3).

^{415.} *Compare* Law (2005:3386) [Entry, Residence and Social Integration of Third-Country Nationals in the Hellenic Territory], art. 70, with Νόμος (2001:2910) [Law (2001:2910)] Είσοδος και παραμονή αλλοδαπών στην Ελληνική Επικράτεια. Κτήση της Ελληνικής ιθαγένειας με πολιτογράφηση και άλλες διατάξεις [Entry and Stay of Aliens in Greek Territory. Acquisition of Greek Citizenship by Naturalisation and Other Provisions.], art. 38, Εφημερίς της κυβέρνησεως της ελληνικής Δημοκρατίας [Official Gazette of the Hellenic Republic] [E.K.E.D.] 2001, A:91 (Greece) (amended to Law 2003:3146 E.K.E.D. A:125) available at <http://www.unhcr.org/refworld/docid/3b209fd54.html> (accessed June 21, 2012).

^{416.} Law (2005:3386), art. 78.

^{417.} Law (2001:2910), art. 44(6).

^{418.} Διάταγμα 114/2010 [Decree 114/2010] Καθιέρωση ενιαίας διαδικασίας αναγνώρισης σε αλλοδαπούς και ανιθαγενείς του καθεστώτος του πρόσφυγα ή δικαιούχου επικουρικής προστασίας σε συμμόρφωση προς την Οδηγία 2005/85/ΕΚ του Συμβουλίου «σχετικά με τις ελάχιστες προδιαγραφές για τις διαδικασίες με τις οποίες τα κράτη μέλη χορηγούν και ανακαλούν το καθεστώς του πρόσφυγα» (L 326/13.12.2005) [On the Establishment of a Single Procedure for Granting the Status of Refugee or of Beneficiary of Subsidiary Protection to Aliens or to Stateless Persons in Conformity with Council Directive 2005/85/EC On Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (L 326/13.12.2005)], art. 28(1), Εφημερίς της κυβέρνησεως της ελληνικής Δημοκρατίας

Such leave is granted “in particular taking into account the objective impossibility of removal or return...due to *force majeure*, such as serious health reasons of the applicant or of members of his family, international embargo imposed on his/her country, civil war followed by mass violations of human rights, or the fulfillment of the requirements of the non-refoulement clause of article 3 of the [ECHR] or of article 3 of the [CAT].”⁴¹⁹ The examples in the provision are non-exhaustive.

Authorities must provide an applicant granted leave to remain on humanitarian grounds with a special residence permit, which is valid for two years and extends as well to family members.⁴²⁰ The holder of such a permit may apply for a renewal provided he or she makes such application at least thirty days prior to the permit’s expiration.⁴²¹ The rights of persons granted leave to remain on humanitarian grounds are the same as those enjoyed by beneficiaries of subsidiary protection.⁴²² An older Presidential Decree provided a residence permit for only one year, albeit with a somewhat more relaxed renewal requirement, obliging applications just fifteen days before expiration, rather than thirty.⁴²³

One authoritative study of subsidiary protection in Europe has pointed to Greece as being among a small handful of EU Member States that, “provide greater protection [than do other EU Member States] since [Greece’s] legislation covers cases of *force majeure and natural disasters, independently of any human intervention*.”⁴²⁴ While this study is somewhat dated, its findings are based on provisions similar to those currently in force.⁴²⁵

[Official Gazette of the Hellenic Republic] [E.K.E.D.] 2010, A:195 (Greece) *available at* <http://www.unhcr.org/refworld/docid/4cfdadf2.html> (accessed 29 July 2012).

^{419.} *Id.* art. 28(2).

^{420.} *Id.* art. 28(4).

^{421.} *Id.* art. 28(5).

^{422.} *Id.* art. 28(6).

^{423.} Διάταγμα 61/1999 [Decree 61/1999] Refugee Status Recognition Procedure, Revocation of the Recognition and Deportation of an Alien, Entry Permission for the Members of his Family and Mode of Cooperation with the United Nations High Commissioner for Refugees, art. 8(1), Εφημερίς της κυβέρνησεως της ελληνικής Δημοκρατίας [Official Gazette of the Hellenic Republic] [E.K.E.D.] 1999, A:63 (Greece) *available at* <http://www.unhcr.org/refworld/docid/3ae6b4d830.html> (accessed June 22, 2012).

^{424.} Daphné Bouteillet-Paquet, *Subsidiary Protection: Progress or Set-Back of Asylum Law in Europe? A Critical Analysis of the Legislation of the Member States of the European Union*, in SUBSIDIARY PROTECTION OF REFUGEES IN THE EU, *supra* note 189, at 211, 237-38.

^{425.} Bouteillet-Paquet based her conclusion on the older legal provisions mentioned above, specifically, article 8(2) of Presidential Decree 61/1999 and article 44(6) of Law 2910/2001. *See also* Law 2910/2001, art. 37(4)(b). Nonetheless, current provisions largely track language set forth in prior legislation and some provisions of the older laws remain in effect. *See* Foreign Law Guide, Greece, Immigration and Emigration, *supra* note 408 (noting for example that parts of Law 2910/2001 are retained in force).

Italian Republic

Italian legal order does not offer “an organic law regarding asylum,” with the result that “today’s Italian asylum system...is not made up of a complete text but of many different provisions and references retraceable in several legislative texts, or in memorandums and legislative measures...and in many different [case-law] verdicts.”⁴²⁶

At the outset, article 10 of the Italian Constitution guarantees a right of asylum:

The foreigner who is denied in his own country the real exercise of the democratic liberties guaranteed by the Italian Constitution has the right of asylum in the territory of the Republic, in accordance with the conditions established by law.⁴²⁷

Though not co-extensive with the Geneva Convention, Italy’s constitutional right to asylum is, in some respects, broader. To the extent that a person displaced by natural disaster is denied—in his own country—effective exercise of those “democratic liberties” set forth in the Italian Constitution, that individual is eligible for asylum (in accordance with other relevant legal provisions). Displaced persons may, however, find eligibility “somewhat difficult to establish,”⁴²⁸ presumably for both legal and practical reasons.

As a matter of national law, it is the Italian Prime Minister who, by means of a decree, activates EU-harmonized temporary protection under Council Directive 2001/55, thus providing for “temporary and immediate protection”⁴²⁹ in accordance with the TPD. In addition, the Prime Minister, again by decree, may activate a non-EU-harmonized form of temporary protection under circumstances involving “relevant humanitarian demands, in case of conflicts, *natural disasters* or other particularly serious events in non-EU countries.”⁴³⁰ This national temporary protection is set forth in article 20, paragraph 3 of Legislative Directive 25 of July 25, 1998, alongside other “Extraordinary Reception Measures for Exceptional Events.”⁴³¹

In addition, Italy “provides for the issuance of a “residence permit for humanitarian reasons.”⁴³² While this residence permit does not grant a protection status (e.g. “refugee” or

^{426.} CATERINA BOCA ET AL., THE PRACTICES IN ITALY CONCERNING THE GRANTING OF NON-EU HARMONIZED PROTECTION STATUSES 7 (Centro Studi e Ricerche IDOS ed., Jacopo Marcomeni trans., 2009).

^{427.} Art. 10 para. 3 Costituzione (amended to Const. L. No. 1/2003) (It.), *available at* <http://www.oceanalaw.com>.

^{428.} Bruno Nascimbene & Claudia Guilini, *Comparative Legal Study on Subsidiary Protection—Italy*, in SUBSIDIARY PROTECTION OF REFUGEES IN THE EU, *supra* note 189, at 569, 596.

^{429.} Decreto Legislativo 4 luglio 2003, No. 85 art. 2(1)(a) (It.).

^{430.} Combined Text of Measures Governing Immigration and Norms on the Condition of Foreign Citizens, Decreto Legislativo 25 luglio 1998, n. 286, in G.U. 18 ago 1998, n. 191 supp. n. 139, art. 20 (It.) (emphasis added).

^{431.} “Misure straordinarie di accoglienza per eventi eccezionali.”

^{432.} D. Lgs. 25/1998, art. 5(6).

“beneficiary of subsidiary protection”), there is continued recognition that, the “residence permit for humanitarian reasons” plays “a key role” in the work of completing the legal protection instruments in the Italian asylum system.⁴³³ Despite the general “lack of a normative reference regarding the granting of residence permits on humanitarian grounds,”⁴³⁴ some instruction is set forth in guidelines for the evaluation of refugee claims, published in 2005 by the National Committee for the Right of Asylum of the Ministry of the Interior, which indicate that there are,

general circumstances, which are ‘not envisaged by the Geneva Convention of 1951, but are equally likely to lead to the need for protection of the applicant’⁴³⁵ that include the following: civil war and national or ethnic unrest; political instability, episodes of violence or inadequate respect for human rights; famine or *natural and environmental disasters*; refusal of the country of origin to readmit asylum applicants.⁴³⁶

Finally, article 5(6) also prevents “the refusal or revocation of a residence permit” where there are “serious reasons, in particular of a humanitarian nature or arising from constitutional or international obligations of the Italian State.”⁴³⁷ However, application of the article has always been “troublesome,” in that authorities have never introduced, “legal provisions [or] official guidelines clarifying the specific cases in which the norms and potential conditions of exclusion can be applied...”⁴³⁸

Ireland

In Ireland, when “determining whether to make a deportation order in relation to a person, the Minister [for Justice, Equality and Law Reform] shall have regard to [*inter alia*] humanitarian considerations...so far as they appear or are known to the Minister.”⁴³⁹ Presumably, such humanitarian considerations would go beyond the scope of other considerations expressly set forth in this article (art. 3(6) of the 1999 Immigration Act), including, for example, age;⁴⁴⁰ duration of residence in Ireland;⁴⁴¹ family and domestic circumstances;⁴⁴² the nature of the person’s connection with the State;⁴⁴³ as well as the

⁴³³. BOCA ET AL., *supra* note 426, at 13.

⁴³⁴. *Id.* at 16.

⁴³⁵. Ministry of Interior, National Committee for the Right of Asylum, GUIDELINES FOR EVALUATION OF APPLICATIONS FOR THE GRANTING REFUGEE STATUS 68 (2005).

⁴³⁶. BOCA ET AL., *supra* note 426, at 16 (emphasis added).

⁴³⁷. D. Lgs. 25/1998, art. 5(6).

⁴³⁸. BOCA ET AL., *supra* note 426, at 14-18.

⁴³⁹. Immigration Act, 1999 (Act No. 22/1999) art. 3(6)(h) (Ir.).

⁴⁴⁰. *Id.* art. 3(6)(a).

⁴⁴¹. *Id.* art. 3(6)(b).

⁴⁴². *Id.* art. 3(6)(c).

⁴⁴³. *Id.* art. 3(6)(d).

person's employment record and prospects.⁴⁴⁴ Accordingly, some have suggested that there may be room to make the "environmental argument."⁴⁴⁵

If a protection applicant is eligible neither for refugee nor for subsidiary protection status, then the Minister is obligated to consider whether a deportation order should be made or whether the applicant should enjoy leave to remain, "having regard to the matters referred to in section 3(6) of the 1999 Act."⁴⁴⁶ However, the Minister's final deportation order is discretionary to the extent that such order complies with other provisions of section 3 and does not breach non-refoulement obligations as set forth in the Refugee Act of 1996.⁴⁴⁷

The Immigration, Residence and Protection Bill of 2010⁴⁴⁸ sought to repeal and replace the Aliens Act of 1935 and the Immigration Acts of 1999-2004, as well as the Refugee Act of 1996, eliminating article 3(6) outright.⁴⁴⁹ The 2010 bill provides that, "the Minister shall also decide, in his or her absolute discretion, whether to grant a residence permission to the protection applicant...[despite a determination that the applicant is not entitled to protection and is removable], but only if the Minister is satisfied that there are *compelling reasons* that arise from [representations made during the protection application process] which prevent the Minister from removing the applicant...or otherwise justify permitting that applicant...to remain in the State."⁴⁵⁰ Beneficiaries under the new bill would enjoy not merely a stay of deportation, but a residence permit.

While consideration of "compelling reasons" may seem to encompass "humanitarian considerations," as currently required under article 3(6), "compelling reasons" is more limited in that its scope is controlled by applicant representations made during earlier proceedings—focused not on humanitarian protection, but rather on refugee or subsidiary protection status—and, therefore, more constrained.⁴⁵¹ Applicants are unlikely to raise facts specifically related to disaster-induced displacement during the application process for refugee status or subsidiary protection status given that such facts would have little probative value with respect to status determination under those respective legal regimes. Consequently, facts considered under the "compelling reasons" criterion are unlikely to advance the cause of persons displaced by environmental or natural disaster.

The Immigration, Residence and Protection Bill of 2010 had advanced to the Committee Stage by the end of the 30th Dáil. With a new government in place, the Dáil subsequently

^{444.} *Id.* art. 3(6)(e) & (f).

^{445.} European Parliament, *supra* note 197, at 58.

^{446.} European Communities (Eligibility for Protection) Regulations 2006 art. 4(5) (S.I. No. 518/2006) (Ir.), available at <http://www.irishstatutebook.ie/2006/en/si/0518.html>.

^{447.} Refugee Act, 1996 (Act No. 17/1996) art. 5(1) & (2) (Ir.).

^{448.} Immigration, Residence and Protection Bill 2010 (No. 38/2010) (Ir.).

^{449.} European Parliament, *supra* note 197, at 58.

^{450.} Immigration, Residence and Protection Bill 2010 § 89.

^{451.} European Parliament, *supra* note 197, at 58.

restored the Bill to order on March 23, 2011.⁴⁵² The Minister for Justice and Equality expressed initial hopes to advance the legislation, albeit with “amendments to the Bill as originally published by the previous Minister.”⁴⁵³ However, the 2010 Bill, “has been kicked from pillar to post by all parties” for some time,⁴⁵⁴ and recent speculation holds that the current Government “will not be proceeding” with the proposal and is planning instead “to publish a new immigration Bill.”⁴⁵⁵ Any possible immigration act “reset” may provide advocates an opportunity under Irish law either to advance the status of persons displaced by natural disaster or to hold tight to what little ground now exists.

Republic of Lithuania

In Lithuania, beneficiaries of subsidiary protection status receive a temporary residence permit for one year.⁴⁵⁶ Subsidiary protection status is granted on the basis of the Republic of Lithuania’s 2004 Law on the Legal Status of Aliens, article 87, which is, in many respects, broader in scope than article 15 of the EU Qualification Directive.⁴⁵⁷

Recall that under Qualification Directive article 15 “serious harm” is limited to the death penalty or execution; torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; and a serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict. In contrast, Lithuania’s article 87 provides that, subsidiary protection “may be granted” *inter alia*, to applicants for whom there is a well-founded fear of “a threat that his human rights and fundamental freedoms will be violated,” or a well-founded fear that, “his life, health, safety or freedom is under threat as a result of endemic violence which spread in an armed conflict or which has placed him at serious risk of systematic violation of his human rights.”⁴⁵⁸

Thus, in Lithuania, authorities may grant subsidiary protection status to those who, in the context of armed conflict, flee endemic violence, as well as to those who, in a context *other than* armed conflict, flee endemic violence—in the latter case, where such violence creates “a serious risk of systemic violation of human rights.” Accordingly, for the purpose of analyzing a possible nexus with disaster-induced displacement, we may conclude that, to the extent endemic violence—experienced in the context of environmental degradation or disaster—threatens an applicant’s life, health, safety or freedom, thereby placing him at

⁴⁵². 728 DÁIL DEB. col. 361-02 (Mar. 23, 2011) (Ir.).

⁴⁵³. 730 DÁIL DEB. col. 720 (Apr. 20, 2011) (Ir.).

⁴⁵⁴. 738 DÁIL DEB. col. 246 (July 12, 2011) (Ir.).

⁴⁵⁵. 754 DÁIL DEB. col. 245 (Feb. 7, 2012) (Ir.).

⁴⁵⁶. Law on the Legal Status of Aliens (No. IX-2206) of Apr. 29, 2004, art. 48(1) & (2) Žin [Official Gazette] No. 73-2539 (Lith.).

⁴⁵⁷. European Parliament, *supra* note 197, at 58.

⁴⁵⁸. Law on the Legal Status of Aliens, art. 87.

serious risk of systematic violation of his human rights, the applicant is eligible for subsidiary protection status as a matter of Lithuanian law.

Furthermore, subsidiary protection under article 87 may also be granted on the basis of a threat “to human rights and fundamental freedoms,” indicating that even in situations where *violence is entirely absent*, a threat to human rights and fundamental freedoms—for instance, a threat generated or exacerbated by environmental disaster—may provide sufficient grounds for the grant of subsidiary protection status.

Note that article 87 indicates merely that authorities “may” grant subsidiary protection status, suggesting that the decision is discretionary. However, article 18 of the Qualification Directive on the “granting of subsidiary protection status” provides that, “Member States *shall* grant subsidiary protection status to a...person eligible [under criteria set forth in the Directive].⁴⁵⁹ Consequently, the grant of subsidiary protection status under article 87 must be understood to be discretionary only to the extent that the substantive criteria described therein go beyond the scope of subsidiary protection status harmonized under Council Directive 2004/83/EC [or, by the end of 2013, Directive 2011/95/EU]. Where facts in an individual asylum applicant’s case meet the substantive criteria set forth in the Council Directive, a decision granting subsidiary protection under article 87 of Lithuania’s Law on the Legal Status of Aliens is compulsory. Or, rather, we can say at least that to the extent the Qualification Directive’s provisions have “direct effect,” the grant of protection is compulsory as a matter of regional European Union law.

Finally, Lithuanian law provides that authorities may suspend expulsion of an alien where “objective reasons,” render implementation of the decision to expel impossible, for instance, where an alien “is not in possession of a valid travel document.”⁴⁶⁰ When the reasons for the suspension are no longer valid, the expulsion “must be implemented without delay.”⁴⁶¹ However, where reasons for the suspension linger beyond one year, the alien “shall be issued a temporary residence permit...and the decision regarding the expulsion of the alien shall be reconsidered by the court.”⁴⁶² Conceivably, as an objective matter, an environmental disaster could render expulsion of an alien, or group of aliens, impossible for weeks or months, if not for a year or longer. Consequently, article 128 may be relevant to the phenomenon of disaster-induced displacement.⁴⁶³

⁴⁵⁹. Qualification Directive, *supra* note 175, art. 18 (emphasis added).

⁴⁶⁰. Law on the Legal Status of Aliens, art. 128(2)(4).

⁴⁶¹. *Id.* art. 128(3).

⁴⁶². *Id.* art. 132.

⁴⁶³. European Parliament, *supra* note 197, at 58.

Republic of Malta

In late 2008, Malta introduced “Temporary Humanitarian Protection” in an effort to fill the *lacuna* that remained as a “result of the replacement of the former Humanitarian Protection status with Subsidiary Protection” under “EU Directives, the [Maltese] Refugees Act⁴⁶⁴ and relevant subsidiary legislation.”⁴⁶⁵ Malta grants Temporary Humanitarian Protection (THP) status not as a matter of law, but rather, as a matter of policy, and thus the administrative decision is discretionary in nature.⁴⁶⁶

The Ministry for Justice and Home Affairs created THP status by means of a Policy Document entitled, *Policy on the Granting of Temporary Humanitarian Protection*.⁴⁶⁷ All the same, THP “falls within the asylum policy framework,”⁴⁶⁸ and beneficiaries enjoy “the same rights as those granted to beneficiaries of subsidiary protection under article 14 of the Procedural Standards in Examining Applications for Refugee Status Regulations.”⁴⁶⁹ Status is valid for one year, renewable by the Minister for successive one-year terms so long as the condition that initially gave rise to the status persists.⁴⁷⁰

Where an asylum-applicant does not satisfy the conditions for refugee or subsidiary protection status, but, nonetheless, in light of other humanitarian considerations, should not be returned, THP may be granted under one or more of the following provisions: a) where the applicant is a minor; b) where the Refugee Commissioner considers that the applicant should not be returned to his country of origin on medical grounds; c) where the Refugee Commissioner considers that the applicant should not be returned to his country of origin on *other humanitarian grounds*.⁴⁷¹ It is upon the “other humanitarian grounds” provision of the THP, that some legal experts argue the policy “may in principle [apply] to environmental displacees.”⁴⁷² The language applied in the policy and the latitude afforded the Commissioner certainly support such a hypothetical interpretation.

However, it seems that in recent practice, the Refugee Commissioner has generally extended Temporary Humanitarian Protection to address the situation of rejected asylum-seekers who

⁴⁶⁴. Refugees Act (Act XX of 2000) (Chapter 420) (amended to Act VII of 2008) (Malta).

⁴⁶⁵. EUR. MIGRATION NETWORK, NAT’L CONTACT POINT FOR MALTA, THE PRACTICE IN MALTA CONCERNING THE GRANTING OF NON-EU-HARMONIZED PROTECTION STATUSES 21 (2009).

⁴⁶⁶. Ministry for Justice and Home Affairs, Policy on the Granting Temporary Humanitarian Protection (2008), as reprinted in *id.* Annex 3, at 28-29.

⁴⁶⁷. NAT’L CONTACT POINT FOR MALTA, *supra* note 465, at 10, 22.

⁴⁶⁸. *Id.* at 11.

⁴⁶⁹. Legal Notice 243, Procedural Standards in Examining Applications for Refugee Status Regulations, SL 420.07 (2008) (Malta); Ministry for Justice and Home Affairs, *supra* note 466, at ¶ 11, at 29.

⁴⁷⁰. *Id.* ¶¶ 7, 8, 9, at 28-29.

⁴⁷¹. *Id.* ¶ 1, at 28.

⁴⁷². European Parliament, *supra* note 197, at 59.

have resided in Malta for a number of years without status, thus rendering the policy, at least in some respects, “more regularization than protection.”⁴⁷³

Kingdom of Norway

While not an EU Member State, Norway is a signatory to the Schengen Convention and a member of the European Economic Area, which includes the European Union, Iceland, and Lichtenstein in an area of free labor flow. In 1975, faced with increased social and political tension over immigration, the Norwegian parliament implemented an immigration ban, which remains in force today.⁴⁷⁴ Given this political context, it is perhaps surprising that, in a recent redraft of the Norwegian Aliens Act, the Ministry of Immigration introduced the possibility of granting residence permits “to applicants who come from a region affected by a *humanitarian catastrophe*, including a natural disaster.”⁴⁷⁵ The proposal considered the possibility that such residence permits might be of a “temporary” nature.⁴⁷⁶ In its proposal, the Norwegian Directorate of Immigration (UDI) had pushed for express wording referring to environmental displacement. However, the Ministry of Immigration did not support that proposal,⁴⁷⁷ and the adopted text includes no express reference. Rather, the final text of Section 38 declares that,

A residence permit may be granted even if the other conditions laid down in the Act are not satisfied provided there are strong humanitarian considerations or the foreign national has a particular connection with the realm. To determine whether there are strong humanitarian considerations, an overall assessment shall be made of the case. Importance may be attached, *inter alia*, to whether... (c) there are social or *humanitarian circumstances* relating to the return situation that give grounds for granting a residence permit [emphasis added],

In other words, authorities may grant a residence permit where there are strong humanitarian considerations, the presence of which depends, at least in part, upon whether there are humanitarian circumstances justifying the grant of the permit. Thus, the presence of *humanitarian considerations* depends, *inter alia*, upon the presence of *humanitarian circumstances*. This circularity simply emphasizes the fact that Norway grants humanitarian protection solely upon a discretionary basis. Nonetheless, in its White Paper to the Aliens Act, the Ministry suggested that, in principle, it may be appropriate to grant a residence permit (or temporary permit) to applicants from an area affected by a humanitarian catastrophe, such as

^{473.} *Id.*

^{474.} International Immigration and Nationality Law (2nd ed.), Release 1, 2012 (Juris Publ’g.) § NOR/1 (2012).

^{475.} CHRISTEL COUNIL, *The Protection of ‘Environmental Refugees’ in International Law*, in MIGRATION AND CLIMATE CHANGE 359, 370 (Étienne Pugué et al. eds., 2001) (emphasis added).

^{476.} U.N. High Comm’r for Refugees, *supra* note 145, at 13.

^{477.} Kolmannskog & Myrstad, *supra* note 228, at 324.

a natural disaster, and referred assessment of relevant cases to article 38, paragraph 2(c),⁴⁷⁸ suggesting that there is a specifically identifiable legal locus for the consideration of such cases under Norwegian law.

Slovak Republic

In the Slovak Republic, lawmakers have transposed the EU's concept of "temporary protection" under the rubric of "Temporary Shelter." Chapter 5, section 29(1) of the national Asylum Act provides that,

Temporary shelter should be granted for the purpose of protecting foreigners from violent conflicts, endemic violence, impacts of a *humanitarian disaster* or permanent or mass violation of human rights in the country of their origin.⁴⁷⁹

At the same time, Section 29(2) says that, the Government shall determine the commencement, conditions and termination of temporary shelter, "in accordance with the decision of the European Union Council," indicating that any government decision to grant temporary shelter is "dependent on the decision of the European Union Council."⁴⁸⁰ As we have seen, it is highly unlikely that the Temporary Protection Directive includes persons impacted by humanitarian disaster. Therefore, despite the express reference, it would appear, in fact, that Slovakia does *not* grant temporary shelter (i.e. temporary protection) to persons displaced by natural disaster,⁴⁸¹ or, at least, makes such grant only to the extent the grant is first recognized in a decision of the European Union Council.

Note further that the Act does not say, "Temporary shelter *shall be* granted..." or even that, "Temporary shelter *may be* granted..." Rather, it says simply that, "Temporary shelter *should be* granted for the purpose of protecting foreigners from...impacts of a humanitarian disaster."⁴⁸² Nonetheless, the fact that the Republic of Slovakia has included the "impacts of

^{478.} E-mail from Kenneth Adale Baklund, Specialist Director, Department of Migration, Norwegian Ministry of Justice and Public Security, to author (Apr. 10, 2012 14:03 CES) (on file with author). The White Paper is available only in Norwegian and the relevant text reads: "*I prinsippet kan det også være aktuelt å innvilge oppholdstillatelse (eventuelt midlertidig) til søkere som kommer fra et område som er rammet av en humanitær katastrofesituasjon, så som etter en naturkatastrofe. I praksis har imidlertid ikke dette fremstått som noen sakskategori av særlig omfang. Departementet mener derfor at det heller ikke er grunn til å nevne denne type situasjoner særskilt i loven, slik som UDI har foreslått. Det vises til lovforslaget § 38 annet ledd bokstav c.*" Proposition No. 75 (2006-2007), On the Act Concerning Foreigners' Access to the Territory and Their Stay Here (Immigration Act) § 7.6.3.3.

^{479.} Act No. 480/2002 Coll., Act of June 20, 2002 on Asylum and Amendment of Some Acts, § 29(1) (amended to 643/2007 Coll.) (2002) (Slovk.) (emphasis added).

^{480.} European Parliament, *supra* note 197, at 59.

^{481.} *Id.*

^{482.} Act No. 480/2002 § 29(1).

humanitarian disaster” in its relevant legislation may, at least, speak to the government’s openness to protecting persons affected by natural disaster.

In addition to the temporary shelter provision, section 9 of the Asylum Act stipulates that, “The Ministry [Migration Office] may grant asylum on *humanitarian grounds* even when no reasons under section 8 [persecution] are established...”⁴⁸³ No further definition is provided in the Act, however, a Ministry of the Interior Regulation⁴⁸⁴ indicates that asylum on humanitarian grounds may be granted to otherwise failed asylum applicants who are elderly, traumatized, or suffering from a serious medical condition, and whose return could cause severe physical or psychological suffering or death.⁴⁸⁵ The Ministry may withdraw asylum granted for humanitarian reasons “when such reasons have ceased to exist and the alien can return to the country of origin.”⁴⁸⁶ It would seem that the breadth of Ministerial discretion under section 9 could benefit at least certain persons displaced by environmental disaster though no evidence suggests that authorities have interpreted the provision in this manner. Furthermore, while the language of section 9 suggest it is a discretionary provision, to the extent that a claimant’s return may cause major physical or psychological suffering or death, ECHR articles 2 and 3 would limit the scope of discretion, making protection mandatory in extreme cases, as discussed above.

At one time, a related Act of the National Council offered a humanitarian exemption to the rule that a visa applicant must file at a diplomatic mission or consulate office abroad—at least in the case of short-term and transit visas.⁴⁸⁷ The exemption stipulated that border police may grant a “short-term visa for a *humanitarian reason*, provided that the alien proves that his/her entry is urgent and that he/she could not foresee it or that granting of the visa is in the interest of the Slovak Republic.”⁴⁸⁸ The validity of such visas “must not exceed 15 days”⁴⁸⁹ and “neither continuous stay nor the total of days of several stays may exceed 90 days in six months.”⁴⁹⁰ Section 10 provided for a (maximum) 5-day “Transit Visa” on the same humanitarian grounds (the total of days of multiple transits “must not exceed 90 days in six months.” It is conceivable that either of these sections could have provided some relief to persons displaced by disaster. Authorities could have granted either type of visa on a

^{483.} *Id.* § 9 (emphasis added).

^{484.} Regulation of the Ministry of Interior of the Slovak Republic No. 4/2003, art. 7 (2003). Consolidated version published in Bulletin of the Ministry of Interior of the Slovak Republic, Mar. 10 2005 (Vol. 19/2005).

^{485.} MIROSLAVA ŠNÍREROVÁ & MIROSLAVA VOLANSKÁ, THE DIFFERENT NATIONAL PRACTICES CONCERNING GRANTING OF NON-EU HARMONISED PROTECTION STATUSES IN THE SLOVAK REPUBLIC: NATIONAL STUDY FOR THE EUROPEAN MIGRATION NETWORK 17 (2009) (Slovk.).

^{486.} Act No. 480/2002 § 15(4).

^{487.} Act No. 48/2002 Coll., Act of Dec. 13, 2001 on Stay of Aliens and on Amendments and Modifications to Some Other Acts § 13(1) (2002) (amended to 558/2005 Coll.) (Slovk.), *available at* <http://www.unhcr.org/refworld/docid/44a2a1344.html> (accessed Apr. 2, 2012).

^{488.} *Id.* § 11(2).

^{489.} *Id.*

^{490.} *Id.* § 11(1).

group basis.⁴⁹¹ However, once again, no evidence suggests authorities had ever used the provision in this way, and what's more, neither the short-term visa nor the transit visa (based on humanitarian grounds) appear in a subsequently amended version of the Act, those articles having been repealed.⁴⁹² Indeed, one author confirms that the Act on Stay of Aliens "does not stipulate anything in granting protection for third country nationals based on the grounds of environmental disasters."⁴⁹³

Kingdom of Sweden

Under the Swedish Aliens Act, "a 'person otherwise in need of protection' is an alien who in cases other than those referred to in Section 1 [i.e. "refugees"] is outside the country of the alien's nationality, because he or she" *inter alia*, "is unable to return to the country of origin because of an *environmental disaster*."⁴⁹⁴ "The refusal of entry and expulsion of [such] an alien...may not be enforced...unless there are exceptional grounds for this."⁴⁹⁵ While indicating that most disasters will result in only a temporary need for protection, the *travaux préparatoires* speaks as well of the need for durable solutions, for instance, in the case of "sinking" islands.⁴⁹⁶

The provision applies as well to "a stateless alien who is outside the country in which he or she has previously had his or her usual place of residence."⁴⁹⁷ The statute is "based on a preparatory foundation that limits its applicability to cases of sudden environmental disasters and does not extend to cases of continuous environmental decline," this according to the Division for Migration and Asylum Policy at the Swedish Ministry of Justice.⁴⁹⁸ Also, there must be no internal flight alternative and application of the law may be restricted in "exceptional situations" if Sweden's absorption capacity is overwhelmed.⁴⁹⁹ Decisions are made on an individual basis.⁵⁰⁰

^{491.} *Id.* § 8(1)(d)(2).

^{492.} See Amended Act No. 48/2002 Coll., Act of Dec. 1, 2009 on the Stay of Aliens, Amending Certain Other Acts (in force Jan. 15, 2010 except art. 6-8, 99 of Title I & Title III in force Apr. 5, 2010) (Slovk.). Articles 9 to 11 of the original legislation (Act No. 48/2002 Coll., Act of Dec. 13, 2001) were repealed by Regulation 342/2007 Coll., effective as from Dec. 21, 2007.

^{493.} European Parliament, *supra* note 197, at 59.

^{494.} 4 ch. 2(3) § Aliens Act, (Svensk författningssamling [SFS] 2005:716) (amended through SFS 2009:16) (Swed.) (emphasis added).

^{495.} 12 ch. 3 § SFS 2005:716.

^{496.} SOU 1995:75 *Swedish Refugee Policy in Global Perspective* 100 [government report series].

^{497.} 4 ch. 2(3) § SFS 2005:716.

^{498.} Ben Glahn, 'Climate Refugees'? *Addressing the International Legal Gaps – Part II* INT'L BAR NEWS (Aug. 2009), <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=3E9DB1B0-659E-432B-8EB9-C9AEEA53E4F6> (Mar. 20, 2012).

^{499.} U.N. High Comm'r for Refugees, *supra* note 145, at 12.

^{500.} Martin, *supra* note 69, at 406.

Sweden first incorporated the concept of subsidiary protection for persons displaced by environmental catastrophe as part of a 1997 revision to the Aliens Act,⁵⁰¹ a revision that reflected the codification of contemporary judicial practice.⁵⁰² However, it seems authorities have yet to extend protection under the provision.⁵⁰³

Swiss Confederation

Despite the fact that it is not a Member State of the European Union, Switzerland has, nonetheless, associated itself with the Schengen *acquis* (eliminating border controls between certain European nations) as well as with the rules governing responsibility for the review of asylum applications (the “Dublin” system).⁵⁰⁴ Switzerland’s independence from the EU has a number of implications. For instance, the refugee definition set forth in the Qualification Directive, which essentially bars EU citizens from applying for asylum in EU countries,⁵⁰⁵ is not applicable in Switzerland.⁵⁰⁶ Thus, EU citizens can apply for asylum in Switzerland. As for disaster victims, the Swiss Asylum Act provides that,

Switzerland may grant temporary protection to persons in need of protection as long as they are exposed to *a serious general danger, in particular* during a war or civil war as well as in situations of general violence.⁵⁰⁷

In accordance with the above article 4, the Federal Council (*Conseil Fédéral*) decides whether (and under which criteria) to grant temporary protection to *groups* of persons.⁵⁰⁸ However, before doing so, the Council must consult the cantons, charitable organizations, and, if need be, other non-governmental organizations, as well as UNHCR.⁵⁰⁹

^{501.} Orjan Edström, *Comparative Legal Study on Subsidiary Protection—Sweden*, in SUBSIDIARY PROTECTION OF REFUGEES IN THE EU, *supra* note 189, at 755, 767.

^{502.} Government Proposition 1996/97:25, 100 (Swed.).

^{503.} MCADAM, *supra* note 153, at 104.

^{504.} See PEERS, *supra* note 57, at 92; see also Loi du 26 juin 1998 sur l’asile [LAsi] [Asylum Act] June 26, 1998 (amended to Apr. 1, 2011), RS 142.31, SR 142.31, Annex 1 at 54 (Switz.) (compiling a comprehensive list of agreements constituting Switzerland’s association with Dublin rules) *available at* <http://www.admin.ch/ch/e/rs/1/142.31.en.pdf> (accessed June 15, 2012).

^{505.} Qualification Directive, *supra* note 175, art. 2(e). Qualification Directive, *supra* note 177, art. 2(f).

^{506.} EUR. COUNCIL ON REFUGEES & EXILES, COMPLEMENTARY PROTECTION IN EUROPE 62 (2009).

^{507.} Loi du 26 juin 1998 sur l’asile [LAsi] [Asylum Act] June 26, 1998 (amended to Apr. 1, 2011), RS 142.31, SR 142.31, art. 4 (Switz.), *available at* <http://www.admin.ch/ch/e/rs/1/142.31.en.pdf> (accessed June 15, 2012) (emphasis added). Use of the phrase “in particular” indicates that criteria for the grant of temporary protection under article 4 are non-exhaustive.

^{508.} *Id.* art. 66(1).

^{509.} *Id.* art. 66(2).

As for individuals, if enforcement of a removal order is “impossible, illegal, or unreasonable,”⁵¹⁰ authorities must regulate the individual foreigner’s stay in accordance with the “temporary admission” provisions of the Federal Act on Foreign Nationals,⁵¹¹ which provides that, where enforcement “is not possible, not permitted or not reasonable, [authorities] *shall* order temporary admission.”⁵¹² More precisely, enforcement “is not possible” if the foreign national is “unable to travel,” to his country of origin or a third country⁵¹³ “is not permitted” if prohibited by Switzerland’s “obligations under international law,”⁵¹⁴ and “*may be* unreasonable” if the foreign national is “specifically endangered by situations such as war, civil war, general violence and medical emergency.”⁵¹⁵

In addition, authorities may postpone deportation “for an appropriate period if special circumstances such as the ill-health of the person concerned or a lack of transport so require.”⁵¹⁶ Finally, “Foreign nationals shall also be admitted if international law obligations, *humanitarian grounds* or the unity of the family so requires.”⁵¹⁷

While none of these provisions “expressly mention natural or environmental disasters,” one leading expert reports that the Swiss Ministry of Foreign affairs has concluded that legal provisions “dealing with subsidiary as well as temporary protection may be interpreted to cover climate-related scenarios.”⁵¹⁸ Walter Kälin made these observations during a January 2009 Ministry roundtable meeting in which he participated.⁵¹⁹

^{510.} Author’s translation. Here, see the original French. “Si l’exécution du renvoi n’est pas possible, est illicite ou ne peut être raisonnablement exigée, l’office règle les conditions de résidence conformément aux dispositions de la LEtr [RS 142.20] concernant l’admission provisoire.” *Id.* art. 44(2). The available English translation of article 44 falls short, and, in any case, while authorities have made the Act available in English (and Rumantsch), only the French, German, and Italian versions are official, that is, legally enforceable.

^{511.} Loi fédérale du 16 décembre 2005 sur les étrangers [LEtr] [Federal Act on Foreign Nationals] Dec. 16, 2005 (amended to Oct. 11, 2011), RS 142.20, SR 142.20, ch. 11 (Switz.), *available at* http://www.admin.ch/ch/e/rs/c142_20.html (accessed June 15, 2012).

^{512.} *Id.* art. 83(1) (emphasis added).

^{513.} *Id.* art. 83(2).

^{514.} *Id.* art. 83(3).

^{515.} *Id.* art. 83(4) (emphasis added). Note that criteria under article 83(4) are non-exhaustive. Note as well that foreigners eligible for temporary admission under article 83(3) may not be excluded, whereas those admitted articles 83(2) and (4) *must be* excluded if they have been sentenced to long-term custodial detention or made subject to certain criminal law measures, have seriously or repeatedly violated (or represented a threat to) public security and order or represent a threat to internal or external security of Switzerland, or have made removal or expulsion impossible due to their own conduct.

^{516.} *Id.* art. 69(3).

^{517.} *Id.* art. 3(2).

^{518.} Walter Kälin, *Conceptualizing Climate-Induced Displacement*, in CLIMATE CHANGE AND DISPLACEMENT, *supra* note 83, at 81, 100.

^{519.} Walter Kälin, *Distinguished Lecture Series – 3 delivered in Kolkata, India, Climate Change Induced displacement – A Challenge for International Law*, 30 (Dec. 15, 2010) (Mahanirban Calcutta Research Group trans. pub., March 2011) *available at* <http://www.mcrg.ac.in/DL3.pdf> (accessed June 18,

United Kingdom of Great Britain and Northern Ireland

While there is no explicit legislation on the subject, the United Kingdom has, in the past, provided a degree of relief to disaster victims via “ad hoc immigration concessions.”⁵²⁰ For instance, following the 2004 Indian Ocean Tsunami, the U.K. responded to UNHCR’s call for suspension of involuntary returns, thus providing relief for failed asylum seekers from “affected areas of India, Sri Lanka, Thailand and Indonesia.”⁵²¹

Nearly a decade earlier, following the July 1995 volcanic eruption on the West Indies island of Montserrat, the United Kingdom extended all islanders Exceptional Leave to Remain (ELR) for a period of two years through a voluntary evacuation program.⁵²² After a subsequent eruption in 1997, the U.K. introduced an “Assisted Regional Voluntary Relocation Scheme,” which helped Montserratians relocate to the United States, Canada, and other parts of the Caribbean region.⁵²³ In time, the U.K. offered Montserratians indefinite leave to remain, and on May 21, 2002, finally granted full citizenship.⁵²⁴

However, McAdams points out that these actions were taken with a degree of “apparent reluctance,” despite the fact that Montserrat was an overseas dependency toward which the U.K. had special obligations.⁵²⁵ Indeed, McAdams argues that the eventual extension of citizenship “had nothing to do with the Montserrat crisis.”⁵²⁶ Rather, through adoption of the British Overseas Territories Act of 2002, announced as early as 1999, the U.K. granted automatic citizenship to nearly *all* citizens of overseas territories, not only those from Montserrat.⁵²⁷ While the timing may have been fortuitous for Montserratians, it would be inaccurate to characterize the extension of British citizenship as a humanitarian act.⁵²⁸ The

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⁵²⁰ Kolmannskog & Myrstad, *supra* note 228, at 317.

⁵²¹ *Id.* at 323-24.

⁵²² *Id.* at 317-18. At one point in time, the ELR guidelines made one brief reference to the effect that, “in the view of the administration [environmental disasters are] not a claim based on Convention reason.” ELSPETH GUILD, *Comparative Legal Study on Subsidiary Protection—United Kingdom*, in SUBSIDIARY PROTECTION OF REFUGEES IN THE EU, *supra* note 189, at 787, 814.

⁵²³ MCADAM, *supra* note 153, at 109.

⁵²⁴ *Id.* at 108.

⁵²⁵ *Id.* at JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW 109 (2012).

⁵²⁶ *Id.* at 108 (2012).

⁵²⁷ *Id.* See British Overseas Territories Act, 2002, c. 8, § 3 (U.K.). Excluded were the Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus, two military bases retained by the U.K. following the 1960 grant of independence to Cyprus.

⁵²⁸ MCADAM, *supra* note 153, at 108.

Soufrière Hills volcano in Montserrat remains active to this day.⁵²⁹ The capital, Plymouth, “is now a ghost town, buried beneath more than [a meter] of volcanic ash.”⁵³⁰

In April 2003, the U.K. replaced the “Exceptional Leave to Remain” policy, under which Montserratians had enjoyed initial relief during the early stages of the disaster, with two new categories, Humanitarian Protection (HP) and Discretionary Leave (DL).⁵³¹ The legal basis for these two forms of relief is the 1971 Immigration Act, which “[gave] discretion to the Secretary of State for the Home Office to grant leave to a person for a reason not covered by the Immigration Rules.”⁵³² Decisions once taken as a matter of discretion are now bifurcated into the two new categories, one of which provides mandatory protection (HP) and the other of which remains discretionary (DL).⁵³³ Claims are evaluated first for asylum, then for Humanitarian Protection, and finally for Discretionary Leave.⁵³⁴

^{529.} MONTERRAT VOLCANO OBSERVATORY, MVO SCIENTIFIC REPORT FOR VOLCANIC ACTIVITY BETWEEN 1 NOVEMBER 2011 AND 30 APRIL 2012, Open File Report OFR 12-01 (2012), *available at* <http://www.mvo.ms/resources/downloads/finish/12-6-month-reports/942-mvo-scientific-report-for-volcanic-activity-between-1-november-2011-and-30-april-2012/0>.

^{530.} COMMONWEALTH SECRETARIAT, THE COMMONWEALTH YEARBOOK 2012, MONTERRAT (2012) *available at* http://www.commonwealth-of-nations.org/xstandard/united_kingdom_country_profile.pdf (accessed June 29, 2012).

^{531.} U.K. BORDER AGENCY, APU Notice 01/2003, Humanitarian Protection and Discretionary Leave (2003) (amended to June 7, 2012) (U.K.) *available at* <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/> (accessed June 29, 2012).

^{532.} EUR. COUNCIL ON REFUGEES & EXILES, *supra* note 506, at 67. Section 3(2) of the 1971 Immigration Act provides the Secretary of State with the legal authority to create and amend Immigration Rules, and section 3(1)(b), which at one time provided the legal basis for ELR, currently provides the legal basis for HP and DL.

^{533.} In 2006, the U.K. implemented the Qualification Directive through two legal instruments: The Refugee or Person in Need of International Protection (Qualification) Regulations, 2006, S.I. 2525 (U.K.) and Secretary of State for the Home Department, Statement of Changes in Immigration Rules, 2006, Cm. 6918, § 6 (inserting humanitarian protection provisions) (U.K.). While Humanitarian Protection status is now regulated under these instruments, Discretionary Leave is not incorporated in any of the Rules or Regulations and remains at the discretion of the Secretary of State under asylum policy instructions. *See id.* at 67. Note that there is yet another category, Leave Outside the Rules (LOTR). While LOTR may be used “in other compelling circumstances (in protection cases),” its primary role is to provide specific immigration concessions for targeted micro-groups of individuals (e.g. airline staff, employees of firms under contract to NATO, film crew on location, Japan youth exchange scheme, Pestalozzi Children’s Trust, research assistants to MPs, representatives of overseas insurance companies, St. George’s University School of Medicine, athletes, entertainers, etc.). Therefore, LOTR is of no relevance to disaster-displacement. *See* U.K. BORDER AGENCY, Immigration Directorates’ Instructions, Leave Outside the Rules (LOTR), c. 1, § 14 (2006), <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/idischapter1/section14/section14.pdf?view=Binary>.

^{534.} U.K. BORDER AGENCY, API: Considering Asylum Claims and Assessing Credibility, § 9-10 (undated) (amended to June 7, 2012) (U.K.) *available at* <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/> (accessed June 29, 2012).

Authorities must grant Humanitarian Protection to those non-excludable applicants for whom it has been shown that “substantial grounds” exist for believing return would involve “a real risk of suffering serious harm.”⁵³⁵ Along with the three grounds defined in the EU’s Qualification Directive as constituting “serious harm,” the U.K. provision retains an additional ground, “unlawful killing.”⁵³⁶ Humanitarian Protection is essentially the U.K.’s subsidiary protection category roughly mirroring the Qualification Directive, and for the purpose of disaster-induced displacement is likewise of limited utility.⁵³⁷

On the other hand, Discretionary Leave may be applicable to disaster displacement. DL is granted outside the Immigration Rules,⁵³⁸ generally for a period of no more than three years, renewable for another three years, after which, in most cases, an individual is eligible to apply for “indefinite leave to remain.”⁵³⁹ The purpose of Discretionary Leave is to meet the needs of those excluded from, or not in need of, international protection.⁵⁴⁰ Indeed, the U.K. considers it to be a form of “leave to remain” rather than a “protection status.”⁵⁴¹ DL may be granted for “a limited number of specific reasons.”⁵⁴² Such reasons include, *inter alia*, where the applicant is “able to demonstrate particularly compelling reasons why removal would not be appropriate.” In addition, authorities may grant Discretionary Leave to applicants who successfully advance claims made under ECHR article 8 or article 3 (but only on medical grounds or in “severe humanitarian cases”).⁵⁴³

With respect to humanitarian cases, the U.K. Border Agency has suggested that,

There may be some extreme cases (although such cases are likely to be rare) where a person would face such poor conditions if returned—e.g., absence of water, food or basic shelter—that removal in itself could be a breach of the U.K.’s Article 3 obligations.⁵⁴⁴

⁵³⁵. Immigration Rules § 339C (iii) (updated to June 2012) (U.K.).

⁵³⁶. *Id.* § 339C ¶ 2(ii).

⁵³⁷. EUR. COUNCIL ON REFUGEES & EXILES, *supra* note 506, at 67.

⁵³⁸. EUR. MIGRATION NETWORK, *supra* note 291, at 71.

⁵³⁹. U.K. BORDER AGENCY, APU Notice 01/2003, Humanitarian Protection and Discretionary Leave (2003) (amended to June 7, 2012) (U.K.)
<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/>
(accessed June 29, 2012).

⁵⁴⁰. U.K. BORDER AGENCY, Enforcement Instructions and Guidance: Humanitarian Protection and Discretionary Leave (HP/DL), c. 30.1 (updated to Apr. 25, 2012),
<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/oemsectione/chapter30?view=Binary> (accessed June 29, 2012).

⁵⁴¹. EUR. MIGRATION NETWORK, *supra* note 291, at 71.

⁵⁴². U.K. BORDER AGENCY, *supra* note 540.

⁵⁴³. *Id.*

⁵⁴⁴. MCADAM, *supra* note 153, at 77 (citing Asylum Policy Brief: Discretionary Leave amended to October 27, 2009).

As McAdam points out (with respect to climate change), this statement is “significant because it recognizes that a violation of article 3 based on [socio-economic] deprivation of the basic means for survival...may...apply in the non-removal context.”⁵⁴⁵

In the domestic context, the U.K. has already recognized that extreme socio-economic deprivation violates the article 3 obligation. In *ex parte Adam*, the House of Lords found that under certain facts, article 3 compels the Secretary of State to provide social assistance to otherwise indigent asylum applicants.⁵⁴⁶ Indeed, the Secretary has an existing statutory obligation to provide accommodation and basic means of subsistence to “destitute” asylum seekers. However, where he determines that an asylum application was not timely made, he has a corollary obligation to withhold such assistance.⁵⁴⁷ This later obligation is qualified though by, among other things, article 3. That is, the Secretary may not deny assistance where such denial would breach article 3.⁵⁴⁸

A decision to deny assistance has grave consequences for indigent claimants because asylum applicants lack permission to work in the U.K. and denial of social assistance may—as it did with respect to the individuals in *Adam*—relegate asylum-seekers to sleeping in the street and begging for food, with predictable consequences in terms of effects upon mental and physical health, self-worth, and human dignity.

In *Adam*, which consolidated several cases with similar facts, Lord Bingham found that, “Treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being.”⁵⁴⁹ While the proscribed treatment “must achieve a minimum standard of severity” and the “threshold is a high one,” the line is crossed where “[an] applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life.”⁵⁵⁰ It is not unimaginable that in similarly “extreme cases,” the character and degree of socio-economic deprivation witnessed in the country of origin on the heels of a major natural disaster could likewise reach the article 3 ECHR threshold, thus precluding return, at least where deprivation involves some degree of state action.⁵⁵¹

^{545.} *Id.* at 77. To clarify, by the term “non-removal” McAdam means here cases deciding the issue of removal, rather than cases deciding issues other than removal.

^{546.} Regina v. Secretary of State for the Home Department, *ex parte Adam*, [2005] UKHL 66 [¶ 7] (appeal taken from Eng. & Wales), available at <http://www.unhcr.org/refworld/docid/43fc2d1a0.html> (accessed July 1, 2012).

^{547.} Nationality, Immigration and Asylum Act, 2002, c. 41, § 55(1) & (2) (U.K.).

^{548.} *Id.* § 55(5)(a).

^{549.} Regina v. Secretary of State for the Home Department, *ex parte Adam*, [2005] UKHL 66 [¶ 7] (appeal taken from Eng. & Wales).

^{550.} *Id.*

^{551.} Judgment as to whether a given individual case reaches the threshold demanded by Article 3 is based upon “a fair and objective assessment of all relevant facts and circumstances” and that, “Many factors may affect that judgment, including age, gender, mental and physical health and condition, any facilities or

Note that the policy brief McAdam cites above is no longer available on the U.K. Border Agency web site. According to the Agency, the Discretionary Level policy instruction is “currently being updated.” Interestingly, other related instructions, which appear as current on the Agency web site, make similar statements, only in more cautious language. For example, one provision states that removal in certain “extreme cases” may amount, not to a “breach” of U.K. obligations under article 3, but rather to “ill treatment” under article 3.⁵⁵² Another instruction states that removal in such extreme cases would amount to ill treatment merely “under the Immigration Rules” (rather than under article 3).⁵⁵³

This is purely speculative, but perhaps, in reviewing its Discretionary Leave policy, the U.K. is under some retreat here from the notion that an “extreme case” could reach levels of socio-economic deprivation that trigger a breach of article 3 *without* at the same time triggering a *non-refoulement* obligation. Recall that the U.K. does not regard Discretionary Leave as a “protection status,” and created the DL category, in part, to address cases in which an applicant is *not* in need of international protection. The U.K. seems to be characterizing relief under these “extreme cases” as discretionary, compelled by humanitarian or compassionate considerations, rather than protection.⁵⁵⁴ However, at the point where removal (in an “extreme case”) breaches article 3, decision-making passes from the realm of discretion to that of obligation, and the U.K. should rightfully review such cases under its Humanitarian Protection provision, which implements the EU Qualification Directive’s subsidiary protection scheme (specifically here, article 15b).⁵⁵⁵

That is to say, under given facts, socio-economic deprivation either rises to the threshold of an article 3 violation or does not.⁵⁵⁶ Where deprivation meets violation, a State’s *non-refoulement* obligations are clear. The article 3 prohibition is absolute, and with respect to socio-economic deprivation, there can be “only one legal test...whether there is a real risk of the applicant being subjected to inhuman or degrading treatment or punishment.” Thus, the

sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation.” *Id.* ¶ 8.

^{552.} U.K. BORDER AGENCY, API: European Convention on Human Rights, § 7.2, at 18 (Oct. 2006) (re-branded Dec. 2008) (U.K.), *available at* <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/> (accessed June 29, 2012).

^{553.} U.K. BORDER AGENCY, API: Humanitarian Protection (undated), *available at* <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/> (accessed June 29, 2012).

^{554.} MCADAM, *supra* note 153, at 77-78.

^{555.} *See id.* at 64-79 (2012) (providing a comprehensive analysis of the status of socio-economic deprivation as a violation of ECHR Article 3).

^{556.} *Id.* at 71-72. *See also* R.S. (Zimbabwe) v. Secretary of State for the Home Department, [2008] EWCA Civ. 1421, [¶ 31] (Eng. & Wales).

focus of analysis is on facts relevant to each individual claim, though in a given case, facts that meet the threshold will prove to be “not only exceptional, but extreme.”⁵⁵⁷

Finally, it is worth noting that the United Kingdom has also implemented the Temporary Protection Directive.⁵⁵⁸ With regard to the U.K. perspective on the TPD, it is also helpful to recall—as mentioned earlier—that following adoption of the Directive, then U.K. Home-Office Minister Desmond Browne said, “The Directive that we are implementing will ensure that each European Member State plays its part in providing humanitarian assistance to people forced from their homes by war and *natural disasters* and will enable a quicker coordinated response to prevent human suffering.”⁵⁵⁹

Other European Union Countries

This study has not set out to “prove the negative.” That is to say, the study does not go so far as to claim that, “With respect to disaster-induced displacement in country X, no legally relevant provisions exist.” Instead, we have pointed to those arguably relevant provisions uncovered through close review of secondary literature, which pointed us to further investigation in primary sources. At times, it was not a legislative provision, but rather evidence of past practice or policy that served as impetus for further investigation. All this is to say that there may be, and certainly must be, further relevant provisions and policy developments in countries not address here. With limited resources, this study has highlighted a broad range of such provisions and developments. We encourage others to build on this work.

Conclusion

Our review of European migration and asylum law reveals that despite some intriguing developments over the last two decades, there is little foundation for claiming that Europe has, by any measure, addressed the growing protection gap created by disaster-induced displacement. Given the prospective scope of anticipated disaster-induced migration challenges, and having surveyed relevant European mechanisms and responses through the prism of international, regional, and national-level legal regimes, we are left with the sense that what we have uncovered here amounts to little more than wishful thinking.

⁵⁵⁷. N. v. Secretary of State for the Home Department, [2003] EWCA Civ. 1369, [¶ 40] (Eng. & Wales), available at <http://www.unhcr.org/refworld/docid/4162a48f4.html> (accessed July 1, 2012).

⁵⁵⁸. Immigration Rules, §§ 354-356B (updated to June 2012) (U.K.).

⁵⁵⁹. Press Release, UK Home Office, UK Plans in Place to Protect Victims of Humanitarian Disasters, 1 (Dec. 20, 2004) (emphasis added). Note as well that the U.K. demonstrated leadership on climate change through release of a highly influential study that labeled climate change “the greatest market failure the world has ever seen,” and then (in nearly 700 pages) arguably proved this statement to be true. See SIR NICHOLAS STERN, THE STERN REVIEW: REPORT ON THE ECONOMICS OF CLIMATE CHANGE (2006) available at http://mudancasclimaticas.cptec.inpe.br/~rmclima/pdfs/destaques/sternreview_report_complete.pdf.

In certain instances, a vaguely worded provision may provide—under extraordinary facts and strained legal interpretation—some degree of relief for disaster victims, in theory at least. Where statutes expressly reference environmental disaster, they remain untested; where past practice has accommodated disaster victims, it has often done so with reluctance; and where pronouncements tout the plight of disaster victims and the migration challenges inherent in climate change, policy has not kept pace with promise.

Yet, neither is the landscape barren. Together, the various statutory provisions, legislative proposals, case holdings, institutional studies, academic papers, policy statements, and past practice (with respect to at least a handful of recent natural disasters) suggest that there may be some opportunity to advance the dialogue. It is crucial that we do so. Even setting aside the more alarmist predictions,⁵⁶⁰ we can be certain that climate change will bring a greater number of natural disasters—of greater intensity—with unpredictable migration consequences. Europe Union Member States, along with likeminded countries, such as Norway and Switzerland, have an opportunity to provide pragmatic leadership. As Henderson noted, in 1902, “It is probable that climatic changes will largely influence the distribution of civilization in the future, as it has done in the past, though our modern means of counteracting climatic disadvantages may modify its significance.”⁵⁶¹

Let us hope so.

^{560.} See e.g., HUMAN TIDE: THE REAL MIGRATION CRISIS 6 (CHRISTIAN AID, May 2007), (predicting one billion people displaced persons between 2007 and 2050, including 50 million displaced by conflict and extreme human rights abuses; 50 million displaced by natural disasters; 645 million displaced by development projects such as dams and mines; 250 million “permanently” displaced by climate change-related phenomena such as floods, droughts, famines and hurricanes; and 5 million Convention refugees), available at <http://www.christianaid.org.uk/Images/human-tide.pdf>.

^{561.} HENDERSON, *supra* note 36, at 10.

About the Author

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Engaged in the human rights and refugee relief field for more than twenty years, Michael Cooper has served with several leading agencies, including the International Rescue Committee, Mercy Corps, Médecins du Monde, Human Rights Watch, the Roosevelt Institute, and the U.N. High Commissioner for Refugees. His humanitarian relief work has taken him to such diverse places as Albania, Kosovo, Chiapas (Mexico), Mongolia, China, Iraq, and Iran. He also served for a short time as a Special Assistant in the Obama Administration, working on legal issues related to protection of federal facilities against terrorist attack. Michael studied in Norway at the Peace Research Institute of Oslo and has a Masters in Global Policy and Conflict Resolution from New York University. He is a Public Interest Law Scholar at the Georgetown University Law Center, from which he received his J.D., as well as a Certificate in Refugees and Humanitarian Emergencies. Michael is married to Béatrice Maillé, a Canadian lawyer and diplomat who currently serves as Counselor to the Kingdom of Belgium and the Grand Duchy of Luxembourg.