

# **The EU's Responsibility to Protect Environmentally Displaced People**

Written by Ansgar Fellendorf and David Immer

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## **The EU's Responsibility to Protect Environmentally Displaced People**

<https://www.e-ir.info/2015/08/22/the-eus-responsibility-to-protect-environmentally-displaced-people/>

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### **The European Union's Responsibility to Protect Environmentally Displaced People and Their Position in the Common European Asylum System**

"If climate change makes our country uninhabitable, we will march with our wet feet into your living rooms." [1] – Atiq Rahman, Bangladesh Climate Negotiator

When UN Secretary General Ban Ki Moon called climate change "the defining issue of our era", the matter unquestionably had reached the global political level. [2] In fact, the apolitical and highly-regarded Intergovernmental Panel on Climate Change (IPCC) repeatedly has produced factual evidence for rapid climate change and removed any doubt about its man-made character. [3] Evidence has further shown that human movement is closely linked to climate conditions, and with global temperatures rising environmental migration is expected to reach unprecedented

# The EU's Responsibility to Protect Environmentally Displaced People

Written by Ansgar Fellendorf and David Immer

levels.[4] As a matter of fact, scholarly literature vividly debates the issue of climate refugees, also referred to as environmentally displaced people (EDP).[5] However, the legal regimes of our world have not yet adapted to climate-induced migration. Currently, there is no global governance system acknowledging and protecting climate refugees, leading to a “protection gap”. [6]

The academic, and in fact dominantly legal, debate regarding the status of EDP is well-established. It is acknowledged that law regimes have to adapt to the transformations that accompany climate change.[7] Indeed, the focus of discussion lies on the applicability and suitability of different international law instruments in granting *locus standi* to EDP. Some advocate the establishment of new rules,[8] others believe in the full exploitation of existing international law such as the 1951 Convention relating to the Status of Refugees (1951 Convention).[9] Again different scholars have endorsed the UN's Guiding Principles on Internal Displacement,[10] or explored the possibilities of climate refugee protection in ad hoc regimes under the auspices of the UNFCCC.[11] This broad and varied discussion of international law instruments for the protection of EDP, however, has not led to a nascent consensus with outcomes for further research.

The present paper thus, rather than entering into a lively, yet unfruitful, debate, takes a novel approach by analyzing the protection of EDP in the Common European Asylum System (CEAS). While other regional refugee instruments such as the 1984 Cartagena Declaration on Refugees have been inspected in the context of environmentally induced migration,[12] a thorough analysis of the EU regime has been broadly neglected. However, it is highly relevant to explore the possibilities of this elaborate law regime, as the influx of EDP is expected to increase. While one might object that the EU as a territorial entity is confined in its actions, the mere extraterritorial character of climate change challenges this opposition. Due to global warming's universal impacts, the conduct with its consequences is also a regional priority. The EU in particular, with its firm institutional setup as well as its normative power can be justified as a relevant actor when discussing the protection of EDP.[13] The European Commission, as well, has recognized that migration driven by climate change is relevant for EU policy.[14] Admittedly, this line of argument implies a European responsibility to protect climate refugees and hence requires a theoretical discussion. Steering away from the legal approach, this paper aims to give a critical perspective on the extent of EDP protection under the CEAS.

In the course of analysis, first the concepts and definitions of environmental and climate-induced migration are closer assessed. Thereafter, a theoretical discussion, highlighting three IR traditions, enables the establishment of a European responsibility to protect climate refugees. Subsequently the fourth chapter defends the paper's choice of argument and consequently analyzes the various tools of the CEAS. In addition, European policy is scrutinized in search of potential bridges for the protection gap of EDP. Finally, the conclusion recaps the critique of the CEAS in light of the EU's responsibility to grant *locus standi* to climate refugees.

Whereas we discuss the most relevant directives, provisions and principles of the CEAS, no claim of a thorough legal analysis is made. However, the paper provides valuable insights and offers a novel approach to a debate, which seems to have run into somewhat a deadlock. It avoids the vicious cycle of the international law legal discussion and identifies the EU as an important regional actor in protecting EDP.

## Delineating the Issue: Environmentally Displaced People

The study of environmental migration, a relatively recent field on the academic map, still deals with various concepts that describe an analogous phenomenon. This chapter shortly reviews the debate and defines “climate refugees”, “environmental refugees”, and “environmentally displaced people” (EDP) for the further course. Indeed, it appears that the varying typology has obstructed a more defined debate.[15] whereas conceptual agreement between the link of climate change and human migration has appeared.[16] In fact, the IPCC has suggested that “the gravest effects of climate change may be those on human migration”. [17] In various places of the globe, especially drylands, coastal zones and mountainous regions, people are displaced by climate change effects such as drought, flooding, shoreline erosion and agricultural disruption.[18] The Commission phrased more carefully that “climate-induced events [...] are likely to assume greater importance in influencing migration.”[19] Some estimations suggest that in 2010 about 38 million people were forced to relocate due to climate-related events and that drought affected about 108 million people.[20] Accordingly, some scholars put the number of environmental refugees as high as 200 million by the year

# The EU's Responsibility to Protect Environmentally Displaced People

Written by Ansgar Fellendorf and David Immer

2050.[21] However, these numerical claims have been called into question because they are difficult to empirically substantiate, and at least implicitly political.[22]

Unsurprisingly, scholars have soon opposed the presented linear causal relationship between climate change and migration. Their critique of “environmental migration” neglects the assumption that global warming is a major cause for displacement. Accordingly, there exist multiple and overlapping grounds for migration streams such as the interdependency of changes in the natural environment, human adaptability and poverty. One has to take into account the complexity of the decision-making to migrate and not only view the physical “tipping-point”, but also the socio-cultural environment.[23] Nevertheless, climate change effects remain an essential factor in forcing so-called “environmental refugees” to migrate. Even the fiercest critics accept that environmental factors play a role in migration patterns, also due to empirical field work.[24]

One of the earliest and most cited definition of “environmental refugees” stems from a 1985 UNEP report, which construed:

“people who have been forced to leave their traditional habitat, [...] because of a marked environmental disruption that jeopardized their existence.”[25] Many scholars have followed this train of thought and subsequently elaborated that “any person who owing [...] to degraded environmental conditions threatening his life, health, means of subsistence, or use of natural resources is unable [...] to avail himself to the protection of that country” can be classified as an environmental refugee.[26]

When discussing “environmental refugees” a crucial distinction between climate change-induced and climate change-unrelated causes has to be made.[27] The former includes the climate change effects sea-level rise, extreme weather events, drought and water scarcity. The latter describes for example industrial pollution, logging and construction of infrastructure.[28] The focus of this paper lies on climate change-induced migration as a global phenomenon, rather than on local migration patterns due to on-spot causes. Thus, environmental refugees are conceptualized as people migrating due to the harmful effects of climate change. The term “climate refugee” does not allow for this confusion because of its literal phrasing. Another frequent distinction in the literature is between slow-onset and rapid-onset natural disasters, whose frequency is exacerbated by climate change. The former includes phenomena such as desertification and sea-level rise and the latter the increased occurrence of weather extremes and natural catastrophe. Accordingly, people are displaced for a varying time span.[29] The difference proves also important for policy-makers as natural disasters can cause a mass influx of temporarily displaced people and slow-onset effects can cause a grave disruption of society.[30] When analyzing the CEAS further on, it is useful to keep these differing causes for climate-induced displacement in mind.

Legal experts soon objected to definitions of “environmental refugees” and “climate refugees”. According to the 1951 Convention refugees are defined by international law as individuals who are unable to return to their home country because of a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.”[31] Hence, people migrating for climate-induced reasons do not meet these international legal standards. In fact, the Convention lacks any reference to the natural environment per se.[32] Opposition to the term “climate refugee”, however, has also proven politically motivated. Asylum issues lie in a socio-political context with increased restrictions on immigration due to popular sentiment. Thus, state parties fear that the term “refugee” would trigger disliked obligations under international law.[33]

Taking into account these objections and the fact that most climate refugees are internally displaced, the term of “environmentally displaced people” (EDP) has been coined.[34] It was soon adopted by intergovernmental bodies, and the UNHCR explicitly states that “the terms ‘climate refugees’ and ‘environmental refugees’ are not accurate or useful nomenclatures and should, therefore, be avoided.”[35] As mentioned, official bodies have preferred the terminology of “environmental displacement” as international law provides no specific legal status to this new concept. The European Commission, for instance, has preferred the term “environmentally displaced person” for being descriptive, while not necessarily implying governance responsibility.[36] The International Organization for Migration (IOM) defines EDP as “persons [...] who have crossed an international border and for whom environmental degradation, deterioration or destruction is a major cause of their displacement.”[37] This terminology emphasizes

# The EU's Responsibility to Protect Environmentally Displaced People

Written by Ansgar Fellendorf and David Immer

also the cross-border character of EDP, resembles strikingly the concept of climate refugees and hence fundamentally describes the same phenomenon. This has led Morrissey to draw the conclusion that the debate on “environmental refugees” is less about the nature of the relationship between climate change and human mobility itself, but more about the representation and terming.[38]

For the purpose of this paper, the legal discussion of exact terminology is not entered profoundly. Despite the outcry of UNHCR and legal experts, the terms “climate refugee”, “environmental refugee” and “environmentally displaced person” are used interchangeably and viewed as describing the same phenomenon. It is true that they constitute a differing framing of climate-induced migration. However, rather than being concerned with representation, the paper focuses on the established link between climate change and migration. We agree with Bierman’s definition and view climate refugees (and any of the other terms that is) as *“people who have to leave their habitats, immediately or in the near future, because of sudden or gradual alterations in their natural environment related to at least one of three impacts of climate change: sea-level rise, extreme weather events, and drought and water scarcity”*. [39] The effects of climate change are viewed as the main push-factor for migration, while naturally multiple and interdependent factors such as poverty and adaptability play a role. A possible critique is the presumed simplicity of this definition focusing on climate factors. However, there already exists a well-established literature and conceptual agreement on political and economic refugees, leaving climate-induced migration in need of a distinguished phrasing.

## Theoretical Perspectives and EU Responsibility

After engaging in an analysis concerning the legal status and definition of EDP, it is furthermore crucial that this very concept is viewed through the lens of relevant IR traditions. This appears necessary as “climate refugees- and climate change- not only exist (in terms of physicality), but are also socially constructed (and understood) using different world-views”[40]. With reference to this, this chapter applies a liberal, realist, as well as critical approach to climate-induced migration. In light of the purpose of this work, it is necessary to detect, as much as justify, the certain IR tradition which will find further application.

To start with, liberal tradition of IR theory deals with several approaches towards the issue of environmental refugees. Firstly, the very nature of the concept of EDP is often analysed with regards to legal definitions. Thus, the focus lies on international governance and the inherently liberal notion of multilateralism, emphasizing the rule of law.[41] For instance, Gemenne notes that climate refugees are “not being prosecuted for their belong[ing] to a particular group and not always crossing international borders,”[42] which ultimately eliminates EDP as refugees in terms of the 1951 Convention. Not merely the definition and scope of climate refugees is contested within liberal literature, but also policy options aimed at countering the issue. With reference to this, suggested policy options range from exhausting different international law instruments to programs, which aim at reducing the ecological footprint.[43] The justification for proposing such policy options is rooted in traditionally liberal principles such as “economic prosperity and personal fulfilment”, which cannot be granted in the event of environmental insecurity.[44] In addition, another cornerstone in liberal theory is the stress on cooperation. Liberal authors argue that “as the physical impacts of climate change, for example the large displacement of people will be significant [...] the international system can only function if everyone with a stake in it believes that they can make it work.”[45]

In fact, the latter example illustrates the state-centric approach of liberal theory, since states are the main actors within the international system influencing laws and policy. Whereas the formulation may also consider international institutions, EDP cannot be regarded as an actor within the international system. In liberal theory they are thus not considered as having “a stake”. Another shortfall of liberalism is the rational-actor assumption. While we do not criticize it in depth, it is interesting to point to the fact that due to rational self-interest state actors do not stress climate-induced migration. Accordingly, liberal literature fails to provide a normative direction.[46] Indeed, liberal norms such as cooperation and peace find little application outside a legal context when discussing environmentally-induced migration. While liberal literature discusses different forms of cooperation, it fails to question the underlying mechanisms of the problem, and disregards political and economic factors leading to climate-induced displacement. Since this paper analyzes the CEAS, the liberal stance on EDP and “burden sharing on the international level”[47] is important to consider. However, liberal theory cannot account for a European responsibility as it lacks the normative direction and can therefore largely be discounted.

# The EU's Responsibility to Protect Environmentally Displaced People

Written by Ansgar Fellendorf and David Immer

On the other hand, realist notions and interpretations concerning EDP are oftentimes characterized as a subgroup of environmental security. Accordingly, realist thinkers predominantly see the emergence of climate refugees in a context of national security. Henceforth, climate migration is perceived as a “threat multiplier”, as it bears the potential to “act as an accelerator or catalyst for existing tensions between nation states.”[48] High EU officials, as well, emphasized the risks and resource pressures of environmental change.[49] Respectively, some European governments have shared these realist concerns and named climate change a major risk factor for instability, especially in Africa.[50] In the same vein, realist thinkers are keen on underlining the significance and danger of environmentally-induced migration per se. In order to portray the threat accurately, they refer to data and statistical analysis. For instance, Myers notes that the “estimate of 25 million environmental refugees was cautious and conservative,” considering that 900 million people endure desertification.[51]

Owing to such forecasts, the significance of environmental migration for Western national security is underlined. Scholars argue that “there are limits to host countries capacity, let alone willingness, to take in outsiders,”[52] as this issue could lead to “ruined national economies, terror, danger, extinction.”[53] As a matter of fact, realist writings may even move beyond these state centric interpretations and offer militarist perspectives. With reference to this, certain readings identify climate refugees as “climate terrorists.”[54] Such notions are justified by providing example scenarios of North Africans who “can clandestinely cross from Tunisia to Sicily in a three-hour voyage,” [55] portraying Spain as “an even easier target for North Africans.”[56] To sum up, the realist framework raises awareness about the security aspect of environmentally-induced migration.

However, realist notions can be criticized for their perception of climate refugees and furthermore proven unsuitable for the course of this analysis. For instance, Chin claims that climate migration by “African Muslims may prove even more worrying and could ultimately tear apart the European social fabric.”[57] This claim does not solely lack of evidence, but additionally creates an imagery of climate refugees as possessing intended violent agency. Maintaining that “in a review of 38 cases of environmental migration, conflict occurred in half of the receiving areas”[58] presupposes and implies that EDP are the solitary factor leading to conflict. It is a paradox however, that realists portray environmental refugees as both “hapless victim and resourceful agent.”[59] Moreover, such realist assumptions predominantly focus on the effects of environmental migration felt by the Western state, marginalizing the consequences for developing countries. As this example nicely demonstrates, Edward Said shall be proven right. He stressed that one has to be “sensitive and attentive to the role of knowledge”[60], since “knowledges born in Europe are inadequate to their non-European object.”[61] Consequently, this paper refrains from adopting such inaccurate militarist notions of EDP. However, we acknowledge that it is in the very nature that “humans have long chosen to move in order to adapt to natural/social calamities.”[62]

After exhausting the realist framework for interpretations on EDP, the following paragraph serves the identification of the critical perspective. First and foremost, critical thinkers are keen on underlining their discontent with realist and liberal writings. Accordingly, realist literature is often criticised, for the fact that their “figures are arrived at more by conjecture than scientific method.”[63] Other critical scholars question the validity of the academic debate on climate refugees in itself, since the discourse on climate refugees has been largely dominated by realist and liberal notions.[64] With reference to this, it has been argued that the mainstream IR theories link the question of “who is to be secured” with Western interest. This leads to neglecting the significance of environmental displacement for developing countries, although most migration occurs in the Global South.[65] In the same vein, this realist predominance assumes that the term “climate refugee” is negatively denounced. For instance, Neo-Malthusian narratives, which underline the dangers of population pressure and scarcity, are alleged of overestimating the connection between potential conflicts and EDP.[66] Consequently, such images of climate refugees are regarded as a degradation narrative, which draws upon colonial stereotypes.[67] Scholars may even put forward the idea that this negative imagery of the environmental refugees appeals to the global North, for the fact that it may serve to justify and sustain rigid asylum policies.[68] Following this train of thought, it is suggested that the global North intentionally “depoliticize[s] the cause of displacement”[69], in order to dismiss an obligation for granting asylum.

However, another strand of critical theory focuses on this Western liability concerning the emergence of EDP. In line with this, the question about the causes of environmentally-induced migration comes to the fore. The critical interpretation rests upon the concept of ecological debt, which essentially presumes an obligation owed by the global

# The EU's Responsibility to Protect Environmentally Displaced People

Written by Ansgar Fellendorf and David Immer

North towards the global South as well as towards the planet. Admittedly, critical writing suggests that “the causes of debt are industrialised countries with their consumption and production patterns.”[70] Thus, in the present context, the EU as a highly developed entity owes an ecological debt towards the creditor countries of the Global South. Bearing this in mind, the argument appears that it does not suffice to name the global North as a major greenhouse polluter, but that “we must make room for environmental refugees.”[71] As Jon Barnett notes, neglecting the responsibility on the side of the global North will be “morally difficult to sustain since it is their emission which will have caused the problem.”[72] Accordingly, the notion of a debt owed by the global North appears to be well-established within the critical framework.

The two mainstream IR theories realism and liberalism have proven largely unsuitable to approach the issue of climate-induced migration. Liberal theory disregards the causes of environmental displacement, but stresses state-centric cooperation and a “global environmental responsibility,”[73] therefore neglecting a particular European responsibility. Realism, in contrast, applies incorrect views of EDP and focuses on the national security of mainly developed states. The critical tradition neglects such a postcolonial view and provides tools, such as the ecological debt and an inclusive approach, to identify a European responsibility to protect EDP. Applying the critical framework, it is crucial to investigate upon the relationship between the blame for and vulnerability to the emergence of climate refugees. De facto, the culpability of the EU towards the emergence of EDP comes to the fore when using the per capita CO<sub>2</sub> emissions as an indicator. In the mid-2000s the EU member states used more than 8 t CO<sub>2</sub> emissions per capita,[74] whilst for instance African countries merely emitted 0,9 t CO<sub>2</sub> per capita.[75] Concerning the vulnerability, many scholars agree that “those who suffer climate change harms are, and will increasingly be, victims of events that have resulted [...] from human activities undertaken elsewhere.”[76] Due to its greater adaptive capacity, Europe’s vulnerability to climate change and to its effects is marginal.[77] The EU Commission, too, has acknowledged that the regions of the world feel the impact of climate change disproportionately with the developing world being hit hardest.[78] Accordingly, we witness a discrepancy between the originator and the victim of environmentally-induced migration.

In light of the concept of ecological debt, the responsibility of the EU becomes clear. The Global South is not only a victim of the harmful emissions of the perpetrator (Global North), but also a creditor of the ecological debt.[79] This terminology endows developing countries with the right to hold developed countries, and therefore also the EU, liable. Furthermore, the EU is economically powerful with its GDP exceeding that of the USA and China.[80] Having established this, it is possible to derive a European responsibility as laid out in the *UNFCCC Framework Convention on Climate Change*. According to this framework, the notion is maintained that “the developed country Parties should take the lead in combating climate change and the adverse effects thereof.”[81] One might object this as a liberal argument, however the Framework Convention is not legally binding and our focus lies on the moral obligation of the text.

Additionally, the deontological view of human rights endows inherent attributes to all humans. The effects of human-induced climate change, including pollution and floods, would consequently mean a violation of rights such as the right to food and adequate housing.[82] Adopting this deontological view of human rights henceforth challenges the EU as violating such rights.

To sum up, a European responsibility to protect EDP can be derived from the discrepancy between the over proportional blame for, in contrast to the low vulnerability to, the effects of climate change leading to displacement. Additionally, the powerful economic position of the EU and a deontological reading of human rights endow it with a moral obligation for the consequences of global warming.

To a low degree, the EU seems aware of its responsibility towards climate refugees. De facto, it recognizes the principle of “common but differentiated responsibility” and endorses a leading role in global efforts to promote climate change mitigation and adaptation.[83] At the same time, the Commission views migration as a legitimate adaptation strategy in its own right.[84]

One might rightfully object to the biased phrasing of this responsibility-based approach, however “theory is always for someone and for some purpose” since “theory constitutes as well as explains the questions it asks.”[85] Following

# The EU's Responsibility to Protect Environmentally Displaced People

Written by Ansgar Fellendorf and David Immer

this line of argument, the next chapter scrutinizes from the established perspective the CEAS for potential protection of EDP.

## The Common European Asylum System and the Protection of Environmentally Displaced People

### *The Relevance of the CEAS in the Context of Climate-Induced Migration*

After discussing a European responsibility and obligation to protect EDP, we now analyze their current *locus standi*, possible interpretations and plausible rationales in the Common European Asylum System (CEAS). The literature has elaborated closer on other regional refugee instruments such as the 1984 Cartagena Declaration on Refugees[86]. However, there exist surprisingly few writings about EU legislation on climate refugees. Rather than to empirically inspect every article of the EU legal realm, the aim of this chapter is to present a coherent narrative of the European legal and policy perception of EDP. No future actions are suggested, however due to the established normative lens certain aspects are criticized.

The EU in particular is a relevant institution to analyze in this context as it has been famously identified by Ian Manners as a “normative power”. He explicitly states that the EU in the international arena promotes principles of rule of law, sustainable development and social solidarity. Furthermore, the firm institutional setup and the elaborate *aquis communautaire* allow for a profound protection against the state and its institutions.[87] Indeed, it appears that the Union has acknowledged the pending ecological crisis and through its principle of sustainable development and strife towards an improved quality of the natural environment (Article 3 of the Treaty on the European Union) accepts a certain degree of responsibility.[88] In fact, the Council has acknowledged that the Union shall prioritize efforts to “address climate change at all political levels”. [89] In other words, the EU is on the one hand simply well capable to protect EDP and on the other hand inherits a moral obligation. Additionally, it has been suggested that notably regional actors possess the resources and political legitimacy to facilitate environmental migration.[90]

Certain scholars recommend that legal instruments may not be the appropriate way to approach the issue of EDP. They prefer different tools such as crisis coordination and development aid.[91] A recent working paper of the Commission, as well, elaborates intensively on the role of disaster risk reduction and humanitarian aid.[92] However, the CEAS in particular carries a sincerity and enduring character with effective protection, while policy dependent instruments may fluctuate according to the political parties in place. Indeed, we have established that the EU needs to recognize its responsibility in adjusting to the new reality of increased environmental migration and the CEAS proves most effective for its binding nature.

Another objection might be that it would be more suitable to investigate the EU's role to protect EDP in the negotiation of an international law regime, rather than to focus on the internal asylum system. However, as mentioned before, the academic and policy debate about various international law instruments has proven unsatisfactory.[93] Many UN frameworks have no binding character and as exemplified earlier certain institutions such as the UNHCR reject any typology of “refugee” altogether. Previously we identified climate refugees as people who have to leave their habitat involuntarily and thus the CEAS applies as the term asylum describes “protection offered to an alien on account of a threat abroad, by a state within its territory or by the Community within the EU.”[94] Interestingly, the definition refrains from specifying on the threat. Naturally, in the European context any intra-Community movements are exempt as in this case the Union is viewed as one political entity.

Historically, the issue areas of asylum and immigration have been low on the European agenda, as the Community started as a purely economic enterprise. In the 1990s, however, the Dublin Convention regulating asylum application set precedence for a Union-wide asylum policy.[95] Subsequently, the EU has increasingly “communitarised” the various aspects of asylum.[96] However, to date the issue of climate-induced migration has been largely overlooked by the EU. The Commission genuinely first mentioned environmental migration in a 2007 Green Paper and published consequently the Global Approach on Migration and Mobility. This document, however, found little resonance within the European Parliament and the Council. In fact, European policymakers have deemphasized the issue and reduced its priority in international fora.[97] More recently, the EU seems to have paid greater attention to climate-induced migration and it funded several research projects on the issue. In addition, the Commission published the before

# The EU's Responsibility to Protect Environmentally Displaced People

Written by Ansgar Fellendorf and David Immer

mentioned internal working document titled “An EU Strategy on adaptation to climate change”. It indicates a European awareness of EDP, for instance stating “where displacement [following slow-onset disaster] occurs, it is essential to provide assistance to the displaced, safeguard their rights, [and] promote efforts to find durable solution.”[98] Moreover, the “Commission will consider how to [...] facilitate remittance transfers better take into account the needs of regions suffering environmental degradation, including in the aftermath of sudden-onset disasters.”[99] However, this point falls short of relevance as it relies on private remittance transfers.

An initial critique of the European Asylum Law regime focuses on the actual decrease of rights of asylum seekers because the outcomes of the negotiations of the member states tend to be the lowest common denominator of the state parties. Hence, EU policy-making concerning asylum can be described as a “race to the bottom”, where the final policy will match the lowest protection.[100] In light of an increased climate-induced migration the traditionally restrictive European approach to immigration might seem counterintuitive. De facto, Geddes reasons with the inadequate conceptualization of environmental refugees for the lack of policy and legal response.[101] However, this paper has shown that the link between climate change and displacement is well-established.

Following, the various directives, regulations and other tools of the CEAS are scrutinized from the critical perspective established in a search for protection of EDP. It has been acknowledged that there is “only limited potential for legal protections [of EDP] or new interpretations of existing [EU] law.”[102] However, the academic literature seems to lack any coherent account of the potential EU law instruments. Whereas our aim to critically analyze the CEAS implies a certain neoliberal notion, the established normative view opposes a critique of content incoherence.

## *Analysis of the Laws, Directives, and Principles of the CEAS*

The CEAS comprises several different treaty provisions, regulations and directives. Luedtke has suggested to view the European Asylum Law Regime as “sharing policy”, “sharing people”, and “sharing money”.[103] Consequently, we analyze these different tools and principles, inquire potential bridges for the protection gap of EDP, and critically assess certain provisions. First, we start to investigate the “sharing policy” component with its legislation, thereafter the Dublin Regulation is inspected and finally the European Refugee Fund briefly discussed.

In most legal traditions, the constitution sets out the basic legal framework. Thus, it serves useful to initially view the relevant provisions of the Treaty of Lisbon. The most frequent legal basis for the CEAS states that “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*.”[104] However, the Union must also adopt legislation in accordance with the 1951 Geneva Convention, which renders the categorization of EDP as “refugees” difficult in European law. The treaty continues to discuss the European responsibility to ascertain a “uniform status” for people in need of international protection. In addition, it establishes harmonization in other aspects of asylum such as the reception mechanisms and conditions, the general admissibility of asylum and policy in case of mass influx.[105] In addition, Article 191 TFEU describes the precautionary principle which “requires action to be taken ahead of full scientific certainty”.[106] Thus, in theory the Lisbon Treaty provides the necessary legal basis for a uniform subsidiary protection regime for EDP: In the following we normatively discuss the most relevant Union directives and policies based on these provisions in the context of EDP.

First, we investigate the subsidiary protection granted under the 2011 Qualification Directive.[107] Whereas EDP cannot be protected as “refugees” in the strict sense because of the legal phrasing of the 1951 Convention, subsidiary protection allows for complementary measures. In fact, the directive sees a person eligible if on return the person would “face a real risk of suffering serious harm.”[108] Notes from the discussion of the directive show that the Commission challenged member states (MS) whether environmental disasters should be a cause for subsidiary protection.[109] However, the final definition of serious harm does not include any climate-induced events or environmental degradation. Nevertheless, the definition of the serious harm of “inhumane or degrading treatment” could be interpreted to prevent return to regions affected by climate-induced degradation.[110] Some MS have passed legislation granting refugee-type protection for people affected by natural disaster. In Sweden, for instance, a person “unable to return to the country of origin because of an environmental disaster” may qualify for asylum.[111]



# The EU's Responsibility to Protect Environmentally Displaced People

Written by Ansgar Fellendorf and David Immer

Furthermore, Finland explicitly mentions “environmental disaster” as a ground for temporary or permanent protection.[112] Thus, individual MS have applied the concept of “serious harm” in broader terms. Yet, this additional protection is not due to EU legislation, but is based on the fact that MS “may introduce [...] more favourable standards for determining who qualifies as a refugee” or is entitled to subsidiary protection.[113] Recital 35 indicates that “risks to which a population [...] is generally exposed do normally not [...] qualify as serious harm.”[114] It remains however open to discussion if climate change effects are risks that a population is “generally exposed” to or if their anthropogenic character renders them different.[115]

Furthermore, it is relevant to scrutinize the Temporary Protection Directive,[116] which grants limited subsidiary protection in cases of “mass influx” of displaced people. People qualifying “in particular” are “persons at serious risk of [...] generalised violations of their human rights.”[117] Again, there is no explicit mentioning of climate-induced displacement, however the phrasing of “in particular” suggests that the list is not exhaustive and could be expanded by a qualified majority decision of the Council.[118] Additionally, human rights are often violated following a natural disaster, making the application of this directive possible. Interestingly, an UK official interpreted the directive as “providing humanitarian assistance to people forced from their homes by war *and natural disasters* [emphasis added].”[119] In practice, the UK has eased immigration rules following a “mass influx” on an ad-hoc basis, for instance after the volcano eruption of Montserrat. As previously seen, Finland grants the most extensive protection for EDP who cannot return home because of an “environmental disaster”. [120] However, this also implies that a person is already staying on Finish territory and does not cover any potentially displaced people across borders.

Still, the temporary protection directive is important for guiding principles on how to deal with sizeable human migration caused by rapid-onset environmental disasters. It appeared during the negotiation for the directive, that the Economic and Social Committee saw a potential case for temporary reception of EDP.[121] Indeed, there seems to appear a substantial political will for temporary protection, also because the stay is limited to a maximum of three years. The Council’s so-called Stockholm Programme calls for sustainable migration, which “in a spirit of solidarity can [...] manage fluctuations in migration flows.”[122] On the other hand, the directive lacks any protection for an individual displaced by climate-induced effects as it only refers to “mass influxes”. Moreover, the directive does not apply to any person who is displaced by slow-onset disaster, or who cannot return after three years due to environmental and humanitarian reasons.[123]

The Return Directive, which regulates the removal of illegal immigrants, provides in Article 9 (2) a list of grounds for the postponement of removal. Possible reasons include the third national’s health, *non-refoulment* and technical reasons.[124] While it does not mention environmental disaster as a cause for postponement it leaves room for national discretion to grant EDP more favourable conditions. Yet, the issue remains that a displaced person must already reside within the Union.

Directive 2013/33/EU of the European Parliament and the European Council lays out common standards for the reception of applicants for international protection. In fact, this directive bears little relevance for the issue of EDP, as it establishes for instance rules concerning employment, health care and conditions of detention. [125] Merely Chapter IV is of interest, as provisions for vulnerable persons are defined. For this purpose, vulnerable persons are for instance categorized as persons who have been subject to torture, rape or other serious forms of psychological, physical or sexual violence.[126] It can be argued, that people who have experienced and suffered from environmental disasters could be included in these provisions.

Attention has also been drawn to the fact that in some cases of climate-induced migration also human rights, humanitarian and refugee laws apply.[127] As mentioned in the treaty the principle of *non-refoulment* binds all MS and prohibits them to remove an asylum seeker “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 punishment.”[128] It appears that these conditions presuppose human involvement, in the sense that one person influences the well-being of another person. Actions such as the death penalty, torture, punishment and inhuman treatment cannot be carried out by nature as it does not have agency per se. Therefore, intervention of nature in the form of floods or drought cannot be considered a risk, which consequently eliminates the chances of protection of EDP under *non-refoulment*. Nevertheless, a philosophical definition of action may be useful: “If a person’s head moves, she may or may not have moved her

# The EU's Responsibility to Protect Environmentally Displaced People

Written by Ansgar Fellendorf and David Immer

head, and, if she did move it, she may have actively performed the movement of her head or merely, by doing something else, caused a passive movement.”[129] In the context of “serious risks” and *non-refoulement* active performance includes human actions such as torture. On the other hand, climate change can be seen as a passive movement. In fact, it can be ascribed to the actions of climate polluters, which include to a high degree the EU member states. Thus, also climate change effects such as drought and increased floods can be attributed indirect agency. As a result, the definition of *non-refoulement* and inhumane or degrading treatment could after some deliberation include climate change effects as “serious risks”.

Some academics have argued along this line and proposed that the principle possesses in exceptional cases the potential to prohibit return of individuals to areas devastated by drought, floods or other climate-related events.[130] However, this does not change the fact, that protection under *non-refoulement* is only possible when you reside inside the EU. It does not grant any particular status, or *locus standi*, to EDP outside the Union. This has also led the Parliamentary Assembly of the Council of Europe to worry about the lack of protection of EDP. It encouraged MS to assume a “pioneering role in [...] protection of people compelled to leave their homes for environmental reasons” and to elaborate a European framework for the protection of EDP.[131] As the analysis of this paper exemplifies, little action has followed these propositions due to date.

The Dublin Regulation is worth noting for our investigation, as it is considered the “flagship of the EU’s asylum aquis.”[132] Being the cornerstone of the category of sharing people, the Dublin Regulation enables insights into the geographical distribution of responsibilities of the MS. More detailed, the regulation concludes that merely one MS is designated the responsibility to process an asylum application for a third country national. The purpose is to prevent so-called “asylum shopping”, which describes submitting several asylum applications in different MS.[133] In the context of environmentally-induced migration the Dublin Regulation is interesting because individual MS such as Finland, as discussed above, grant a certain degree of protection. Thus, an EDP might enjoy greater safety when applying in Finland. Otherwise, it is irrelevant in which MS a climate refugee applies as Community Law applies equally everywhere.

The last component of the CEAS “sharing money” refers to the European Refugee Fund (ERF). The rationale behind is to compensate the MS for the unequal distribution of asylum seekers among the Community. As the European Council pointed out, the intention of the ERF is to “promote a balance of efforts in receiving and bearing the consequences of displaced persons in order to demonstrate solidarity between the Member States.”[134] In order to achieve this aim, European funds are allocated among projects. These intend to assist asylum seekers, refugees and displaced persons with the reception, integration and repatriation.[135] When examining the purpose of such projects one witnesses that for instance programs exist for asylum seekers which have experienced sexual violence, but not for climate refugees.[136] In fact, projects qualifying for funds from the ERF support people who are identified according to the above discussed directives.[137] Hence, these criteria marginalize EDP in the ERF as well. Article 13 (3) of the decision establishing the ERF III further explicitly names four categories of displaced for which the fund supplies financial support. These priority groups again do not comprise EDP,[138] despite the European awareness of environmentally induced migration.

To conclude, we have shown that there exist no specific instruments in the CEAS that grant legal status to environmental refugees. While the EU has partly recognized the issue, it has so far failed to establish an adequate protection framework for environmentally-induced displacement. The analysis has presented certain bridges for protection gaps, such as the Temporary Directive in case of “mass influx” after a natural disaster. In addition, political will on the European level could adjust certain provisions to declare climate change effects as a “serious harm” or “serious risk”.

## Conclusion

The aim of this research has been, applying a critical perspective, to identify protection gaps of and possible remedies for climate refugees within the CEAS framework. It is relevant to investigate environmentally-induced migration, as the number of EDP is expected to increase. In addition, we have opted for the EU as a regional actor, since the dominant debate about the suitability of different international law instruments has so far not produced any

# The EU's Responsibility to Protect Environmentally Displaced People

Written by Ansgar Fellendorf and David Immer

rewarding outcomes. The EU in particular can be identified as a normative power with an elaborate asylum law regime, which in 'best practice' could protect EDP. Thereafter, the discussion of relevant IR traditions has concluded, that the EU can be attributed with a responsibility and moral obligation to grant protection status to climate refugees. This European accountability can be derived from the ecological debt it owes to developing countries. These feel the effects of global warming to a higher degree, while contributing significantly less to its causes. Moreover, climate-induced natural disaster is often accompanied by violations of human rights. A deontological reading thereof ascribes a moral obligation on the global community, and especially the normative power EU, to protect EDP.

Another initial concern has been the exact typology of the link between climate change and displacement. With reference to that, legal scholars and official bodies have rejected the terms "climate refugee" and "environmental refugee" due to their political implications and the wording of the 1951 Convention. However, we have established that these two definitions are analogous with the concept of "environmentally displaced person" and differences lie solely in the representation. There follows a certain paradox: whereas the concept of EDP is well-established, and also acknowledged by the EU, they enjoy no explicit protection status in the CEAS.

It is important to investigate the asylum law, rather than policy tools such as crisis coordination or development aid, since the CEAS possesses a binding character and thus offers enduring protection for environmental refugees. Overall, it can be concluded that the EU fails to grant *locus standi* to climate refugees and henceforth provides no adequate protection. The negotiation outcomes tend to be the lowest common denominator. This is mirrored in the individual directives and regulations. Neither the Temporary Protection Directive, nor the Qualification Directive explicitly list EDP. Nevertheless, there exist arguments that the former could cover a "mass influx" of displaced people by natural disaster, however the law would need to be adapted by the Council. Secondly, the Qualification Directive allows for subsidiary protection outside the strict refugee definition of the 1951 Convention. In fact, the issue of including climate-induced displacement was raised, yet, the final description of "serious harm" dismisses climate change effects. Although certain member states such as Finland and Sweden passed legislation to protect third-country nationals on their territory from environmental disaster in their home countries, this remains the exception to the rule.

The phrasing of "inhumane or degrading treatment", provided for by the principle of *non-refoulement*, could prevent third-country nationals from being expelled to areas of climate-induced disasters. The rationale behind this argument lies on the one hand in the humanitarian emergency, often accompanying natural disaster. On the other hand, one can identify the agency of entities such as the EU as passively triggering climate change effects. Lastly, the European Refugee Fund serves as a useful indicator of priorities within the CEAS. The findings show that certain groups of asylum-seekers enjoy EU subsidies in the form of programs. Contrarily, projects aimed at relieving environmental refugees are looked for in vain.

Taking these findings into account, future research could question or advance a European responsibility towards climate refugees. For this purpose, we invite also different methodologies, such as quantitative evidence. Furthermore, legal scholars could use this paper as an intellectual stimulus to further explore the possibilities of the CEAS to bridge the protection gap of EDP.

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