

Environmentally Displaced Persons in Europe: Limits of the Legal Protection of this Controversial Category of Migrants

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Abstract

The article investigates the controversial category of the Environmentally Displaced Persons (EDPs) and the limits of the EU legal framework in providing subsidiary protection to this category of migrants. The Environmentally Displaced Persons are those migrants forced to flee from their home country due to environmental disasters and degradation. First, the article explains why the EU should take action to protect EDPs. Second, it examines if the Temporary Protection Directive and the Qualification Directive can provide adequate protection to EDPs. Finally, the article analyses the most recent approaches of the EU on the matter and it seeks to understand why the EU is still reluctant in providing a specific legal framework in order to protect EDPs.

Introduction: the controversial phenomenon of the Environmentally Displaced Persons

In the past few years, more and more attention has been given to the relation between climate change and migration. In particular, NGOs, UN agencies and scholars have studied how the increase of environmental disasters is exacerbated by climate change.

Climate disasters or gradual degradation is a direct or indirect cause of both internal or external displacement and even a source of conflicts due to the scarcity of primary resources such as water and food as a consequence of environmental degradation.¹

According to a report published by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) and the Internal Displacement Monitoring Centre of the Norwegian Refugee Council (NRC), in 2008 about 36 million people had been displaced due to sudden-onset natural disasters and 20 million of these people only because of climate-related sudden-onset disasters.²

Predictions on how many displaced people in future are alarming: Norman Myers estimated 150 million of “environmental refugees” in 30 years.³

Currently, in international law there is not an official definition to define, and thus to protect, all of those people forced to migrate owing to environmental factors. Often these persons had been denominated “climate refugee” or “environmental refugee” but, indeed, they cannot be recognized as “refugees” according to the Article

¹ Vikram Kolmannskog, Finn Myrstad “Environmental Displacement in European Asylum Law”(2009) 11 European Journal of Migration and Law 313-326

² Office for the Coordination of Humanitarian Affairs (OCHA) and the Internal Displacement Monitoring Centre (IDMC)/Norwegian Refugee Council, Monitoring Disaster Displacement in the Context of Climate Change, Geneva, 2009, p. 15.

³ Myers N., Kent J. Environmental Exodus: An Emergent Crisis in the Global Arena, (1995) Climate Institute, Washington DC, 1, 14

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1(a) of the 1951 Convention relating to the Status of Refugees⁴ that defines a “refugee”: “any person who [...] owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country”.⁵

Hence, there is no legal basis in international refugee law to include in the above official definition the “climate refugees” and, because of a lack of definition of this category, the International Organization for Migration (IOM) suggested the term “environmentally displaced persons” (hereinafter EDPs) which includes “Persons who are displaced within their country of habitual residence or who have crossed an international border and for whom environmental degradation, deterioration or destruction is a major cause of their displacement, although not necessarily the sole one.”⁶

The Intergovernmental Panel on Climate Change (IPCC) reported that both Europe and neighboring regions are influenced by the effect of climate change.⁷ Particularly in Africa, the situation highlighted by the report seems drastic: it has been estimated that by 2020, between 75 and 250 million people will suffer water scarcity and that agriculture could suffer a decrease of up to 50%.⁸

Although many displaced people remain within the internal border of their country, at the same time, others decide to flee abroad. Europe is one of their destination.

⁴ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>

⁵ 1951 Geneva Convention, art. 1(a)

⁶ Glossary on Migration, 2nd Edition. International Migration Law No. 25, IOM, Geneva, p.34. Available at

<http://publications.iom.int/bookstore/index.php?main_page=product_info&cPath=56&products_id=1380> Accessed 22 December 2016

⁷ Intergovernmental Panel on Climate Change, ‘Climate Change 2007: Synthesis Report. Summary for Policymakers’, in: *Fourth Assessment Report, 2007* <https://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf> accessed 22 December 2016

⁸ *Ibid*, p.11

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This phenomenon raises some issues in order to determine the extent of the protection that an EDP could seek in Europe. First, it is important to understand if, in light of the fact that there are no international standards that protect EDPs, the EU has the responsibility to protect them.

Second, based on the assumption that Europe should take action to protect EDPs, it is now necessary to identify the European legal instruments that might grant protection to this category and their adequacy in protecting EDPs.

The first part of the paper will analyse if the EU has a responsibility to take action to protect the EDPs. In so doing, two soft law instruments will be investigated: a document published by the European Commission in 2013⁹ and a study made by the European Parliament;¹⁰ both of these works show the interest and the awareness at EU level about EDPs.

The second part of the paper will analyse the Temporary Protection¹¹ and Qualification¹² Directive investigating the limits of these two instruments on granting protection to EDPs. It will be discussed whether the European legal framework does not adequately address this situation.

The third and final part of the paper will analyse the latest approach of the Commission on the matter, the 2013 Working Staff Document. The review of the re-

⁹ European Commission, "COMMISSION STAFF WORKING DOCUMENT, Climate change, environmental, degradation, and migration " 2013 (hereinafter 2013 Working Staff Document) Available at <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52013DC0216&from=EN>> accessed 22 December 2016

¹⁰ European Parliament, "Climate Refugees" Legal and policy responses to environmentally induced migration" 2011 (hereinafter 2011 Parliament Study). Available at <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/462422/IPOL-LIBE_ET\(2011\)462422_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/462422/IPOL-LIBE_ET(2011)462422_EN.pdf)> accessed 22 December 2016

¹¹ 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] OJ L 212/ 23 (hereinafter Temporary protection Directive, or TPD)

¹² Council Directive 2004/83/EC of 29 April 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] OJ L 304/23 (hereinafter Qualification Directive, or QD)

search will show that the Commission is having a cautious and vague approach to the phenomenon of EDPs. In fact, the EU institution suggests an external approach based on development cooperation rather than providing new concepts and instruments to grant protection to the victims of environmental disasters and degradation. The paper will argue that possible reasons of this remote approach may be the current priority for EU and Member States to cope with the migration crisis and, more importantly, the necessity to define the category of EDPs under the international law; once this controversial category is officially recognized at an international level, the EU may be more receptive to develop specific provisions to grant protection to EDPs.

The EU awareness of EDPs and its responsibility to take action

Most scholars and the UN agree that it is impossible to grant the status of refugee to people who fled from their country of origin due to environmental degradation or natural disasters because these two factors are not considered as valid grounds to claim asylum.

In fact, considering the definition given by Article 1 of the 1951 Refugee Convention, a person, in order to obtain the status of refugee, must have a “well-founded fear of being persecuted” and these reasons for persecution are limited to “race, religion, nationality, membership of a particular social group or political opinion”.¹³

Although some scholars argued that EDPs category could fall into the definition of refugee by reasoning that environmental degradation is government induced and, thus, it may be considered as a form of persecution, academics do not lend rel-

¹³ 1951 Refugee Convention, art. 1

evant credibility to this argument because a direct relationship between environmental disasters and governments' actions has never been proven.¹⁴

Other scholars contemplated the possibility to change and extend the 1951 Refugee Convention definition but this proposal had been considered as a risk to devalue the current international protection granted to refugees.¹⁵

In addition, the UNHCR underlined that EDPs cannot be considered as refugees because, in theory, they can still ask protection from their government, while refugees cannot.¹⁶

Because of a lack of definition of EDPs, the international legal framework cannot grant adequate standards of protection; for this reason, some alternative forms of protection have been proposed.

Until now, states have tended to provide applying complementary forms of protection. In general, complementary or subsidiary protection is based on human rights treaties¹⁷ and on general humanitarian principles and it is guaranteed every time a person or a category of persons needs to be protected but it does not meet the specific criteria required by the law for the recognition of refugee status.¹⁸ In the case of refugees, complementary protection has been described as “protection

¹⁴ See for example Alex Aleinikoff (2003) “Protected Characteristics and Social Perceptions: An Analysis of the Meaning of ‘Membership of a Particular Social Group’.” In *Refugee Protection in International Law*, edited by E. Feller, V. Türk & F. Nicholson. Cambridge: Cambridge Univ. Press. and Jessica Cooper (1998) “Environmental Refugees: Meeting the Requirements of the Refugee Convention,” *New York University Environmental Law Journal* 6: 480– 529.

¹⁵ David Keane “The Environmental Causes and Consequences of Migration: A Search for the Meaning of ‘Environmental Refugees’,” (2004) *Georgetown International Environmental Law Review* 16: 209–23

¹⁶ United Nations Refugee Agency (UNHCR) (2005) *Environmental Guidelines*. Geneva: UNHCR and IUCN

¹⁷ See, for example, Article 1 of the 1951 Refugee Convention

¹⁸ Aurelie Lopez, “The Protection of Environmentally-displaced persons in International law” (2007), *Environmental Law Journal* 37, pp.365-409

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granted by states on the basis of an international protection need outside of the 1951 Convention framework.”¹⁹

While the regime of the international protection is regulated by international agreement, on the contrary, the regime of the complementary protection is governed by national or regional legislations.

At the EU level, complementary protection is regulated by art. 78 of the Lisbon Treaty²⁰ which states:

1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.²¹

In practice, currently there are two instruments that offer a form of complementary protection in Europe: the Temporary Protection Directive and the Qualification Directive.

Before starting the analysis of the above mentioned instruments, it is necessary to clarify a question that may be raised at this point: if there are no international standards, why should Europe take action? The answer can be found in soft-law in-

¹⁹ Jane Mc Adam “Complementary Protection in International Refugee Law”, (2007) Oxford: Oxford Univ. Press.

²⁰ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, pp. 1–271

²¹ Treaty of Lisbon, art. 78

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struments that recognize the importance and the reality of the problem of EDPs and the necessity to develop effective tools to protect this undefined category of persons. The EU framework on the matter was drafted for the first time in 1999 when the European Parliament referred to this topic in the resolution “The Environment, Security and Foreign Policy”.²² Gradually, more and more MEPs discussed and worked on this issue and, finally, in 2011 the European Parliament published a study on legal and policy responses to environmentally induced migration.²³

During the last 15 years, the European Commission produced several reports and research on the matter of the environment, climate change and forced migration which showed its commitment on the topic of EDPs.²⁴

In 2012, the Council of EU, commenting the 2012 EU Global Approach to Migration and Mobility,²⁵ formally concluded that it had recognized “the need to further explore the linkages between climate change, migration and development, including the potential impact of the climate change on migration and displacement”.

Furthermore, in 2013, the European Commission, after a request from the European Council during the Stockholm Programme, published the “Commission Working Staff Document”.²⁶ The research is focused on the human mobility caused by climate related disasters and environmental degradation and it looked at EU policy responses on the matter and recommendations for future actions and durable solutions.

²² European Parliament, Resolution on *The Environment, Security and Foreign Policy*, passed on January 29, 1999, A4-0005/99, JO C 128/92 of 7 May 1999

²³ 2011 Parliament Study (n11)

²⁴ See for example, Joint Paper from the High Representative and the European Commission to the European Council: *Climate change and international security*, S113/08, 14 March 2008, Joint Reflection Paper by the High Representative and the Commission 'Towards a renewed and strengthened European Union Climate Diplomacy', 9 July 2011

²⁵ Communication FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS The Global Approach to Migration and Mobility, COM/2011/0743

²⁶ Commission Working Staff Document (n10)

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Establishing specific instruments that protect EDPs is extremely important because, as the Human Rights Council has stated:

climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation, and recalling that in no case may a people be deprived of its own means of subsistence.²⁷

The Temporary Protection Directive

It is on the basis of the above reports, studies and political statements, that the EU institutions may decide to take action to give legal protection to EDPs. The next section will examine the existing legal instruments on which such protection might be granted.

The Temporary Protection Directive was created to regulate the mass influx after the Yugoslav civil war in the early 1990s. At the very first time of its adoption, the aim of the Directive was to provide temporary protection to all those people fleeing from ex-Yugoslavia who, although they did not fulfill the criteria of the 1951 Geneva Convention to be recognized as refugees, they were considered in need of some form of protection.²⁸

²⁷ Human Rights Council, Human Rights and Climate Change, Resolution 10/4. Available at <http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_4.pdf>

²⁸ European Commission, "Study on the Temporary Protection Directive, Executive Summary" (January 2016). Available at <<https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e->

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Temporary protection has been developed to prevent the block of asylum systems and to guarantee immediate protection.²⁹ In general, the directive's purpose was, first, to set minimum standards at EU level and, second, to balance the MS' efforts in receiving persons.³⁰ To sum up, the Temporary Protection Directive was adopted to arrange an efficient framework able to support situations of mass influx.

So far, this Directive has never been applied. To be activated, there should be a situation of mass influx established by a Council Decision (qualified majority) and after a proposal from the Commission that should also take into consideration any Member States' request.

The absence of activation of the Directive has caused the implementation of various national forms of temporary protection that differ from one country to another, with different procedures and benefits.³¹

More specifically, the Directive provides temporary protection to displaced persons during "mass influxes"; the legislator opted for a very broad definition of mass influxes ("large number of displaced persons")³² because it was decided to empower the Council to define case by case the measure of "mass influx". If the purpose of requiring the Council to adopt a decision was to ensure flexibility to take account of specific situations, this has effectively deterred Member States from requesting the activation of the TPD.³³

In the matter of EDPs, the main weakness of the TPD is that it provides temporary protection only in case of "mass influx", whilst in case of environmental disas-

[library/documents/policies/asylum/temporary-protection/docs/executive_summary_evaluation_tpd_en.pdf](#)>. Accessed at 26 December 2016

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² Temporary Protection Directive, art. 2(d)

³³ 2013 Working Staff Document, (n10)

ters displaced individuals who do not constitute a “mass influx” may be in need of protection as well.

Moreover, when art. 2(c) defines “displaced persons” it refers “in particular” to “persons who have fled areas of armed conflict or endemic violence” or “persons at serious risk of, or who have been victims of, systematic or generalized violations of their human rights”.³⁴ Because the article does not provide an exhaustive list but it rather refers to “generalized violations of human rights”, it could be argued that EDPs are part of the category of “displaced persons” that the TPD seeks to protect.³⁵ In fact, natural disasters and environmental degradations may undermine the enjoyments of human rights such as the right to life, the right to adequate food, the right to water, the right to health and the right to adequate housing which could rise to such level as to amount to “generalized violations of human rights”.³⁶

The Commission underlined this fact in its 2013 Working Staff Document when it stated that the TPD may “leave [...] wide room of manoeuvre, in the form of open definitions of key words, such as “mass influx”.³⁷

If, as it has been argued,³⁸ the TPD may provide a temporary protection to EDPs, the duration of this form of protection remains limited. Article 4 sets the duration of the protection to 1 year, but the Directive allows, in some circumstances,³⁹ the possibility to implement and extend the duration up to 3 years.⁴⁰ In case of environmental disasters, the reconstruction and rehabilitation of the territory takes longer than three years and, thus, this duration does not offer a valuable solution.

³⁴ Temporary Protection Directive, art. 2(c)

³⁵ Kolmannskog (n2), pp. 316-317

³⁶ 2013 Working Staff Document (n10), p. 16

³⁷ *Ibid.*, p.19

³⁸ Kolmannskog (n2)

³⁹ Temporary Protection Directive, art. 4(2)

⁴⁰ Temporary Protection Directive, art. 4

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Furthermore, article 22 of the TPD states that “in cases of enforced return, Member States shall consider any compelling humanitarian reasons which may make return impossible or unreasonable in specific cases”⁴¹ but it does not provide any instructions to Member States on which status to provide to these persons.⁴²

To conclude, although the EDPs could fall into the definition of “displaced persons” and they might obtain the protection granted by the TPD, the extent of the protection of the Directive has various limitations. Moreover, the Directive has never been implemented in 15 years and, at the moment, it is not foreseen that it will be activated in the near future.

The Qualification Directive

The Qualification Directive was adopted after the Tampere European Council in 1999 when it was decided to establish a Common European Asylum System.⁴³ In 2004, the QD was adopted and took effect from 10 October 2006.⁴⁴ This Directive established common grounds to provide a subsidiary form of international protection to non-EU citizens or stateless persons who cannot be recognized as refugees according to the definition of the 1951 Refugee Convention but who nonetheless require protection because there are “substantial grounds” for believing that if such persons were returned to their country of origin, they would face “a real risk of suffer-

⁴¹ Temporary Protection Directive, art. 22

⁴² Kolmannskog (n2), p. 318

⁴³ European Union: Council of the European Union, *Presidency Conclusions, Tampere European Council, 15-16 October 1999*, 16 October 1999, available at:

<http://www.refworld.org/docid/3ef2d2264.html> Accessed on 24 December 2016

⁴⁴ The Qualification Directive, art. 38

ing serious harm”.⁴⁵ Furthermore, the QD is based on human rights and on the *non-refoulement* principle.⁴⁶

The QD provides minimum standards for granting subsidiary protection but each Member State is free to apply more favourable measures.⁴⁷

The current version of the QD does not include victims of climate change as potential candidates for subsidiary protection. The main reasons why the QD does not provide protection to EDPs will be now analysed, the paper will also take into consideration amendments, relating to EDPs, proposed by the Commission and the European Parliament during the years.

“Subsidiary Protection status” is defined by article 2(f) as “the recognition by a Member State of a third country national or a stateless person as a person eligible for subsidiary protection”.⁴⁸

Article 2(e) states that applicants who do not meet the criteria to grant the status of refugee, to apply for subsidiary protection, must face “a real risk of suffering serious harm as defined in Article 15”. Article 15 goes on to provide a list of what the QD means by “serious harm”:

- (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 conflict⁴⁹

⁴⁵ The Qualification Directive, art. 1(e)

⁴⁶ The *non-refoulement* principle is defined by art. 33 of the 1951 Geneva Convention

⁴⁷ The Qualification Directive, art. 3

⁴⁸ The Qualification Directive, art. 2(f)

The current version of the Article 15 does not explicitly contemplate the possibility to include EDPs in any of the meanings of “serious harm” and, thus, at the moment these persons cannot directly enjoy subsidiary protection.

Nonetheless, in the past the possibility to include the victims of environmental disasters among those who can enjoy the subsidiary protection had been discussed both by the Commission and the Parliament.

In 1999, in a discussion paper on subsidiary protection, the Commission proposed to include “environmental disasters” as a ground of subsidiary protection⁵⁰, nonetheless that proposal has not received a positive response from Member States. Moreover, in 2002 a report issued by the European Parliament underlined “the urgent need to devise the appropriate instruments and policies of prevention” for EDPs because this category needs to be urgently protected.⁵¹

Despite the Parliament, having initially displayed a proactive approach to include EDPs among those categories who may enjoy subsidiary protection in Europe, the Parliament has since been less inclined to extend the scope of the QD. As a result, in July 2011 the European Parliament made another proposal regarding potential amendments to the QD, it refrained from mentioning the necessity to grant protection to the victims of environmental disasters.⁵²

⁴⁹ *Ibid.*, art. 15

⁵⁰ Council of Europe, Discussion paper on subsidiary protection, Asile 41. Brussels: Council of the European Union 1999, p. 6

⁵¹ European Parliament, Report on the proposal for a Council directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, (2002)

⁵² European Parliament, Report on the proposal for a directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, COM(2009)0551 – C7-0250/2009 – 2009/0164(COD), 14 July 2011

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As the scholar Kolmannskog highlighted, the first proposal of Article 15(c) was broader and it included the possibility to grant subsidiary protection in case of “systematic or generalized violations of human rights”⁵³ and, as other scholars argued, it is possible for such violations of human rights to cover a very wide range of situations, including environmental disasters.⁵⁴

Then, the Council presented an alternative formulation to add a letter (d) in Article 15 including, among the acts that may be considered as “serious harm”, “acts or treatment outside the scope of sub-paragraphs (a) to (c) [...] 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”.⁵⁵ This proposed amendment has been considered too vague⁵⁶ because, as Kolmannskog reasoned, the proposed extension, only referred to man-made events which would not include environmental disasters and degradation.

If an environmental disaster, and the related human mobility, may be considered entirely man-made or not is still a controversial topic. For instance, according to the ICCP the sea level rise is a man-made effect⁵⁷ but, as the Commission argued, several factors play in climate change and the connected disasters and degradations. Thus, attributing climate change as a unique driver of migration is complicated.⁵⁸

⁵³ European Commission, Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection (2001) OJ C 51E , 26.2.2002, p. 325–334

⁵⁴ R. Piotrowicz and C. Van Eck, ‘Subsidiary protection and primary rights’, 53 *International and Comparative Law Quarterly* 2004 as cited by Kolmannskog (n1)

⁵⁵ Council of the European Union, Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, (2002), *Presidency note*, 12148/02

⁵⁶ *Ibid.*

⁵⁷ IPCC, (n8)

⁵⁸ 2013 Working Staff Document (n10)

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Although the Commission stated that the QD would “not include environmental degradation nor climate change amongst the types of serious harm which can lead to granting such protection”,⁵⁹ some scholars argued that the letter (a) and (b) of Article 15, in some cases, may foresee the possibility to include victims of environmental disasters.

In fact, according to the argument of the scholar Kolmannskog, despite the European Court of Human Rights having never dealt with cases regarding EDPs, other cases about disaster prevention and the right to life may foresee a progressive interpretation of “inhuman treatment”. The scholar relied upon the cases *D v UK*⁶⁰ and *Bensaid v UK*⁶¹ to reason that there are strong arguments to believe that article 15 (a) and (b) of the QD could be applied in circumstances of “extreme natural disasters or degradation on the basis of the ban on torture, inhuman or degrading treatment or the right to life”.⁶²

Moreover, also according to Mayrhofer and Ammersome, persons forced to migrate due to the climate change effect, may be covered by subsidiary protection, specifically by the lett.(b) of article 15.⁶³ After having studied the recent jurisprudence of the ECtHR, the above mentioned scholars concluded that it may be possible to grant subsidiary protection on the ground of “inhuman or degrading treatment” only when EDPs, if forced to return in their home country, might face absolute poverty or

⁵⁹ *Ibid.*, p.18

⁶⁰ *D. v. United Kingdom*, 146/1996/767/964, Council of Europe: European Court of Human Rights, 2 May 1997, available at: <http://www.refworld.org/docid/46deb3452.html>

⁶¹ *Bensaid v. The United Kingdom*, Appl. No. 44599/98, Council of Europe: European Court of Human Rights, 6 May 2001, available at: <http://www.refworld.org/docid/3deb8a1e4.html>

⁶² For a deeper analysis of the two cases see Kolmannskog (n2), p.322

⁶³ Morika Mayrhofer and Margit Ammer “People moving in the context pf environmental change: the cautious approach of the European Union” (2014) *European Journal of Migration and Law* 16, pp.389-429

because they would face difficult socio-economic situations due to the fact that they belong to vulnerable groups.⁶⁴

After having seen the main obstacles which the QD poses to granting protection to the EDPs and having examined several proposals, it is possible to conclude that although EU recognizes the reality of environmental disasters and the forced human mobility they may provoke, at the moment no effective and practical measures have yet been taken to provide a legislative basis for extending protection to EDPs. Thus, in the absence of a specific provisions, it is very hard to try to find circumstances under which EDPs could qualify for protection under the QD.

The latest approach of the European Commission

So far, the paper analysed the normative gaps and the obstacles in the EU legal framework for granting protection to EDPs. The last part will investigate the latest study of the European Commission, the previously mentioned “Commission Staff Working Document, Climate change, environmental degradation, and migration”,⁶⁵ the study argues that considering that the Commission suggests an approach based on development and adaptation, the EU is still far from establishing specific tools which address the protection of EDPs.

The paper will find that the reasons of this distant approach is the lack of an official definition at international level: the matter of ensuring the protection of EDPs is a controversial issue due to the wide range of factors that contribute on environmental induced migration. Although the EU has all the means to grant protection to

⁶⁴ *ibid.*, p.417-418

⁶⁵ 2013 Working Staff Document (n10)

this category, the topic still needs to be further explored and classified at an international level before being able to contribute to a specific legal framework at EU level.

In its 2013 Working Staff Document (initially planned as a Communication), the Commission gathered several experts and representatives from NGOs, from the International Organization for Migration, UNHCR and Member States in order to develop a study that not only analysed the EU legal and policy framework but also gave some recommendations to develop future effective responses.

The strategy suggested by the Commission is an “adaptation” based approach in order to reduce environmental displacement.⁶⁶ This procedure means “anticipating the adverse effects on climate change and taking appropriate action to prevent or minimize the damage they can cause”.⁶⁷ Measures of adaptation might be the efficient use of scarce water resources, choosing specific and stronger trees species, flood defences etc.

In addition, the Commission made a link between “adaptation” and “disaster risk reduction” policies and actions, these two factors should increase the level of adaptation to climate change and environmental degradation in order to reduce related migration.

The aim of the strategy is to allow persons who want to remain in territories affected by environmental disasters and degradation to do so. Only during extreme situations should those persons be entitled to cross international borders.⁶⁸

Though, the Commission’s response to the environmentally induced migration is a remote approach on the matter, the suggested strategy is based on develop-

⁶⁶ *Ibid.*, pp.21-25

⁶⁷ *Ibid.*

⁶⁸ *ibid.*

ment cooperation between EU and countries affected by climate change rather than a proactive program that establishes new instruments and concepts.⁶⁹

According to the Treaty of Lisbon (see Article 78 and 79) the EU has all the means to develop effective policies and legal instruments to grant protection to the EDPs. As seen, climate change effects and the related induced migration is a very complicated phenomenon due to the many factors involved, moreover it is a matter that includes both internal and external dimensions of EU policy.⁷⁰ The role of climate change as a direct migration driver is still not completely defined, the lack of official definition and different patterns of migration create difficulties and gaps on developing effective responses to this complex topic.

Currently, Europe is tacking the biggest migration crisis after the second world war and, thus, the main priority is devising effective measures to cope with this issue. The difficulties raised in controlling the migration crisis have led to EU migration policies more and more orientated toward a “restrictive and control-orientated approach”, this is also due to the pressure of Member States.⁷¹ Thus, the environmental induced displacement is considered as a less urgent problem compared with the contemporary migration and asylum issues that EU has to cope with.

The document of the Commission showed the awareness of the EU on the phenomenon and its related problems but also the reluctance of the institution to create a specific framework that, first, addresses to defines the category of migrants displaced due to environmental factors and, second, that provides a form of protection to EDPs. The Commission’s hesitation can be seen when it reviewed the existing instruments (the TPD and the QD) and when it suggested an external approach

⁶⁹ Mayrhofer and Ammer (n64)

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

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on the topic (adaptation) rather than recommend the adoption of a specific legal framework tailored on resolving the issues caused by the environmental induced migration.

Furthermore, it is important to highlight the fact that, at national level, only few member states (Sweden and Finland) have provided in their legal frameworks specific and appropriate instruments that address EDPs and environmentally induced migration.⁷² On the one hand, these legislations may be used as a good practice for future specific provisions but, on the other hand, the fact that only two MS have decided to establish particular norms in their legislation, means that the willingness for further developments from other Member States is still limited.

Based on the above study of the Commission Working Paper, it is possible to conclude that although the EU is aware about the problem of EDPs and about the necessity to develop effective concepts and instruments to resolve this phenomenon, the EU's approach on the question is still far from providing a satisfactory legal framework.

The reasons for this vague and reluctant approach can be found in the fact that currently Europe is facing an important migration crisis that urgently needs to be controlled and resolved and on that fact that, at international level, the category of EDPs is still undefined.

Although, at the moment, the EU is aware of the reality of the migration caused by environmental disasters and degradation, and of the necessity to protect this category of displaced persons, the EU's development of specific instruments to protect EDPs is unlikely to be adopted until this category becomes the subject of an agreed definition in international law. As the European Parliament suggested, it is

⁷² See Swedish Aliens Act, Chapter 4, Section 2a and Finnish Aliens Act, Chapter 6, Section 88a(1)

necessary to pursue a holistic approach on the matter that provides durable solutions.⁷³

Lately, the impact of climate change on migration has been addressed both by the UN and advocated by several NGOs together with various migration panels. They all agreed on the necessity and urgency to define the category of EDPs at an international level, to clarify their legal status and, finally, to adopt specific measures that protect them.⁷⁴

Hopefully, once EDPs become recognized as a category of persons in need of protection under international law, the EU will be encouraged to develop effective and practical instruments that provide sufficient protection to EDPs.

Conclusion

The phenomenon of environmentally displaced persons is a complicated reality that involves a wide range of factors and that creates different patterns of migration. Finding a connection between climate change, environmental disasters and degradation and migration is not always immediate; this is the main reason why, at the moment, there are no international standards to protect EDPs. Lately, the issues related to EDPs have been studied both at an international and European level but, so far, no official definition has been agreed yet. The lack of an official recognition under the international law caused protection gaps.

⁷³ 2011 Parliament Study (n11)

⁷⁴ See for example, "The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, 1/CP.16, chapter on 'Enhanced action on adaptation', paragraph 14 (f)", Human Rights Council, Resolution 10/4 on Human Rights and Climate Change, Adopted without a vote at the 41st Meeting, 25 March 2009, available at <http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_4.pdf>, the 2012 IOM Council Resolution on the Migration Crisis Operational Framework, available at <[https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/MC2355 - IOM Migration Crisis Operational Framework.pdf](https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/MC2355_-_IOM_Migration_Crisis_Operational_Framework.pdf)>

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First, the paper has analysed why EU has the responsibility to protect EDPs. Considering that at the moment there are no international instruments that directly protect this category, it is important to clarify if and why the EU should take action to grant protection to EDPs.

To argue that EU has responsibility to protect this category, several soft-law instruments (such as the 1999 and 2011 European Parliament studies and the 2013 Working Staff Document) have been analysed; it has been found that these studies recognize the importance and the reality of the problem of EDPs and consequent necessity to develop effective tools that protect this undefined category of displaced persons.

Second, the paper has investigated the two EU instruments that grant complementary protection: the Temporary Protection Directive and the Qualification Directive. After having investigated the two directives, it has been found that neither of them provide a sufficient level of protection to people forced to leave their country due to environmental disasters and degradation. In particular, the TPD cannot provide an adequate level of protection because of the limited duration of the protection which it can provide (maximum 3 years) and because the directive only refers to “mass influx” of displaced persons, individuals are not contemplated. Moreover, the Directive has never been applied in practice.

Regarding the Qualification Directive, it has been noted that EDPs could find a form of protection only under specific circumstances related to the lett.(b) of Article 15 (“inhuman or degrading treatment”). Lately, the European Parliament made several proposals in order to include the “environmental displaced persons” among those categories who may enjoy the subsidiary protection in Europe but no further measures have been taken yet.

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Third, the paper analysed the latest EU approach on the matter in question, the 2013 Working Staff Document, and it argued that at the moment the cautious European approach does not foresee the development of specific instruments and concepts that may grant protection to EDPs. In fact, the Commission suggested an “adaptation” approach based on development cooperation rather than proposing new concepts and instruments. The paper found that possible reasons of this external approach may be, first, the priority for the EU and MS to resolve the current migration crisis and, second and more important, the lack of a definition under the international law that generated gaps of international standards of protection. The EU has all the means to take action to protect EDPs but this controversial issue is a matter which involves several different factors and which needs further and deeper studies in order to develop future specific legal instruments which will grant an adequate level of protection to this category. Hopefully, once the category of EDPs is defined by international law, the EU will start to develop a legal framework tailored to grant protection to environmentally displaced persons.