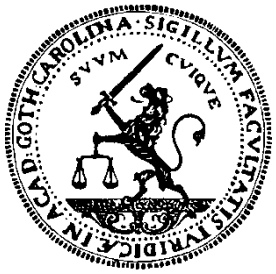

FACULTY OF LAW

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Emerging Norms on Disaster Displacement

Scrutinising Swedish Decision-Makers

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Summary

In times of climate change, climate-related disaster displacement is becoming a growing issue. While the vast majority of disaster displaced people move within their country or to a neighbouring country (within a region), there are also people who move between regions and to Europe (interregional). However, there is currently no global framework that regulates the protection of these interregional disaster displaced persons, nor have Swedish decision-makers thoroughly assessed relevant applications for protection in the past.

This thesis focuses on disaster displacement to Sweden and the role of emerging norms to improve protection in relevant decisions. Both legal-doctrinal research and empirical research in combination with qualitative content analysis are used for this purpose. The thesis first analyses which normative developments exist at international, European, and national level that aim to improve the protection of the displaced. It is considered that although the developments identified are still in the norm emergence stage, they represent significant authoritative interpretative guidance for decision-makers that should be taken into account when deciding on cases of disaster displacement. Building on previous case studies, the thesis analyses 75 asylum/migration cases from 2020-2023 to examine how Swedish decision-makers apply the identified emerging norms. As the case study shows that neither the Swedish Migration Agency nor the Swedish migration courts have applied the emerging norms, the obvious question is raised as to why they are completely disregarded by decision-makers. The thesis concludes that factors such as Nordic loyalty to the legislature and a lack of mobilisation and litigation in relation to disaster displacement to Sweden may contribute to the decision-makers' attitude.

Keywords: norm emergence, disaster displacement, interregional, protection, human rights, Sweden, decision-makers

Wordcount: 24936

Preface

First and foremost, I would like to thank my supervisor Matthew Scott for his guidance and the time he took to support me.

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My parents I would like to thank for their financial support and for letting me study what I am interested in, even though they both come from the field of technical sciences.

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Osby, May 2024
Sarah Martina Alm

Abbreviations

CAF	Cancun Adaptation Framework
CFR	Charter of Fundamental Freedoms of the European Union
CJEU	Court of Justice of the European Union
COI	Country of Origin Information
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
SAA	Swedish Aliens Act
SDMs	Swedish Decision-Makers
SMA	Swedish Migration Agency
SMC	Swedish Migration Court
UN	United Nations
UNFCCC	United Nations Framework Convention on Climate Change
UNHCR	United Nations High Commissioner för Refugees
UNICEF	United Nations Children's Fund
Refugee Convention	1951 Refugee Convention relating to the Status of Refugees

1 Introduction

1.1 Background and Context

Anthropogenic global warming is continuing and is threatening the very existence of life on planet Earth. The average global land temperature rise for the period 2011-2020 is already 1.59 degrees higher than in the period 1850-1900[1], exceeding the 1.5 degree target of the 2015 Paris Agreement.[2] If global warming cannot be kept at or below 1.5 degrees, it is very likely that an overshoot occur, which will have serious and irreversible consequences for human and natural systems.[3] For humanity, this means an increase in extreme weather and climate "in every region across the globe",[4] occurring in the form of sudden-onset events like floods and storms or slow-onset events such as droughts and sea-level rise.[5] These forms of natural hazards can result, e.g. in loss of life or livelihood, property damage or general health impacts,[6] which in turn can lead to migration, displacement and planned relocation (human mobility)[7] within and across state borders.

Implications on human rights

The link between the environment and human rights is generally recognised, for instance by the Stockholm[8] and Rio Declaration,[9] as well as by the United Nations Framework Convention on Climate Change ("UNFCCC").[10] While events caused by climate change can affect human rights in the place where they occur, the human rights of people moving due to the impacts of natural hazards can also be affected at all stages of their journey. In particular, issues relating to the admission and stay in destination countries as well as protection against return to harmful situations can be problematic from a

[1] 'Synthesis Report of the IPCC Sixth Assessment Report' (IPCC 2023) Longer Report para 2.1.1.

[2] 'The Paris Agreement' (UNFCCC 2016) FCCC/CP/2015/10/Add.1 Decision 1/CP.21 art 2(1)(a).

[3] 'Climate Change 2022 - Impacts, Adaptation and Vulnerability' (IPCC 2022) Summary for Policymakers para B.6.

[4] 'Synthesis Report of the IPCC Sixth Assessment Report' (n 1) para 2.1, 4.3.

[5] 'Key Definitions' (*Platform on Disaster Displacement*) <https://disasterdisplacement.org/the-platform/key-definitions/> accessed 29 February 2024.

[6] 'UNISDR Terminology on Disaster Risk Reduction' (UNISDR 2009) 17, 20–1.

[7] The type of movement that disasters can lead to was first recognised by the Cancun Adaptation Framework, see 'The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention' (UNFCCC 2011) FCCC Dec 1/CP.16, 16th Sess, FCCC/CP/2010/7/Add.1 para 14(f).

[8] Declaration of the United Nations Conference on the Human Environment, 1972 (A/CONF48/14Rev1) para 1.

[9] Rio Declaration on Environment and Development 1992, principle 1.

[10] United Nations Framework Convention on Climate Change 1992, preamble.

human rights perspective.[11] Although there is no right to immigrate[12] or enter another country that is not one's own,[13] there are several other rights that are affected by slow- and sudden-onset events or by being returned to an affected country. Most of these rights are socio-economic rights, such as the right to food, water, health, and adequate housing.[14] These rights are affected by limited resources and access to basic needs as a result of adverse impacts of climate change.[15] When socio-economic rights are affected civil and political rights are directly threatened, such as the right to life (with dignity) and the right to be free from ill-treatment. The most serious risk arising from the lack of resources and access to essential needs is the threat of life. [16]

While the effects of climate change affect all people, it should be emphasised that those who are already in a vulnerable situation are most at risk of being deprived of their human rights.[17] Against this background, a disaster is defined as the coincidence of a natural hazard with existing vulnerabilities of those affected to the hazard and inadequate capacities or measures to reduce or manage the expected negative consequences.[18] Furthermore, it should be highlighted that protection for disaster displaced persons in this thesis is understood as any positive action taken by a state in favour of those affected that aims to achieve full respect for the rights of the individual in accordance with international (human rights) law, regardless of the state's legal obligations.[19]

Movement away from affected areas

If people move away from disaster-affected areas, it is debateable whether disasters are the direct cause of human mobility in the context of climate change. This is because the decision to move is multi-casual and complex and is therefore difficult to reduce to a single factor. The conceptual frame-

[11] 'The Slow Onset Effects of Climate Change and Human Rights Protection for Cross-Border Migrants' (UNHCR 2018) para 5.

[12] According to Article 14(1) of the UDHR, which is supported by the 1951 Refugee Convention and its 1967 Protocol, and Article 18 of the EU Convention on Fundamental Rights, there is no right to asylum, only the right to seek asylum.

[13] Article 12(4) ICCPR and Article 3(2) of Protocol No. 4 of the ECHR grant the right to enter one's own country, but not another country.

[14] 'Human Rights and Climate Change' (HRC 2017) A/HRC/35/L.32, preamble.

[15] 'The Slow Onset Effects of Climate Change and Human Rights Protection for Cross-Border Migrants' (n 11) para 36.

[16] ibid; The Intergovernmental Panel on Climate Change concludes with high certainty that climate change and its associated sudden-onset disasters will lead to a significant increase in deaths, see 'Climate Change 2022 - Impacts, Adaptation and Vulnerability' (n 3), at B.4.4.

[17] 'Human Rights and Climate Change' (n 14), preamble.

[18] 'UNISDR Terminology on Disaster Risk Reduction' (n 6) 9.

[19] This definition is based on 'Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (Volume I)' (Nansen Initiative 2015) 7 (hereinafter referred to as "Protection Agenda Vol. I").

work of *Foresight's* Migration and Global Environmental Change report[20] suggests that structural forces influencing human mobility include political, social, economic, demographic, and cultural factors in addition to environmental factors. All of these factors can interact and influence each other. Furthermore, personal factors such as age and gender as well as intervening obstacles such as the costs of moving make the decision to move even more multifaceted.[21] These various factors involved in a moving decision also influence whether mobility is voluntary or forced. This interaction may result in a person unwilling or unable to move despite being confronted with increasing environmental problems. Climate change-induced human mobility can also occur in order to adapt or to proactively avoid the negative effects of a disaster. This suggests that it is difficult to determine whether a decision to move in the context of climate change is entirely voluntary or forced. Rather, it is assumed that climate change-induced mobility falls along this spectrum.[22] However, disasters add to existing problems and can thus provide the final push for people to move, which they might not have done without it. This can be illustrated by an example of the small island state, the island of Kiribati in the Pacific, whose existence is threatened by sea-level rise. A government official noted that disasters "overlay[] pre-existing pressures [such as] overcrowding, unemployment, environmental, and development concerns".[23] Thus, environmental factors can arguably represent "tipping points" in the movement decision. In this context, the decision to move away from disaster-affected areas is no longer voluntary, rather the people concerned are displaced. As this thesis focuses mainly on the forced end of the spectrum it uses the term "disaster displacement".

1.2 Problem Identification

As outlined in the previous section, disasters affect a broad spectrum of human rights. As a result, some people leave disaster-affected areas to seek protection elsewhere. It is anticipated that the number of individuals who will be forced to leave their homes due to the adverse effects of climate change will increase rapidly in the coming decades.[24] In 2020, the United Nations (UN) estimated that up to one billion people could be displaced by disasters by 2050.[25] However, there is a general consensus that most people

[20] Foresight, 'Migration and Global Environmental Change' (The Government Office for Science, London 2011) Final Project Report.

[21] ibid 11–2; See for a detailed description of each factor Robert A McLeman, *Climate and Human Migration: Past Experiences, Future Challenges* (CUP 2013) 33–46.

[22] 'The Slow Onset Effects of Climate Change and Human Rights Protection for Cross-Border Migrants' (n 11) para 12.

[23] Jane McAdam, *Climate Change, Forced Migration, and International Law* (1st edn, OUP 2012) 16–7.

[24] 'Climate Change, Conflict and Displacement: Understanding the Nexus' (*Platform on Disaster Displacement*, 6 October 2018) <https://disasterdisplacement.org/news-events/climate-change-conflict-and-displacement-understanding-the-nexus/> accessed 1 March 2024.

[25] 'Human Mobility, Shared Opportunities' (UNDP 2020) 21.

displaced by disasters move within their own country or to a neighbouring country.[26] People who remain in their own country are covered by the UN Guiding Principles on Internal Displacement.[27] People who move within a (sub)region may fall within the scope of regional agreements dealing with disaster displacement[28] or regional free movement agreements may be applicable.[29] Nevertheless, case studies[30] show that there are also disaster displaced persons who have moved across international borders to another region, e.g. to Europe.[31] It is precisely these *inter*regional displaced persons who are the subject of this thesis. There is currently no international framework that specifically addresses them. While international human rights law and refugee law, including the principle of non-refoulement, protect interregional displaced persons, the existing legally binding protection options are not tailored to the specific characteristics of the persons concerned.

To illustrate this, under the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees (collectively referred to as the "Refugee Convention")[32] protection (in the form of refugee status) is granted to persons who (i) have a well-founded fear of being persecuted, (ii) for reasons of race, religion, nationality, membership of a particular social group or political opinion, (iii) are unable or unwilling to avail themselves of the protection of their country of origin and (iv) are out-

[26] 'Climate Change 2022 – Impacts, Adaptation and Vulnerability: Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change' (IPCC 2022) Technical Summary 52 under TS.B.6.

[27] 'Guiding Principles on Internal Displacement' (ECOSOC 1998) E/CN.4/1998/53/Add.2; in case of interest see Matthew Scott, *Climate Change, Disasters, and the Refugee Convention* (CUP 2020) 150–2.

[28] See section 1.5 of this thesis for a brief overview.

[29] This is because they generally provide broader access to movement within a particular region or sub-region and do not require the fulfilment of narrow eligibility criteria as in the case of refugee protection. See Tamara Wood, 'The Role of Free Movement Agreements in Addressing Climate Mobility' (2022) Forced Migration Review 62, 62; However, see for a progressive approach to free movement 'Protocol on Free Movement of Persons in the IGAD Region' (Intergovernmental Authority on Development 2020) art 16, as the protocol facilitates the free movement by disasters.

[30] Regarding disaster displacement to Austria, see Monika Mayrhofer and Margit Ammer, 'Climate Mobility to Europe: The Case of Disaster Displacement in Austrian Asylum Procedures' (2022) 4 Frontiers in Climate 1; to Germany see Camilla Schloss, 'The Role of Environmental Disasters in Asylum Cases: Do German Courts Take Disasters into Account?' in Simon Behrman and Avidan Kent (eds), *Climate Refugees: Global, Local and Critical Approaches* (CUP 2022); to Sweden see e.g. Margit Ammer, Monika Mayrhofer and Matthew Scott, 'Disaster-Related Displacement into Europe: Judicial Practice in Austria and Sweden' (Ludwig Boltzmann Institute of Fundamental and Human Rights and Raoul Wallenberg Institute of Human Rights and Humanitarian Law 2022) Report <https://rwi.lu.se/wp-content/uploads/2022/04/ClimMobil-1.pdf>.

[31] Even if the number of these people is rather small, from a human rights perspective, the quantitative number of people in need of protection does not change the validity of their protection claims and the need to improve their legal situation.

[32] Convention relating to the Status of Refugees of 28 July 1951, in force since 22 April 1954 (189 UNTS 137); Protocol relating to the status of refugees of 31 January 1967, in force since 4 October 1967 (606 UNTS 267).

side that country.[33] The requirements for being granted refugee status demonstrate that an application for protection based solely on the negative effects of a disaster would not be successful.[34] Instead, the disaster displaced persons must not only be affected by a disaster, but must also be subject to discriminatory treatment based on one of the grounds listed in the Refugee Convention.

While some scholars use the term normative protection gap[35] to refer to the lack of a specific legal framework, there are international efforts and authoritative interpretative guidance on existing international law that question the actual existence of such a gap. These efforts aim to improve the protection provided by existing international law by taking into account the circumstances of disaster displaced persons.[36] In terms of national laws providing protection, Sweden was one of the few states that had until 2021 a provision providing a temporary residence permit for disaster displaced persons.[37] However, international initiatives to improve protection as well as solutions on the ground depend heavily on adherence and implementation by states and their competent authorities. In the case studies by *Ammer*, *Mayrhofer* and *Scott*[38] and by *Scott* and *Garner*,[39] around 200 Swedish cases from 2006 to 2019 were analysed to determine how Swedish decision-makers ("SDMs", including the Swedish Migration Agency ("SMA" or the "Agency") and the Swedish migration courts ("SMCs")[40]) responded to applications from people who have been displaced by disasters and sought to enter or remain in Sweden.[41] The results were disappointing in that the Swedish decision-makers completely disregarded or only gave very limited consideration to applications for protection due to disasters.[42] This thesis builds on the existing case studies by examining the engagement of decision-makers with disaster displacement cases in relation to normative developments aimed at improving protection, as these depend on their application by decision-makers.

[33] Article 1A(2) Refugee Convention.

[34] McAdam, *Climate Change, Forced Migration, and International Law* (n 23) 44.

[35] See e.g. Walter Kälin and Nina Schrepfer, 'Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches' (UNHCR 2012) PPLA/2012/01 31–43; McAdam, *Climate Change, Forced Migration, and International Law* (n 23) 5; Margit Ammer and Monika Mayrhofer, 'Cross-Border Disaster Displacement and Non-Refoulement under Article 3 of the ECHR: An Analysis of the European Union and Austria' (2023) 35 International Journal of Refugee Law 322, 323.

[36] See sections 2.2 – 2.3 of this thesis.

[37] See section 2.4.1.

[38] Ammer, Mayrhofer and Scott (n 30).

[39] Matthew Scott and Russell Garner, 'Nordic Norms, Natural Disasters, and International Protection' (2022) Nordic Journal of International Law 101.

[40] As no case in the selected case law contains a decision by the Swedish Migration Court of Appeal, the term only refers to the first instance courts.

[41] See Scott and Garner (n 39); see also Ammer, Mayrhofer and Scott (n 30).

[42] Ammer, Mayrhofer and Scott (n 30) 23; Scott and Garner (n 39) 111–4.

1.3 Purpose and Research Questions

This thesis attempts to contribute to research on interregional disaster displacement to Europe by extending previous case studies on disaster displacement to Sweden in terms of temporal and substantive aspects. The aim of the thesis is to examine the role of emerging norms on disaster displacement in Swedish migration cases. To achieve this purpose, the thesis identifies normative developments that aim to improve the protection of disaster displaced persons. It also analyses relevant cases in the period of 2020-2023 in relation to the application of these developments by Swedish decision-makers and explores the reasons behind the results.

Consequently, this thesis is guided by the following research questions:

(i) *How far has norm development progressed in relation to improving the protection of interregional disaster displaced persons?*

(ii) *Do Swedish decision-makers apply the identified emerging norms?*

(iii) *How can the attitude of Swedish decision-makers towards the emerging norms be explained?*

1.4 Methodology

A mixture of legal research methods was used for this thesis. For the second chapter, a legal doctrinal approach was chosen. The application of this research method involves a systematic exposition of the rules of a particular area of law by identifying, analysing, and interpreting legislation, case law and other relevant legal sources.[43] In order to go beyond the question of what the law is, the theory of norm dynamics was also chosen, from whose perspective the state of norm development was analysed in more detail. The theory developed by *Finnemore* and *Sikkink* deals with where norms come from and how they change.[44] To answer these questions, the theory conceptualises a so-called norm "life cycle", which consists of three stages, starting with the norm emergence stage, followed by the norm cascade stage and finally the norm internalisation stage.[45] On the basis of this theory, the thesis determined the stage reached in the development of norms in efforts to improve the lack of explicit and legally binding protection options at international, European and national level. It should be noted that the theory of norm dynamics was developed to explore the life cycle of international

[43] Terry Hutchinson, 'Doctrinal Research: Researching the Jury', *Research Methods in Law* (Routledge 2013) 9–10; Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research': (2012) 17 Deakin Law Review 83, 101.

[44] Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 International Organization 887, 888.

[45] ibid 895–6.

norms. However, this study also applies the theory to the European and national levels, as the processes from the emergence of a norm to its internalisation are comparable at all three levels.[46]

The empirical legal research method, an evidence-based method that aims to uncover facts about the law by analysing systematically collected data, was used to analyse the decision-making of the SMCs and the SMA.[47] This research method consists of two components. While the first component involves the collection of data, the second component consists of analysing the selected data to answer the research question.[48] For the collection of cases, a keyword search was conducted in JP infonet's migration law database. The time frame in which the case law was filtered was the period from 1 January 2020 to 31 December 2023. For the selection of disaster-related keywords, it was decided to use the hazards predefined in the report "Hazard Definition & Clarification Review" of the United Nations Office for Disaster Risk Reduction as a guideline.[49] However, obviously non-relevant disaster keywords for this thesis were excluded, while obviously related keywords such as "climate change", "environmental disasters" and "global warming" were added. The keyword "famine" was also included, as it could indicate the impact of a disaster. In addition, it was decided to use the keyword "earthquake" because although it is not a weather-related disaster, from a legal perspective, the legal evaluation of it by the SDMs may be similar to disasters defined in this thesis.[50] As climate change favours the existence and spread of diseases,[51] it was decided to include Covid-19 related cases. The list of predefined hazards already contained the keywords "epidemic" and "pandemic", but in order to get a complete overview of all Covid-19 related cases, the keywords were complemented by the terms "virus", "Covid" and the Swedish synonym *("corona")*.

In total, the search for cases containing one of the five Covid-19-related keywords resulted in over 14,000 cases.[52] However, due to the time constraints of this thesis, only the first 150 cases (sorted by relevance in the database) for each Covid-19-related keyword were considered. Together with the search results for the other 60 disaster-related keywords, this resulted in a total number of 3,689 cases. These decisions were skimmed to decide whether they were relevant to this study. 88% of the cases were not

[46] The theory has also been applied to the national (Swedish) level in Scott and Garner (n 39).

[47] Padil Ishwara Bhat, *Idea and Methods of Legal Research* (OUP 2020) 303.

[48] ibid 304.

[49] 'Hazard Definition & Classification Review' (UNDRR 2020) Technical Report, annex 2.

[50] See on the justification of the inclusion of earthquakes also Mayrhofer and Ammer (n 30) 4.

[51] 'Climate Change 2007 - Human Health' (IPCC 2007) Full Report 393.

[52] The keyword search for "pandemic", "corona" and "covid" each resulted in a four-digit number of cases, the keyword "virus" led to over 800 cases and the keyword "epidemic" to 84 cases.

relevant because the hazard keyword was used in a completely different context, among other reasons.[53] This left 446 decisions that were interesting at first glance. These were considered more closely and further sorted according to whether the applicant had explicitly mentioned at least one keyword in the application for protection. However, most cases were also sorted out at this stage, as the keyword only appeared e.g. in the country of origin information ("COI"). A total of 75 cases were ultimately identified

With regard to the second component of empirical legal research, the method of qualitative legal research was applied to analyse the selected cases. For the third chapter, this method was carried out by using qualitative content analysis, which aims to systematically analyse the material and generalise the results in order to make replicable and objective statements about the selected data.[54] The cases analysed consisted mainly of the court judgement and the attached decision of the SMA. Both parts of the decisions were analysed accordingly. Building on this, the method of qualitative legal research provides for the results to be interpreted and further analysed, for example by conducting cause-and-effect analyses.[55] This was done in the fourth chapter of this thesis by trying to identify where the attitude of Swedish decision-makers towards the emerging norms stems from. To this end, various factors influencing the application of international and European law in Swedish decision-making were discussed.

Finally, it should be noted that for the translation of unknown words in Swedish migration decisions or Swedish literature the online dictionary *PONS* was used. For the translation of whole paragraphs where the context was crucial, a tool for text-translation called *DeepL* was used. It is estimated that translation were used for around 20% of the Swedish material.

1.5 Delimitation

It should not go unmentioned that data shows that most disaster-induced displacement occurs in the global South, [56] particularly in South, Southeast

[53] E.g. reference to an earthquake or a flood as an explanation for the absence of documents or random things like the keyword "sand" that led to 150 cases involving a judge with that surname.

[54] Bhat (n 47) 376; R Srinivasan, 'Content Analysis Technique in Legal Research - a Critique' in Ranbir Singh (ed), *Access to legal information & research in digital age* (National Law University 2012) 138.

[55] Bhat (n 47) 377.

[56] The term was first used by Carl Oglesby in 1969 and is considered a less judgemental alternative to the terms 'developing countries' and 'third world'. The terms 'global South' and 'global North' therefore do not refer to the geographical location of countries. Commonly, the term 'global South' refers to countries in Latin America, parts of Asia, the Middle East and Africa, while countries such as Australia, New Zealand and Japan are considered part of the global North alongside Europe and North America. Sekh Mustak, 'Climate Change and Disaster-Induced Displacement in the Global South: A Review' in Azizur Rahman Siddiqui and Avijit Sahay (eds), *Climate Change, Disaster and Adaptations* (2022) 108.

and East Asia, followed by sub-Saharan Africa. In addition, island states in the Caribbean and South Pacific are disproportionately affected in relation to their small populations.[57] Within this context, it should be emphasised that great progress is being made in the intraregional protection of disaster displaced persons. As far as the African region is concerned, the so-called Kampala Convention[58] adopted in 2009, which represents the first regional legally binding document on internal displacement should be emphasised.[59] Moreover, in 2022, African states adopted the "Kampala Ministerial Declaration on Migration, Environment and Climate Change", which requests the state parties to "take action to avert, minimise and address" disaster displacement internally as well as cross border.[60]

With regard to developments in other regions, in 2018 the South American Conference on Migration adopted the "Regional Guidelines on Protection and Assistance for Persons Displaced across Borders and Migrants in Countries affected by Disasters or Natural Origin".[61] These non-binding Guidelines address the admission and stay, the protection of and durable solutions for disaster displaced persons.[62] The most recent development is the "Pacific Regional Framework on Climate Mobility",[63] which was endorsed by the Pacific island states in November 2023.[64] Under the Framework, states commit to protect the human rights of cross-border displaced persons and to seek ways to provide them with protection in humanitarian admission and stay, as well as longer-term solutions, including resettlement and regularisation of their status in accordance with national law.[65]

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[57] 'Climate Change 2022 – Impacts, Adaptation and Vulnerability: Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change' (n 26) 52 under TS.B.6.1.

[58] African Union Convention for the Protection and Assistance of Internally Displaced Persons (Kampala Convention), adopted 22 October 2009, entered into force 6 December 2012.

[59] 'African Migration Report: Challenging the Narrative' (IOM, and the African Union Commission 2020) 56.

[60] 'Kampala Ministerial Declaration on Migration, Environment and Climate Change' (Ministerial Conference on Migration, Environment and Climate Change 2022) para 13(a).

[61] 'Lineamientos Regionales En Materia de Protección y Asistencia a Personas Desplazadas a Través de Fronteras y Migrantes En Países Afectados Por Desastres de Origen Natural' (South American Conference on Migration 2018).

[62] ibid 5.3-5; 'South American Countries Now Have a Non-Binding Regional Instrument on the Protection of Persons Displaced across Borders and on the Protection of Migrants in Disaster Situations' (*Platform on Disaster Displacement*, 30 November 2018) <https://disasterdisplacement.org/news-events/south-american-countries-now-have-a-non-binding-regional-instrument-on-the-protection-of-persons-displaced-across-borders-and-on-the-protection-of-migrants-in-disaster-situations/> accessed 5 March 2024.

[63] 'Pacific Regional Framework on Climate Mobility' (Fifty-Second Pacific Islands Forum 2023).

[64] 'Regional Framework on Climate Mobility in the Pacific - A Statement by Fiji' (*Platform on Disaster Displacement*) <https://disasterdisplacement.org/perspectives/pacific-islands-countries-endorse-regional-framework-on-climate-mobility-a-statement-by-fiji/> accessed 5 March 2024.

[65] 'Pacific Regional Framework on Climate Mobility' (n 63) para 39.

The foregoing has shown that there are specific protection regimes for disaster displaced persons in different regions. The scope of this thesis is therefore limited to people who do not fall under such a framework, namely interregional disaster displaced persons. For reasons of time and scope, the thesis focuses on people seeking protection in Sweden.

1.6 Outline

In this introduction, the relationship between climate change, human rights and disaster displacement was established. It also identified the need to apply international efforts and national norms to improve the protection of disaster displaced persons, as there is currently no global framework for their protection. The following part of this thesis focuses on the role of normative developments in disaster displacement cases and is divided into three substantive chapters, each corresponding to one of the three research questions. Chapter two will present the normative developments achieved at international, European, and national level to improve the protection of interregional disaster displaced persons. Chapter three will focus on Swedish migration cases and analyse the extent of engagement and application of emerging norms by SDMs in their decision-making. Chapter four will examine the reasons for the non-application of the normative developments by SDMs. The thesis will conclude with an overview of the key findings.

2 Norm Development in the Context of Disaster Displacement

This first substantive chapter forms the basis of the thesis. It identifies normative developments with regard to improving the protection of disaster displaced persons. Based on the theory of norm dynamics, it analyses how far developments have progressed at international, European, and national level. It should be noted that the chapter focuses on the most important and relevant normative developments and is therefore not an exhaustive account.

2.1 Norm Dynamics Theory

The theory of norm dynamics divides norm development in a three-stage process. Beginning with norm emergence, followed by norm cascade, and cumulating in norm internalisation (norm life cycle).[66] The theory separates the first and second stage by a threshold/tipping point.[67] Furthermore, the most important subjects within these stages are "norm leaders" and "norm entrepreneurs".[68] The former refer to states as the legislative subject of national and international law. The latter include, for example and for the purpose of this thesis, national and regional courts, UN treaty bodies such as the HRC, migration law advocates and strategic litigators.

Starting with the norm emergence stage, norm entrepreneurs play a particularly important role here, as they do persuasive work for a newly emerging norm. They attempt to draw attention to an issue by using language that "names, interprets and dramatizes" it.[69] This framing process is adapted to existing alternative norms, as new norms are in competition with them. This is because, from the perspective of the norm leaders to be persuaded, the firmly established norms define the standard of "appropriateness".[70] Additionally, in order to achieve their aim of persuasion, the norm entrepreneurs need organisational platforms from which they can promote their evolving norm. These platforms are also of great importance because they serve to persuade state actors.[71] The tipping point to the next stage is reached when the norm entrepreneurs have succeeded in persuading a critical mass of relevant norm leaders (states) to accept and adopt the norm.[72]

In the second stage, less emphasis is placed on domestic influence to persuade more states to adopt the new norm. Instead, the success of the persuasion is explained by an international or regional "contagion effect". Interna-

[66] Finnemore and Sikkink (n 44) 895–6.
[67] ibid 895, 901.
[68] ibid 895.
[69] ibid 897.
[70] ibid 897–8.
[71] ibid 899–900.
[72] ibid 901.

tional relations between states and international organisations are used to exert pressure on the remaining states to comply with international standards by adopting new norms.[73] *Finnemore* and *Sikkink* point to three factors as drivers for norm followers to comply with the new situation: legitimation, conformity, and esteem. In the context of human rights, national esteem plays a decisive role in the acceptance of new standards. Empirical studies in this area indicate that states perceive their image as human rights violators as strongly negative and are therefore more willing to accept new norms.[74]

The final and concluding phase of the life cycle of a norm is internalisation. Norms in this stage are widely accepted by the majority of norm leaders. In addition, they are no longer debated and therefore have a "taken-for-granted" quality.[75]

Finally, it should be noted that the completion of the norm life cycle is neither inevitable nor irreversible.[76] This means, one the one hand, that many norms never reach the threshold of norm acceptance (cascade), and, on the other hand, that once adopted, norms can also be repealed, and the life cycle begins anew.[77]

2.2 International Level

2.2.1 International Initiatives

The first considerations of disaster-induced displacement date back to 1985,[78] but it took until 2007 for the issue of disaster displacement to become widely known. Although the issue was mainly discussed in the context of the human security approach during this time, proposals for addressing protection deficits emerged and were widely and publicly discussed for the first time (start of the norm life cycle).[79]

[73] ibid 902.

[74] ibid 903–4; see also Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (CUP 1999), especially chapter four on Marocco.

[75] Finnemore and Sikkink (n 44) 904.

[76] ibid 895.

[77] This happened, for example, with the Swedish provision on protection for disaster displaced persons, see section 2.4.1.

[78] Elin Jakobsson, 'Norm Acceptance in the International Community: A Study of Disaster Risk Reduction and Climate-Induced Migration' (Doctoral dissertation, Stockholm University, Faculty of Social Sciences, Department of Economic History and International Relations 2018) 132.

[79] ibid 132–3.

The parties to the UNFCCC used the following three years to negotiate the Cancun Adaptation Framework ("CAF"),[80] in which climate-induced migration was formally recognised for the first time in 2010.[81] It also calls on states to:

> "[take] measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels."[82]

From a legal perspective, this provision is rather weak, as it is non-binding and merely invites states to take measures in relation to climate-induced mobility. There is also no mention of protecting the people affected.[83] Nevertheless, the provision represents a recognition by states of the effects of climate change on human mobility. From the perspective of norm dynamics, the provision is therefore of greater value as it provides a state-defined reference point for the further discussion of the problem.[84] Thus, the adoption of the CAF is aptly described by Jakobsson as a "stepping stone"[85] for the future work of norm entrepreneurs.

In June 2011, the Norwegian government, with the support of the Norwegian Refugee Council and the Centre for Climate and Environmental Research, invited inter alia representatives of civil society, actors from the United Nations and other international organisations as well as governments to the so-called Nansen Conference in Norway.[86] The aim of the norm entrepreneurs at the Conference was to agree on principles to guide state actions in the prevention, management and protection of disaster displaced persons.[87] The conference ended with the presentation of ten principles ("Nansen Principles") that address the challenges of disaster displacement. Normative aspects are included, for example, in principle VII, which calls on states to utilise existing international law and address normative gaps.[88]

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[80] 'The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention' (n 7).

[81] Jane McAdam, 'Creating New Norms on Climate Change, Natural Disasters and Displacement: International Developments 2010–2013' (2014) 29 Refuge: Canada's Journal on Refugees 11, 13.

[82] 'The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention' (n 7), §14f.

[83] McAdam (n 81) 13.

[84] ibid.

[85] Elin Jakobsson and Research Institute of Sweden, *Climate Change and Migration – Policy Approaches for a Sustainable Future* (European Liberal Forum 2019) 19.

[86] 'Nansen Conference on Climate Change and Displacement in the 21st Century' (CICERO et al 2011) Conference Report 4.

[87] ibid 6.

[88] ibid 5.

Overall, the Nansen Conference can be categorised as an important platform for raising awareness for improving the protection of disaster displaced persons at international level. It created a safe space for states that,[89] on the one hand, were not prepared to be pushed by institutional actors or experts and,[90] on the other hand, were "not prepared to discuss the issue seriously in the UN".[91] In was in this context, the Norwegian and Swiss government advocated for an intergovernmental process in which dialogues could be held on experiences and practice related to an adequate response to cross-border disaster displacement.[92] As a result, the Nansen Initiative on Disaster-Induced Cross-Border Displacement ("Nansen Initiative") was launched in October 2012. Its purpose was to address the issue through global government-led consultations as well as sub-regional intergovernmental consultations and civil society meetings.[93]

The key outcome of the Nansen Initiative was the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (Protection Agenda).[94] While the Nansen Initiative did not aim to expand states' legal obligations under international refugee or human rights law or to develop a new binding framework,[95] it did succeed in finding a "more precise niche"[96] for addressing the problem by identifying *effective practices* that can be adopted in national or regional contexts.[97]

With regard to the admission and stay of cross-border displaced persons the Protection Agenda identifies the following effective practices, among others:

- "Granting visas that authorize travel and entry upon arrival for people from disaster-affected countries, or temporarily suspending visa requirements."
- "Reviewing asylum applications of and granting refugee status or similar protection under human rights law to displaced persons in disaster contexts who meet the relevant criteria under applicable international, regional, or national law."[98]

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[89] Jane McAdam, 'From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement: University of New South Wales Law Journal, The' (2016) 39 University of New South Wales Law Journal 1518, 1522–3.

[90] McAdam (n 81) 18.

[91] Jakobsson (n 78) 156.

[92] McAdam (n 81) 18.

[93] Walter Kälin, 'The Nansen Initiative: Building Consensus on Displacement in Disaster Contexts' (2015) Forced Migration Review 5, 5.

[94] 'Protection Agenda Vol. I' (n 19).

[95] Scott and Garner (n 39) 104; Walter Kälin (n 93) 5.

[96] Jakobsson (n 78) 157.

[97] 'Protection Agenda Vol. I' (n 19) para 10.

[98] ibid 47.

With regard to refoulement of foreigners who are abroad when a disaster occurs in their country of origin, the following effective practice has been identified:

- "Providing such persons with humanitarian protection measures such as suspending their deportation or extending or changing their existing migration status on humanitarian grounds […]."[99]

Overall, the Protection Agenda can be characterised as a significant effort to strengthen the protection of cross-border displaced persons, as well as for the norm development, even if it is not legally binding. This can be justified by the fact that states have not only focussed on identifying problems in this area but have reached a consensus on concrete instruments for action that can be implemented immediately.[100] In addition, the practical solutions presented focussed on direct implementability at national and regional level, rather than shifting responsibility to international politics.[101] In light of this, it is remarkable that the protection agenda was supported by 109 countries, including Sweden and many other destination countries from the global North.[102]

More recent developments include the Global Compact on Refugees[103] and the Global Compact for Safe, Orderly and Regular Migration.[104] Although both compacts represent an important step forward, as they recognise the problem of displacement caused by climate change-related disasters at UN level and have been widely endorsed,[105] they do not go beyond the developments achieved by the Nansen Initiative.

Last but not least, in 2020 the UNHCR published a paper entitled "Legal considerations regarding claims for international protection made in the con-

[99] ibid 65.

[100] McAdam (n 89) 1523.

[101] ibid 1524.

[102] 'Our Response' (*Platform on Disaster Displacement*) <https://disasterdisplacement.org/the-platform/our-response/> accessed 5 April 2024.

[103] 'Global Compact on Refugees' (UNGA 2019) A/RES/73/151.

[104] 'Global Compact for Safe, Orderly and Regular Migration' (UNGA 2019) A/RES/73/195.

[105] 181 states voted in favour of the GCR see 'General Assembly Endorses Landmark Global Compact on Refugees, Adopting 53 Third Committee Resolutions, 6 Decisions Covering Range of Human Rights' (17 December 2018) <https://press.un.org/en/2018/ga12107.doc.htm> accessed 22 February 2024; 152 states voted in favour of the GCM see 'General Assembly Endorses First-Ever Global Compact on Migration, Urging Cooperation among Member States in Protecting Migrants' (19 December 2018) <https://press.un.org/en/2018/ga12113.doc.htm> accessed 22 February 2024.

text of the adverse effects of climate change and disasters",[106] which is intended to serve as guidance for judicial decision-makers.[107]

The legal considerations calls on decision-makers assessing applications for refugee protection in the context of disasters to focus not only on the effects of the disaster, but also to consider other factors such as social and political factors interacting with displacement caused by a disaster in order to correctly decide on the refugee status eligibility of the applicant.[108]

The paper also addresses the elements of the refugee definition and clarifies the conditions under which disaster-affected applicants may fulfil the criteria. It notes that the negative impact of disasters on human rights may expose individuals to a risk of human rights violations amounting to persecution within the meaning of the Refugee Convention.[109] It also points out that the persecution feared by a person does not have to be greater than that of other persons in similar situations.[110] In terms of the required nexus, the legal considerations notes that the impact of disasters is particularly harmful to people who are already in a marginalised or vulnerable situation. In conjunction with local political, religious, and socio-economic realities, women and children are among the most vulnerable groups.[111] Finally, the paper points to the interaction of disasters and conflicts and gives the example that:

> "[in situations] where government structures and institutions are weak, the interaction of drought, or other adverse effects of climate change, with conflict can lead to famine. Where the State is unwilling to ensure non-discriminatory access to affordable food, a well-founded fear of persecution for particular populations may arise under the 1951 Convention".[112]

In agreement with *Ober*, it can be concluded that the UNHCR's legal considerations mark an important step forward for an organisation that until then had been reluctant to make clear statements on disaster displacement.[113] While the paper does not redefine international refugee law or explicitly include disaster displaced persons in the refugee definition, it is an

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[106] 'Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters' (UNHCR 2020).

[107] ibid 4.

[108] ibid 4–5.

[109] ibid 7.

[110] ibid 8.

[111] ibid 10.

[112] ibid 11.

[113] Kayly Ober, 'Opinion: What Does UNHCR's New Guidance on the Protection of "climate Refugees" Mean?' (*Devex*, 15 December 2020) <https://www.devex.com/news/sponsored/opinion-what-does-unhcr-s-new-guidance-on-the-protection-of-climate-refugees-mean-98637> accessed 4 April 2024.

authoritative source of important considerations on the international protection of disaster displaced persons, and thus provides significant interpretative guidance for decision-makers in relevant cases.

2.2.2 Teitiota v. New Zealand

In light of *Scott* and *Garner's* argument about the greater likelihood of norm emergence through the progressive interpretation and application of existing international protection standards,[114] this sub-section discusses the Human Rights Committee's ("HRC") decision on *Teitiota v. New Zealand* and its implication for the norm development process.

The case concerns Ione Teitiota and his claim for asylum due to the effects rising sea levels, which are leading to violent disputes over limited habitat in his country of origin (Kiribati),[115] as well as to saltwater contamination and freshwater supply difficulties.[116] His complaint was examined by the HRC as he alleged that New Zealand violated his right to life under the International Covenant on Civil and Political Rights ("ICCPR")[117] by rejecting his application for refugee status and deporting him to Kiribati.[118]

In 2019, the HRC decided that the circumstances on the island of Kiribati were sufficiently precarious to raise concerns regarding the enjoyment of Article 6 ICCPR. The Committee nevertheless concluded that New Zealand had not violated its obligations under the non-refoulement principle by returning the applicant to his home country.[119] This was based on the grounds that the applicant had not provided sufficient evidence that, inter alia, the growing of crops and access to drinking water was not only difficult but impossible. Combined with the prospect that while the applicant claimed that the island would become uninhabitable within 10 to 15 years due to sea level rise, this timeframe would allow the government to intervene with adaptation measures, the Committee considered that the threat to the applicant's life was not sufficiently immediate.[120] The HRC's justification makes clear that the threshold for a successful application in the context of disaster displacement is high.[121]

However, the decision is still significant regarding the scope of the non-refoulement principle in the disaster displacement context. Firstly, for the

[114] See Scott and Garner (n 39).

[115] A small island state in the Pacific.

[116] *Ioane Teitiota v New Zealand* [2019] HRC CCPR /C/127/D/2728/2016 para 3.

[117] International Covenant on Civil and Political Rights of 16 December 1966, in force since 23 March 1976 (999 UNTS 171).

[118] *Ioane Teitiota v. New Zealand* (n 116) para 1.1, 2.

[119] ibid 9.11-9.14.

[120] ibid 9.8-9, 9.12.

[121] See on the successes, but also on the continuing difficulties for displaced persons with regard to the decision Sumudu Atapattu, 'Migrating with Dignity: Protecting the Rights of "Climate Refugees" with the Non-Refoulement Principle' in Simon Behrman and Avidan Kent (eds) (CUP 2022).

first time, a human rights monitoring body has recognised that the effects of climate change can themselves be an obstacle to removal: The Committee explicitly stated that climate change and its effects in the form of slow- and sudden-onset events can expose individuals to a violation of their right to life and freedom from ill-treatment, and thus trigger the non-refoulement obligations of sending states.[122] This recognition has extended the scope of states' non-refoulement obligations to protect persons from climate change-related harm.[123] To clarify, it should be noted that the principle of non-refoulement is not in itself a new development, as it already protects people from being returned to a country where they are at risk of ill-treatment.[124] However, the Committee's interpretation, by explicitly recognising that the principle can protect disaster displaced persons from being returned, can be seen as a normative development improving protection. Secondly, the Committee has clarified its interpretation of Article 6 in the event that a disaster displaced person is to be returned to their home country. In its general comment no. 36 on the right to life, the HRC states that this right includes the right to a life with dignity.[125] In line with this view, the Committee examined in its decision whether the right to life with dignity would be violated if the applicant were returned to Kiribati. In doing so, it assessed the adverse effects of climate change and disasters on the applicant's access to food, water, shelter, and health.[126] For future cases, this means that the Committee requires decision-makers to consider a broad range of social, economic, and cultural rights when deciding whether to expel an applicant.

Finally, it should be recalled that although the HRC's decisions are not legally binding, they serve as authoritative interpretative guidance of the ICCPR. It is therefore anticipated that the HRC's progressive and broad interpretation in the Teitiota case will influence decision-making at the national level in deciding disaster displacement cases. All in all, it can be said that the Committee's interpretation has made an important contribution to the development of international law in the context of disaster displacement.

[122] *Ioane Teitiota v. New Zealand* (n 116) para 9.11.

[123] Elena Papadakos, 'The Lack of Teeth in Teitiota: Exploring the Limits of the Groundbreaking U.N. Human Rights Committee Case Case Note' (2023) 63 Natural Resources Journal 353, 359–60.

[124] See for the principle in refugee law Article 33 of the Refugee Convention; in terms of human rights law is the principle enshrined in Article 3 ECHR and Article 7 of the ICCPR, see also Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007) ch 4.

[125] 'General Comment No. 36' (HRC 2019) Article 6: right to life CCPR/C/GC/36 para 3.

[126] *Ioane Teitiota v. New Zealand* (n 116) para 9.7-10.

2.3 European Level

2.3.1 The European Union

Interregional displacement in the context of disasters received greater attention at European Union ("EU") level in 2008-2009, with publications by European actors drawing attention to the associated problem and calling for action.[127] In 2008, a paper by the High Representative and the European Commission to the European Council on "Climate Change and International Security" stated that "Europe must expect substantially increased migratory pressure" due to disaster displacement.[128] In contrast, the Foresight Programme of the United Kingdom Government Office for Science came to the opposite conclusion in 2011. The report considers high numbers of internationally displaced people to be less likely, as people displaced by disasters do not have the resources that an international movement would require. Consequently, the report concludes that disaster displacement will mainly take place internally.[129] A European Commission working paper published two years later relied heavily on the findings of the Foresight report. The working paper therefore found that the impact of disasters on "migration flows to the EU is unlikely to be substantial".[130] This view led to an immediate reduction in concern about disaster-related displacement into Europe,[131] and to a significant decline in norm entrepreneurs' ambitions to improve protection in the context of disaster displacement. As a result, in the years that followed, the EU focussed primarily on the cause of displacement. Hence, financial, and technical cooperation with countries of the global South has been on the EU's agenda ever since, instead of seeking legislative solutions to the limited protection of those affected.[132]

Furthermore, the "effective practices" mentioned in the Protection Agenda have not been implemented at EU level, which also appears to be linked to the view expressed in the 2013 working paper.[133] Although many European Member States, including the EU itself, supported the Protection Agenda in 2015, the EU has not taken action to address the issue of disaster displaced persons coming to the EU territory from outside the EU and seeking protec-

[127] Elin Jakobsson, 'The Politics of Climate Change and Migration', *Climate Change and Migration – Policy approaches for a sustainable future* (European Liberal Forum 2019) 24–6.

[128] 'Climate Change and International Security' (High Representative and the European Commission 2008) S113/08, at II. iv].

[129] Foresight (n 20) 12–3, 37.

[130] 'Climate Change, Environmental Degradation, and Migration' (European Commission 2013) Commission Staff Working Document SWD(2013) 138 final 11.

[131] Matthew Scott, 'Adapting to Climate-Related Human Mobility into Europe: Between the Protection Agenda and the Deterrence Paradigm, or Beyond?' (2023) 25 European Journal of Migration and Law 54, 66.

[132] ibid.

[133] For how the deterrence paradigm affects the implementation of the Protection Agenda in the EU see Scott (n 131).

tion.[134] In this context, it should not go unmentioned that the Protection Agenda has no positive impact on EU citizens affected by a disaster, as they already enjoy freedom of movement within the EU Member States.

From 1 July 2022 to December 2023 the EU chaired the Platform on Disaster Displacement,[135] which was founded in 2016 as a follow-up mechanism to the Nansen Initiative and is committed to improving the protection of disaster-displaced persons.[136] However, no concrete successes in terms of the development of norms on the issue have been aimed for or achieved.[137]

2.3.2 European Jurisprudence

Finally, the case law of the Court of Justice of the European Union ("CJEU") and the European Court of Human Rights ("ECtHR") should be taken into account. In contrast to those of the HRC, their decisions are binding for the states concerned. However, the same applies to the norm development through interpretation: by interpreting existing norms of the Charter of Fundamental Freedoms of the European Union ("CFR")[138] or the European Convention on Human Rights ("ECHR")[139] and expanding their scope, the courts can contribute to the process of norm development. To date, none of the courts have had the opportunity to rule on an applicant's claim based solely on disaster displacement. Nevertheless, the courts' decisions on the principle of non-refoulement in medical cases and in so-called *predominant cause* cases may provide examples of how they would respond to claims brought by persons displaced by disasters and who are to be returned to their countries of origin.[140]

ECtHR's jurisprudence

The Court has developed extensive case law on the principle of non-refoulement in the context of the prohibition of ill-treatment under Article 3 ECHR. The starting point for this development was the landmark case of *Soering v. the UK* in 1989, in which the Court first established the principle

[134] ibid 68.

[135] 'The European Union, New Chair of the Platform on Disaster Displacement' (*Disaster Displacement*, 6 July 2022) <https://disasterdisplacement.org/news-events/the-european-union-new-chair-of-the-platform-on-disaster-displacement/> accessed 25 February 2024.

[136] 'Platform on Disaster Displacement' (*Disaster Displacement*) <https://disasterdisplacement.org/> accessed 25 February 2024.

[137] See 'EU Hands over Chair of Platform for Disaster Displacement to Kenya' (*EEAS*, 27 February 2024) <https://www.eeas.europa.eu/delegations/un-geneva/eu-hands-over-chair-platform-disaster-displacement-kenya_en?s=62> accessed 6 March 2024.

[138] Charter of Fundamental Rights of the European Union 2012 (OJ C 326/02).

[139] European Convention on Human Rights, as amended by Protocols Nos. 11, 14 and 15 1952 (ETS 5).

[140] Albert Kraler, Caitlin Katsiaficas and Martin Wagner, 'Climate Change and Migration. Legal and Policy Challenges and Responses to Environmentally Induced Migration' (European Parliament's Committee on Civil Liberties, Justice and Home Affairs 2020) Study 79–80.

of non-refoulement in relation to Article 3 ECHR: a state must not send a person back to their country of origin if s/he is at risk of ill-treated there.[141]

In relation to protection against refoulement due to socio-economic deprivation, the Court has set a high threshold for cases where the source of harm is *naturally occurring*. The ECtHR's jurisprudence in medical cases first established this threshold in 1997 in the case of *D v. UK* and concretised it in 2008 in *N v. UK*. Accordingly, there must be "very exceptional" circumstances relating to a terminal stage of the applicant's illness with a real risk of death in the event of return to the receiving state.[142] This very high threshold applied until 2016 and the *Paposhvili v. Belgium* case. In this case, the Court lowered the threshold of a required "imminent risk of dying" by introducing a second possibility, namely a "serious, rapid and irreversible decline" in the applicant's state of health. Secondly, the Court included the criterion of adequate medical care in the receiving country in the threshold and concluded that a receiving state violates Article 3 ECHR by returning a person to a country where the lack of such care leads to a significant reduction in life expectancy *or* in intense suffering.[143] However, the threshold in the *N v. UK* case and even the threshold in the *Paposhvili v. Belgium* case are very high and, while not impossible, are very unlikely to be reached by most disaster displaced persons.

In contrast, a lower threshold applies in cases where the source of harm is predominantly caused by the state[144] (*predominant cause* cases).[145] This lower threshold was first established in the case of *M.S.S. v. Belgium and Greece* and adopted in *Sufi and Elmi v. UK*. Both cases do not concern medical issues, but instead the severe humanitarian situation in the receiving country. The latter case concerns two Somali nationals who were convicted in the UK and were to be expelled to their country of origin.[146] In its judgement, the Court found that the humanitarian situation in the internal displacement camps in Somalia, where the applicants were likely to end up, was dire. The circumstances prevailing there, with very limited access to food, water, shelter and hygiene, were sufficient to constitute treatment contrary to Article 3 of the ECHR.[147] The threshold applied by the Court was thus not the threshold of the judgement in *N. v. UK*, as the presumed harm

[141] *Soering v the United Kingdom* [1989] ECtHR 14038/88 paras 85, 111.

[142] *D v the United Kingdom* [1997] ECtHR 30240/96 paras 52–4; *N v the United Kingdom* [2008] ECtHR [GC] 26565/05 paras 47–51, the court clarified that a reduction in life expectancy does not fulfil the high threshold as it does not lead to imminent death.

[143] *Paposhvili v Belgium* [2016] ECtHR [GC] 41738/10 para 183 (emphasis added).

[144] A state or a non-state actor through an act or omission.

[145] See for the distinction between 'purely naturally occurring harm' cases and 'predominant cause' cases Matthew Scott, 'Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights' (2014) 26 International Journal of Refugee Law 404.

[146] *Sufi and Elmi v the United Kingdom* [2011] ECtHR 8319/07, 11449/07, for the first applicant see paras. 11-17, for the second applicant see paras. 18-26.

[147] ibid 291.

would not be caused by something naturally occurring (e.g. illness) and the receiving state's inability to deal with it.[148] Instead, the Court applied the threshold of the judgement *M.S.S. v. Belgium and Greece*, which found that Belgium violated Article 3 ECHR by sending the applicant to Greece, where he could not provide for his basic needs such as food, hygiene and shelter.[149] The ECtHR based its decision to apply the threshold of the *M.S.S. v. Belgium and Greece* case on the fact that the cause of the harm was primarily the result of the actions of the parties to the conflict in Somalia. With respect to the disaster impact on the humanitarian situation, the Court held that the drought in Somalia had contributed to the humanitarian crisis but was not its primary cause. Thus, the harm feared was not due to a naturally occurring cause (the drought) but was predominantly caused by the actions of state and non-state actors.[150] Other criteria that must be taken into account in cases of predominant cause are vulnerability to ill-treatment and the prospect of an improvement in the applicant's situation within a reasonable timeframe.[151]

Even though the Court described the drought in Somalia as a "natural phenomenon", it could still be argued that cases of displacement caused by disasters fall under the lower predominant cause threshold. The argument could be based on the view that disasters are caused by the state. There is a consensus that industrialised countries are responsible for the majority of historical and current greenhouse gas emissions. These in turn are the cause of anthropogenic climate change and the associated natural hazards.[152] As defined in the introduction, disasters are themselves the combination of a natural hazard, existing vulnerabilities, and a lack of capacity to cope with the hazard. The effects of a disaster also depend on the actions or omissions of the state in relation to the natural hazard or disaster in question.[153] A disaster is therefore not a "natural" event. Assuming this argument is convincing, the lower threshold of the *predominant cause* cases should apply. This would mean that decision-makers should take into account the deprivation of socio-economic rights in the country of origin when applicants seek protection under the principle of non-refoulement in the context of disaster displacement. Nevertheless, the requirements of the lower threshold will only be met in extreme cases, as the remaining requirements must also be met. This would require the applicant to be at particularly vulnerable risk and presumably come from a country affected by a slow-onset event-induced disaster. The effects of slow-onset events are generally more likely to reach the threshold as climate change progresses over time, exacerbating the effects rather than improving them.

[148] ibid 281.
[149] *MSS v Belgium and Greece* [2011] ECtHR [GC] 30696/09 para 254.
[150] *Sufi and Elmi v. the United Kingdom* (n 146) 282.
[151] ibid 283.
[152] See for the argumentation in more detail Scott (n 145) 422–3.
[153] Ammer and Mayrhofer (n 35) 330.

CJEU's jurisprudence

Regarding the CJEU, its jurisprudence on Article 15(b) of the Qualification Directive ("QD")[154] provides an indication of what to expect from the Court in relation to the protection of disaster displaced persons.

The provision applies to beneficiaries of subsidiary protection within the meaning of Article 2(f) of the QD who are at risk of serious harm from ill-treatment in their country of origin. Although this provision "corresponds, in essence to Article 3 of the ECHR",[155] the case law of the CJEU has significantly restricted the possible applicability of the provision to disaster displaced persons through its interpretation.

Firstly, this concerns its interpretation of the term "serious harm". In *M'Bodj v. Belgium*, the Court ruled that the serious harm "must take the form of conduct on the part of a third party and that it cannot therefore simply be the result of general shortcomings in the health system of the country of origin".[156] The situations in which a person displaced by a disaster could fulfil this condition are limited and it is questionable whether the Court will accept arguments in this regard,[157] making the applicability of protection for persons displaced by a disaster even more hypothetical than the corresponding protection option under ECtHR case law.

Secondly, the Court restricts the possibilities for disaster displacement cases under Article 15(b) QD by taking the view that the prohibition on returning seriously ill persons under Article 3 ECHR does not mean that they must also be granted subsidiary protection.[158] The Court justified this by stating that the protection of seriously ill people has no "connection with the rationale of international protection".[159] This negates the prospects for the development of norms improving the protection for disaster displaced persons. As mentioned in the introduction, disaster displaced persons generally do not fulfil the requirement of persecution on one of the Convention

[154] Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) 2011 (L337/9) ('Qualification Directive'), art 15(b).

[155] *Elgafaji v Staatssecretaris van Justitie* [2009] CJEU Case C-465/07 para 28.

[156] *M'Bodj v État belge* [2014] CJEU C-542/13 para 35.

[157] In the case of displacement caused by a disaster, this interpretation could mean that the requirement of serious harm is only met if, e.g., the state of origin does not adequately prevent or respond to the disaster or does not adequately protect the affected persons, see Ammer and Mayrhofer (n 35) 334.

[158] *M'Bodj v État belge* (n 156) para 40.

[159] ibid 44; see also Ammer and Mayrhofer (n 35) 333.

grounds, nor did the drafters of the Refugee Convention intend to include disaster displaced persons in the refugee definition.[160]

2.4 National Level

2.4.1 Sweden

Historically, the Nordic countries have shown a strong proactive role in supporting international treaties and participating in international matters.[161] However, Sweden has not played a significant role in the development of norms at international or European level for the protection of disaster displaced persons. Despite Sweden's regressive role at these levels, Sweden had a national form of protection for disaster displaced persons from 1997 to 2021. The provision offered protection to persons who were outside their country of origin because they were unable to return to their country due to an environmental disaster, Chapter 4, Section 2(a)(2) of the Swedish Aliens Act ("SAA").[162]

The provision was intended for persons who did not qualify for refugee status or subsidiary protection but, who were in need of protection for humanitarian reasons.[163] In order to clarify who is covered by the provision, an attempt was made by the preparatory work. Accordingly, the scope of the provision was limited to environmental disasters, which were defined as sudden-onset disasters,[164] thereby excluding slow-onset disasters such as sea-level rise. In addition, the disaster had to mean that it would be inhumane *(mot humanitetens krav)* to send a person back to their country or origin, at least immediately. Also excluded were situations (i) in which an ongoing deterioration in food production led to serious availability problems and (ii) in which s/he had the opportunity to migrate internally.[165] Persons who met these requirements could be granted a residence permit up to three years.[166]

However, case studies show that Swedish decision-makers have rarely considered the provision, although applicants have explicitly invoked it.[167] The

[160] Walter Kälin, 'Conceptualising Climate-Induced Displacement' in Jane McAdam (ed), *Climate Change and Displacement* (1st edn, Hart Publishing 2010) 88.

[161] See e.g. Marlene Wind, 'Do Scandinavians Care about International Law? A Study of Scandinavian Judges' Citation Practice to International Law and Courts' (2016) 85 Nordic Journal of International Law 281, 282; Johan Karlsson Schaffer, 'The Self-Exempting Activist: Sweden and the International Human Rights Regime' (2020) 38 Nordic Journal of Human Rights 40.

[162] Utlänningslag 2006 (2005:716).

[163] 'Prop. 1996/97:25' (1996) 94, 96.

[164] ibid 100.

[165] ibid 101–2.

[166] See Chapter 5, Section 1 SAA.

[167] See for the whole review Ammer, Mayrhofer and Scott (n 30) 22-30; see also Scott and Garner (n 39) 112.

former can be explained by the fact that the provision not only was vaguely worded, but also that there was insufficient guidance on its application; only the *travaux préparatoires* with the requirements explained above were available.[168] Given the fact that the Swedish judiciary relies heavily on the preparatory material,[169] the application of the provision may have been challenging for the SDMs.

In addition, to these unfortunate prerequisites, there is also a study on the impartiality of Swedish migration practice. *Johannesson* found in her study that Swedish decision-makers take a sceptical approach towards asylum applications.[170] This scepticism, perceived by them as impartiality, is taken to distance themselves from the political discourse that has long been positive towards immigrants in Sweden. This leads to a very low success rate of appealed Migration Agency decisions and generally to a strict interpretation of Swedish migration law.[171] Finally, the high threshold that a disaster had to meet should be mentioned. As already noted, the disaster had to occur in such a way that a return to the home country would be against the requirements of humanity. Following the reasoning of *Scott* and *Garner*, the preparatory material meant that the threshold of the non-refoulement principle established in the case of *N. v. UK* on Article 3 ECHR had to be fulfilled. This means that the situation in the country of origin had to provide "very exceptional" circumstances that would make a return to the home country inhumane.[172] A comparison of this threshold with the threshold set in the *Teitiota v. New Zealand* case shows that the former is significantly higher. This is because the HRC took into account the possible negative impact of disasters on the social and cultural rights of applicants upon return. According to this decision, the principle of non-refoulement under Article 6 ICCPR encompasses far more circumstances than the "very exceptional" circumstances required under the Swedish provision. Additionally, the HRC also did not limit the obligation of non-refoulement to sudden-onset disasters.[173] To summarise, given the high threshold of the Swedish provision and the SDMs scepticism towards asylum applications, it is not surprising that not a single person met the required conditions and therefore no one was granted protection in Sweden on the basis of this provision.[174]

[168] Scott and Garner (n 39) 110, 115.

[169] ibid 116; Pia Letto-Vanamo, 'Courts and Proceedings: Some Nordic Characteristics' in Laura Ervo, Pia Letto-Vanamo and Anna Nylund (eds), *Rethinking Nordic Courts* (Springer Nature 2021) 29–31.

[170] Livia Johannesson, 'Exploring the Liberal Paradox from the Inside: Evidence from the Swedish Migration Courts Migration Policies and Migration Disruptions' (2018) 52 International Migration Review 1162, 1170.

[171] ibid 1166, 1180.

[172] Scott and Garner (n 39) 115.

[173] ibid 120–21.

[174] Ammer, Mayrhofer and Scott (n 30) 23; Scott and Garner (n 39) 116.

In 2016, Sweden suspended its disaster displacement provision.[175] In 2021, Sweden returned to the EU's minimum protection requirements as it decided to repeal the provision.[176] This was motivated on the one hand by the intention to harmonise domestic law more with European law and on the other hand because the provision was rarely used and had not led to a single recognition of protection.[177] However, the shortcomings described above show why the provision failed in several respects. It therefore seems misguided to declare the provision redundant because it was rarely applied, and no protection was granted on its basis.

2.4.2 Other European Countries

The above outline of the development of norms shows that the commitment to the protection of disaster displaced persons is clearly declining between the international and the national, Swedish level. However, the decline in commitment at European level is not causal for the significant decline in protection at national level, as the following two country examples will show.

Italy is currently the only EU member state that provides several protection provisions for disaster displaced persons.[178] Those affected can currently invoke three different provisions that explicitly refer to environmental reasons as a reason for protection. According to Article 20 of the Italian Consolidated Immigration Act ("CAI"), the government can adopt collective and temporary measures for exceptional humanitarian needs, including natural disasters outside the EU.[179] In addition, Article 19 CAI regulates a so-called "special protection status" in cases where refoulement is not possible, including due to environmental conditions in the receiving country that would violate the prohibition of ill-treatment.[180] Finally, a further provision

[175] Lag (2016:752) om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige 2016 at 16§; see also 'Prop. 2018/19:128' (2019).

[176] Lag (2021:765) om ändring i utlänningslagen (2005:716) 2021; Emily Hush, 'Developing a European Model of International Protection for Environmentally-Displaced Persons: Lessons from Finland and Sweden' (*Columbia Journal of European Law*, 7 September 2017) <https://cjel.law.columbia.edu/preliminary-reference/2017/developing-a-european-model-of-international-protection-for-environmentally-displaced-persons-lessons-from-finland-and-sweden/> accessed 27 February 2024.

[177] 'Prop. 2020/21:191' (2021) 53.

[178] Chiara Scissa and others, 'Legal and Judicial Responses to Disaster Displacement in Italy, Austria and Sweden' (2022) Völkerrechtsblog <https://voelkerrechtsblog.org/legal-and-judicial-responses-to-disaster-displacement-in-italy-austria-and-sweden/> accessed 5 March 2024.

[179] Chiara Scissa, 'The Climate Changes, Should EU Migration Law Change as Well? Insights from Italy' (2022) European Journal of Legal Studies 5, 16–7.

[180] ibid 17, 19–20; see also Francesco Negozio, 'What Legal Options for Environmental and Climate-Displaced People under the Italian Protection System? Complementary Protection on Humanitarian Grounds v. Ad Hoc Regimes' (*Refugee Law Initiative Blog*, 30 September 2022) <https://rli.blogs.sas.ac.uk/2022/09/30/what-legal-options-for-environmental-and-climate-displaced-people-under-the-italian-protection-system/> accessed 23 March 2024.

was introduced in 2018: Article 20-bis CAI. This provision provides for a residence permit of six months due to a serious disaster, which can be renewed as long as the country is not environmentally safe.[181]

A review of the Italian cases found that disaster displaced persons were consistently granted national protection. In contrast, the judges have never (yet)[182] granted international protection to the persons concerned.[183] That being said, the provisions unfold their full protection with the help of the interpretation by the Italian Supreme Court of Cassation. The Court ruled in favour of the applicants affected by the disaster in several cases and considered disaster-related protection claims to be convincing.[184]

Austria, on the other hand, has no explicit legal basis for the protection of people displaced by disasters.[185] However, this does not mean that those affected are granted less protection than in Italy. A review of more than 600 cases in which the applicant explicitly invokes disasters as a ground for protection shows that the Austrian courts have examined the claims under the national provision for subsidiary protection.[186] According to the review, the courts' assessment under Article 3 ECHR, i.e. the real risk of ill-treatment due to refoulement to the country of origin, led to the granting of subsidiary protection status.[187] In the successful cases, however, it was not only the disaster that led to subsidiary protection status being granted. Gender, age, the existence of a support network in the home country as well as education and employability also played a role.[188] Overall, the case law of the Austrian courts therefore shows an effort to improve the protection of disaster displaced persons through an interpretative approach that also takes into account disasters and their effects.

The country examples have shown that other European countries take a contrary approach compared to Sweden: They introduce new provisions instead of repealing the provisions on displacement by disasters, and their courts follow a progressive interpretative approach that includes disasters as a criterion for eligibility for protection.

[181] See Article 20-bis(2) of the Italian CAI.

[182] See for an optimistic view Scissa (n 179) 22.

[183] Scissa and others (n 178).

[184] The author Scissa speaks of an ‘evolutionary interpretation’ approach of the Court with regard to the Italian disaster protection provisions, see Scissa (n 179) 20–3.

[185] Scissa and others (n 178).

[186] Mayrhofer and Ammer (n 30) 12.

[187] ibid 12–5.

[188] ibid 15.

2.5 Conclusion

Overall, the question of how far normative development has progressed in relation to improving the protection in the context of disaster displacement can be answered with the developments at the international level represented by the Protection Agenda, the UNHCR's legal considerations on the question of refugee status for disaster displaced persons and the landmark decision *Teitiota v. New Zealand*. The jurisprudence of the ECtHR in *predominant cause* cases should be emphasised to the extent that it indicates that decision-makers should take into account the deprivation of socio-economic rights when deciding on refoulement in the context of disaster displacement. In contrast, the other developments at European and Swedish level have not contributed to progress in the development of norms, in fact they have tended to move in the opposite direction since the EU Commission's 2013 working document and Sweden's repeal of its national protection alternative.

It can be concluded that, although the international norm entrepreneurs have made great efforts, the developments have not progressed beyond the norm emergence stage. Nonetheless, the identified emerging norms already strengthen the protection of disaster displaced persons, as states can expect their decisions to be litigated before international courts or treaty bodies, which in turn apply their own jurisprudence and may also draw on other international sources identified here. Therefore, even *emerging* norms are important sources that decision-makers should take into account when deciding on disaster displacement cases.

3 Case Study

This chapter analyses whether Swedish decision-makers apply the emerging norms in cases of disaster displacement. The chapter is structured into a brief overview of the selected cases, followed by the main part of the chapter, the analysis of the cases. The analysis is divided into sections that reflect the provisions that applicants invoked to enter or remain in Sweden due to disasters in their countries of origin. It begins with applications for international protection under Chapter 4, Sections 1 and 2 of the SAA, followed by a section on humanitarian protection cases under Chapter 5, Section 6 of the SAA. This is followed by a section on obstacles to enforcement under Chapter 12, Sections 18 and 19 of the SAA, and a last section on visitors under the EU Visa Code[189] and Chapter 5, Sections 10 and 19 of the SAA. Each section of the analysis includes a brief description of the relevant national provisions, a summary of the key findings and an illustration based on example cases.

3.1 Overview of the Selected Cases

This section provides an overview of the cases by highlighting similarities and differences, e.g. in relation to the individuals' countries of origin, the disasters they cited in order to enter or remain in Sweden, and the success rate of applications.

Countries of origin and type of disaster to which the applicant referred:

In terms of the origin of the persons, most cases came from the global South (68%). Syria (6), Afghanistan (5) and Somalia (4) were the countries from which most applicants came, followed by Nigeria and Bangladesh (3). While persons from Syria most frequently referred to the earthquake in Tukey-Syria in February 2023, the other cases mainly invoked drought as a reason, followed by general environmental-related problems, such as “natural disasters” or “climate change”. In the cases of people from the global North, all but one referred to the earthquake in Turkey and Syria and to Covid-19. One case from Turkey referred to flooding. In addition to Covid-19, disasters such as earthquakes, droughts and floods were mentioned most frequently. Most cases of applicants from the global North were from Turkey (11) followed by the Balkan countries (6).

[189] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas 2009 (L 243/1) (‘EU Visa Code’).

Protection or immigration category and type of disaster claimed:

In 40% of cases, applicants applied for international or national protection.[190] Of these, 13% of the applicants cited disasters in connection with their application for international protection. 27% relied on disasters to obtain national/humanitarian protection. The disasters invoked in the international and national protection claims were diverse. They ranged from slow-onset events, particularly drought, to sudden-onset events such as floods and earthquakes. In two cases, applicants were granted subsidiary protection, but the SDMs did not refer to a disaster in their reasons for granting the protection. 29% of the cases related to obstacles to enforcement in which the applicants cited Covid-19, ongoing droughts or the consequences of climate change and disasters in general as reasons. In the cases where visitors applied for an extension of their stay (23%), the most frequently cited reason was Covid-19. In the cases where disaster-affected people applied for a visa (8%), the applicants all came from Turkey and referred to the earthquake.

Applicants' level of reliance on disasters in their application:

In most applications for international and national protection, the applicants relied primarily on traditional grounds for protection such as the need for protection due to religion, political opinion, or armed conflict. In other words, they only referred to disasters in these two categories on a subsidiary basis. In contrast, the applicants primarily invoked disasters in order to assert "obstacles to enforcement" against their expulsion decision, as well as to extend their visit in Sweden and as grounds for their visa application.

Level of engagement of decision-makers in relation to the disaster element:

In the majority of cases, the disasters were only dealt with very briefly, i.e. it was stated in one or two sentences that the disaster was not relevant to the application, without giving reasons for this. Only in 5 cases did the decision-makers go into more detail about the disaster. This means that the SDMs used information from the country of origin to assess the severity of the disaster and justified their decision in relation to the disaster and the vulnerability of the applicant. In 26% of the cases, decision-makers ignored the applicant’s disaster reference entirely.

Success rate:

No case was successful due to a disaster reference. With the exception of the two cases in which subsidiary protection was granted for other reasons, this means that 97% of the selected cases were dismissed.

[190] The definition of international and national protection is explained in sections 3.2.1 and 3.2.2.

3.2 International Protection

This section presents international protection claims, meaning applications for refugee status or subsidiary protection according to Chapter 4, Sections 1 and 2 of the SAA.[191] According to the first Section, refugee status may be granted if an alien is outside the country of nationality because of a well-founded fear of persecution for reasons of race, nationality, religion, political opinion, sex, sexual orientation or membership of a particular social group and is unable or, owing to such fear, unwilling to avail himself or herself of the protection of that country. Due to the inclusion of gender and sexual orientation as grounds for persecution, the Swedish definition of refugee is more detailed than that of the Refugee Convention and the QD. With regard to subsidiary protection, the protection against refoulement is relevant in the context of disaster displacement; it protects individuals from being returned to a country where they would face corporal punishment, torture or other inhuman or degrading treatment or punishment.[192] Both international protection statuses are summarised in this chapter, as most applicants applied for international protection in general and did not invoke refugee status or subsidiary protection in particular.

Starting with a case in which subsidiary protection was granted: *UM 11095-18/UM 5502-19*, which concerned an Afghan family with a five-year-old child who appealed against the agency's decision to send them back to their home country. The Agency was of the opinion that the family was in need of protection in their hometown, but that an internal flight alternative to Kabul was reasonable.[193] In their appeal, the family argued, among other things, that Kabul was not a reasonable internal flight alternative due to the humanitarian situation in the drought-affected city.[194] In assessing the humanitarian situation in Kabul, the Court consulted COI and found that a prolonged period of drought had affected access to food and water. However, with reference to the guidance issued by the European Asylum Support Office, the Court found that it may still be reasonable to return individuals to Kabul, taking into account their personal circumstances.[195] Ultimately, the family was granted subsidiary protection as the poor economic situation, the lack of a social network and the child's poor health led to the decision that Kabul was not a reasonable internal flight alternative for them.[196]

[191] The Swedish provisions correspond to those of the QD, see Arts 2(d) and (f) of the QD.

[192] For a detailed account of Sweden's obligations under this provision, see Håkan Sandesjö and Gerhard Wikrén, *Utlänningslagen Med Kommentarer* (13 (digital version), Norstedts Juridik 2023), 4 kap. 2§ Första stycket.

[193] *UM 11095-18, UM 5502-19* see attached decision of the SMA at 7-11.

[194] *ibid 3.*

[195] ibid 10.

[196] ibid 10–2.

The second case in which the applicants were granted subsidiary protection status concerns a Yemeni family consisting of a single mother with six minor children, the youngest of whom was only a few months old. In their application, they stated that "the war, epidemics and the lack of electricity and drinking water make life in Yemen impossible".[197] Even though neither the applicants themselves nor the SMA addressed the apparent causality of the alleged disasters (epidemics) and disaster consequence (water shortages) with climate change, at least a partial causality can be assumed.[198] This is due to the fact that climate change is indeed affecting Yemen by exacerbating water scarcity[199] and leading to disasters such as severe flooding and rainfall, which in turn damages infrastructure and favours the spread of diseases.[200]

The case would have provided an opportunity to assess whether it could fulfil the conditions of the *predominant cause* threshold, i.e. (i) the applicants' ability to provide for their most basic needs, (ii) their vulnerability to ill-treatment and (iii) the prospect of an improvement in their situation within a reasonable timeframe. However, the Agency did not rely on European case law in this case. The SMA also did not address the impact of disasters on the humanitarian situation in Yemen, nor the cited impact of epidemics and water shortages. In contrast, the Agency granted the family subsidiary protection due to the generalised violence in Yemen.[201] The SMA's decision to grant protection on the basis of the most obvious protection ground is plausible. However, with regard to the application of emerging norms aimed at compensating the absence of an explicit legal basis for the protection of disaster displaced persons, it would have been desirable if the applicants' arguments related to the disasters had also been taken into account, as these, when considered together with the other circumstances of the case, could also have been considered a ground for protection.

The following cases are examples where Swedish decision-makers have taken the fear of disaster-related harm into account to an even lesser extent than in the two decisions described above.

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[197] *UM 157-19*, see the attached decision of the SMA at 3.

[198] Partly because the war in Yemen is also contributing to the humanitarian situation in the country. It is recognised that disasters and conflicts are interrelated: conflicts complicate disaster adaptation, and disasters exacerbates conflicts as natural resources become scarce and therefore subject to conflict. See for a detailed explanation with reference to further sources and with specific reference to Yemen B Poornima and Rashmi Ramesh, 'Yemen's Survival Quandary: The Compounding Effects of Conflict and Climate Obstruction' (2023) 18 Journal of Peacebuilding & Development 264; see also 'Climate, Peace and Security Fact Sheet: Yemen 2023' (NUPI and SIPRI 2023) Fact Sheet <https://www.sipri.org/sites/default/files/2023-06/2023_sipri-nupi_fact_sheet_yemen_june.pdf> accessed 15 March 2024.

[199] Nicole Glass, 'The Water Crisis in Yemen: Causes, Consequences and Solutions' (2010) Global Majority E-Journal 17, 23.

[200] 'Yemen Country Office: Humanitarian Situation Report' (UNICEF 2022) 2.

[201] *UM 157-19* (n 197) 6–7.

In *UM 12633-23*, a Turkish woman applied for refugee status and based her application mainly on the Turkish-Syrian earthquakes in February 2023, which led to the loss of her home. Without a home, she feared being exposed to sexual violence as she had no partner and no male network.[202] While the SMC did not address the Turkish woman's argument at all, the SMA discussed it in at least one paragraph. The Agency concluded that the evidence provided by the applicant was not sufficient to assume that she was at risk of persecution because of her gender. Furthermore, it was found that the applicant as a healthy and young woman, could find a new home in her home country and therefore did not need protection due to her being a woman without male support.[203]

Another case concerning an applicant for refugee status after the earthquake in Turkey is *UM 7738-23*. This *sur place* case was about a man who belonged to the Kurdish ethnic minority in Turkey. He initially travelled to Sweden with a visa, but when he became aware that the authorities were not giving the Kurdish minority the same assistance as others in connection with the earthquake in 2023, he applied for asylum. He also related the discriminatory treatment to the floods that occurred in the same region just one month after the earthquake.[204] The latter case is similar to the example given by the UNHCR in a report, which states that "victims of natural disasters [who] flee because their government has consciously withheld or obstructed assistance in order to punish or marginalise them on any of the five grounds" would be covered by the Refugee Convention.[205] However, the SMC found that the applicant's claim was not persuasive and concluded that the level of discrimination against Kurds in Turkey did not justify a need for protection.[206]

The two cases described above show how disasters can trigger the risk of persecution. Furthermore, neither the case of the Turkish-Kurdish man nor that of the Turkish woman contained detailed information about the country of origin, nor was the element of disaster considered in detail. In both cases, however, it should have been examined more closely whether the applicants could actually fulfil the refugee definition. The UNHCR's legal considerations on the international protection eligibility of disaster displaced persons make it clear that people affected by disasters can certainly fulfil the criteria. As described in the previous chapter, the legal considerations refer to a number of rights that can be affected by a disaster, meaning that persecution

[202] *UM 12633-23*, see the attached decision of the SMA at 3.

[203] ibid, see the attached decision of the SMA at 5.

[204] *UM 7738-23* 2–3.

[205] 'Forced Displacement in the Context of Climate Change: Challenges for States Under International Law' (UNHCR 2009) Submission to the 6th Session of the Ad Hoc Working Group on Long Term Cooperative Action under the Convention 9–10.

[206] *UM 7738-23* (n 204) 3.

within the meaning of the Refugee Convention may be present.[207] It also points out that persons seeking international protection may have a legitimate claim if the state's response following a disaster distributes resources and access to them in a discriminatory manner.[208] Furthermore, the legal considerations note that the state's response to a disaster may be different for certain groups, for example due to gender differences. It also states that women are particularly vulnerable to violence in the disaster context.[209] Overall, the SDMs should have assessed whether the applicants had a valid claim by taking into account the UNHCR's legal considerations and considering the interrelation between the consequences of the disaster and the applicants' pre-existing vulnerabilities.

In one case involving an eighteen-year-old Sierra Leonean national, the applicant applied for international protection, essentially on the grounds of a natural disaster that had destroyed his home and separated him from his parents.[210] The disaster the applicant was referring to, was a landslide caused by heavy rain in August 2017 in the capital Freetown, where he was from. The disaster resulted to more than 500 deaths and 3,000 displaced persons.[211] While the SMA completely ignored the disaster in its reasoning, the SMC found that "the general situation in Sierra Leone is not that so serious as to constitute grounds for protection in itself, including the claim of a natural disaster".[212] The decision of the SMA and the judgement entirely lacked any reference to COI.

To summarise, in no decision was a thorough assessment of the applicant's eligibility for refugee status based on the disaster referred to by the applicant evident. In no case did the decision-makers take into account the UNHCR's legal considerations regarding the possibility that disasters may constitute a ground for protection. Overall, in the selected cases, the SDMs only considered disasters to a limited extent when making written decisions on applications for international protection. The effective practice described in the Protection Agenda, according to which authorities should carefully assess cases from disaster-affected countries in order to correctly determine whether the applicant is eligible for international protection,[213] was therefore also not followed by the decision-makers or at least was not reflected in the decisions.

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[207] 'Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters' (n 106) paras 2, 7.

[208] ibid 10.

[209] ibid 10.

[210] *UM 13175-19* 3, see also attached decision of the SMA at 3.

[211] 'UNICEF's Emergency Preparedness and Response in Sierra Leone' (*UNICEF Sierra Leone*) <https://www.unicef.org/sierraleone/emergencies> accessed 18 March 2024.

[212] *UM 13175-19* (n 210) 3.

[213] See 'Protection Agenda Vol. I' (n 19) paras 47, 55.

3.3 Humanitarian Protection

For persons who are not eligible for international protection and who do not fulfil the requirements for a residence permit on other grounds, Chapter 5, Section 6 of the SAA provides for an exception. The provision offers a national form of protection, namely humanitarian protection, which includes a temporary residence permit of thirteen months.[214] In order to benefit from this protection, the applicant must demonstrate "exceptional distressing circumstances" *(synnerligen ömmande omständigheter)*,[215] respectively children must prove "particularly distressing circumstances" *(särskilt ömmande omständigheter)*.[216] For the reasons of simplification, the term "humanitarian reasons" is used as an umbrella term in this thesis. According to the provision, humanitarian reasons relate in particular to the applicant's state of health, adaptation to Sweden and/or the situation in the applicant's country of origin. In the context of disaster displacement, reasons relating to the applicant's state of health and the situation in the applicant's country of origin are primarily relevant. With regard to the application of the provision by the decision-makers, it should be emphasised that the Agency's guidelines provide for a restrictive interpretation of the provision.[217] However, the Agency also states in its guidance that the granting of humanitarian protection is part of legislation based on an "open assessment" in which a variety of factors should be considered and weighed against each other.[218]

The case of a Haitian family is a good example to show the shortcomings of decision-makers in relation to disaster displacement. The family consisted of a woman with a six-month-old daughter and an eight-year-old stepson who came to Sweden with her husband/father to seek international protection for fear of gang violence. With regard to their need for humanitarian protection they referred to natural disasters in general.[219]

In terms of the mother, the Agency found in its assessment of whether disaster-related situation in her home country constitutes exceptional circumstances the following: (i) large parts of Haiti receive little rainfall due to rising temperatures as a result of climate change; (ii) the country's most vulnerable communities are exposed to environmental risks, including limited access to clean water and sanitation; and (iii) more than a third of the popu-

[214] Chapter 5, Section 6(3) SAA stipulates that any new temporary residence permit issued thereafter is valid for two years; a permanent residence permit may be issued after three years of a temporary residence permit.

[215] 'Uppehållstillstånd Enligt 5 Kap. 6 § Utlänningslagen' (Migrationsverket 2021) Rättsligt ställningstagande RS/085/2021 4; for the motives see 'Prop. 2004/05:170' (2005) 185.

[216] This lower threshold has applied since 2013. The amendment was justified on the grounds that the principle of the best interests of the child should be better guaranteed. See 'Proposition 2013/14:216' (2014) Särskilt ömmande omständigheter 15–6, 18ff.

[217] 'Uppehållstillstånd Enligt 5 Kap. 6 § Utlänningslagen' (n 215) 6.

[218] 'Prövning Av Barns Bästa' (Migrationsverket 2020) RS/009/2020 20.

[219] *UM 5852-23/UM 5898-23*, see the three attached decisions of the SMA, each at 3-4.

lation has no access to drinking water and two thirds have limited or no access to sanitation.[220] In addition, the SMA emphasised that these difficult circumstances apply primarily to the most vulnerable part of the Haitian population. However, according to the Agency, the woman had not made it clear that she belonged to this group and that she had difficulties meeting her needs for food and shelter.[221] With regard to the two children, the Agency concluded that the two children neither belonged to the most vulnerable population groups in Haiti, and since they did not mention that they had difficulties meeting their basic needs, the situation in Haiti did not constitute special distressing circumstances.[222] The Court agreed with the Agency without addressing the disaster-related situation.[223]

Overall, compared to other decisions, this decision dealt quite 'extensively' with the applicants' disaster claim. Nevertheless, the decision-makers did not refer to any of the normative developments identified in their reasoning. The assessment of the disaster-related claim also showed shortcomings with regard to COI and the best interests of the child. Starting with the COI, it should be recalled that the family referred generally to "natural disasters" in their application without distinguishing whether they meant slow or sudden-onset disasters or both. However, it is a fact that Haiti has experienced several floods and earthquakes in the past.[224] In its reasoning, the agency relied on a Human Rights Watch report that did not provide details on the consequences of sudden-onset disasters. Accordingly, the Agency's reasoning lacked such information, which may have been crucial in determining whether returning the family would be appropriate.

Furthermore, the best interests of the child were insufficiently considered. By way of background, Article 3(1) of the Convention on the Rights of the Child ("CRC")[225] provides that a child has the right to have his or her best interests taken into account as a primary consideration by decision-makers.[226] The procedural aspect of the principle also requires an assessment of the consequences of a decision for the child and an explicit and detailed explanation of how the best interests of the child were considered in the decision-making process.[227] In relation to disaster displacement and children, it should be emphasised that children are more vulnerable to the psychological and physical effects of disasters and are therefore dispropor-

[220] ibid, see the first attached decision of the SMA at 8-10.

[221] ibid, see the first attached decision of the SMA at 10.

[222] ibid, see the attached second and third decision of the SMA, each at 8.

[223] ibid 3.

[224] For an overview of key disasters (floods, storms, landslides, droughts, epidemics and earthquakes) in Haiti from 1980-2020 see World Bank Group, 'Risk: Historical Hazards' (*Climate Change Knowledge Portal*) <https://climateknowledgeportal.worldbank.org/> accessed 27 March 2024.

[225] Convention on the Rights of the Child 1990 (UN Treaty Series vol 1577, p 3).

[226] Geraldine Van Bueren, 'Children's Rights' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran, *International Human Rights Law* (3rd edn, OUP 2017) 330.

[227] 'General Comment No. 14' (CRC 2013) CRC/C/GC/14 para 97.

tionately affected compared to adults.[228] The Committee on the Rights of the Child generally recommends that states establish a national framework for the protection of children's rights, which should take priority over immigration laws and be independent of the child's immigration status.[229] In addition, the United Nations Children's Fund ("UNICEF") published a report in 2022 setting out nine principles to guide states on how to protect children's rights in the context of disaster displacement. The principle of the best interests of the child is one of them and means that when deciding whether to return children to their country of origin, the impact of disasters in that place must be taken into account.[230] With regard to Sweden, it should be added that the national equivalent of this principle is laid down in Chapter 1, Section 10 of the SAA.[231] This means that the Swedish decision-makers are expressly bound by domestic law to this principle in their decisions in migration cases. With regard to the present case, it can be stated that while the Agency considered in particular the educational situation with regard to the best interests of the child, it did not include such considerations in its assessment of the disaster-related situation in Haiti.[232] The explanations in the section of the case on the deprivation of economic and social rights due to the disaster-related situation in Haiti made no reference to the specific situation of children in either the boy's or the girl's decision. The Agency also failed to take into account the disproportionate impact of water shortages on children compared to adults and their higher vulnerability to its consequences. According to the principle, this should have been taken into account and explicitly discussed when deciding whether the circumstances are special enough to grant the children protection on humanitarian grounds.

In *UM 2956-21*, a man from Nicaragua applied for a residence permit on the grounds that a natural disaster in his home country had destroyed his house and business during his visit to Sweden. He argued that he would therefore have difficulties supporting himself. Furthermore, he stated that the national authorities were unable to help him build a new house.[233] In the Agency's decision, it did not elaborate on the impact of the disaster and the inability

[228] 'The Climate-Changed Child' (UNICEF 2023) 7.

[229] 'The Rights of All Children in the Context of International Migration' (Committee on the Rights of the Child 2012) Background Paper for the 2012 Day of General Discussion; see also 'Handbook on Protection and Assistance for Migrants Vulnerable to Violence, Exploitation and Abuse' (IOM 2019) PUB2019/002/R 255; In this context, it should also be mentioned that the best interests principle may even constitute an independent source of protection. This means that in cases where the applicant is neither eligible for refugee status nor for protection under the principle of non-refoulement, the best interests principle would protect against deportation. See for the entire argument Jason M Pobjoy, 'The Best Interests of the Child Principle as an Independent Source of International Protection' (2015) International Comparative Law Quarterly 327.

[230] 'Guiding Principles for Children on the Move in the Context of Climate Change' (UNICEF 2022) 21–2.

[231] 'Prop. 1996/97:25' (n 163) 333.

[232] *UM 5852-23/UM 5898-23* (n 219) see the attached second and third decision of the SMA, each at 7-8.

[233] *UM 2956-21*, see the attached decision of the SMA at 3.

of the state to support the applicant. In fact, the Agency's assessment lacked any information about the country of origin. As a result, the SMA concluded without justification that the requirements of Chapter 5, Section 6 of the SAA were not met, which resulted in no residence permit being granted.[234]

In the remaining cases, the applicants mostly cited droughts with the associated consequences or earthquakes that destroyed their homes. In four of these cases, the decision-makers completely ignored the disaster-related reference.[235] In a further six cases, it was stated in one sentence that the disaster did not change the assessment that there were no exceptional distressing circumstances.[236] Only in one of the these cases did the SMC refer to information about the country of origin in its assessment.[237] In two other cases, the Court agreed with the Agency's assessment without addressing the disaster-related submissions.[238] In none of the cases were the emerging norms identified applied.

To summarise the findings of this section, it can be stated that the decision-makers' assessment of applications on humanitarian grounds showed that (i) the principle of the best interest of the child was not applied in the disaster context, (ii) relevant information about the country of origin was missing in the vast majority of cases, (iii) emerging norms were not taken into account.[239]

3.4 Impediments to Enforcement

In situations where an application for residence permit has been rejected and the decision to refuse entry or expulsion is final, new circumstances can lead to so-called "impediments to enforcement" *(verkställighetshinder)*. This is regulated in the twelfth chapter of the SAA. According to Section 18 of Chapter 12 of the SAA, the Agency shall examine *ex officio* whether there are new circumstances that could constitute an impediment to enforcement in the case in question. The obstacles that the SMA assesses can be summarised as follows:

(i) new circumstances that would give rise to international protection for the applicant (Chapter 12, Sections 1-3 SAA));

[234] ibid attached decision of the SMA at 4-5.

[235] *UM 17122-17*; *UM 8271-18*; *UM 2944-22*; *UM 2340-22*.

[236] *UM 1374-20*, see the attached decision of the SMA at 7; *UM 11515-20*, see the attached decision of the SMA at 8; *UM 5934-23*, see the attached decision of the SMA 9-10; *UM 13043-23* 7; *UM 1317-23* 7; *UM 5934-23* 3, and see attached decision of the SMA at 9.

[237] *UM 2456-23*, see the attached decision of the SMA at 10.

[238] *UM 5936-20* 3; *UM 2382-23* 6.

[239] When analysing the cases, it was taken into account that between July 2016 and July 2021, humanitarian protection was limited to situations where the decision to reject or return the applicant would violate a Swedish Convention obligation; for the legal basis of this restriction, see Lag (2016:752) at 11§.

(ii) new circumstances that give rise to practical obstacles to enforcement (Chapter 12, Section 18(1)(2) SAA); or

(iii) new circumstances leading to an obstacle on medical or other humanitarian grounds (Chapter 12, Section 18(1)(3) SAA).

All three options may be applicable in the event of a disaster: With regard to the first obstacle, new disaster-related circumstances that would trigger an obligation of *non-refoulement*, as set out in the Teitiota decision, could be relevant. *Practical obstacles* to enforcement in the event of disasters may arise if, for example, infrastructure such as airports or roads have been destroyed by a disaster.[240] *Humanitarian impediments* related to displacement caused by a disaster exist, for example, if the country of origin does not offer protection or assistance in parts of the country that are accessible to the displaced persons, or if what is provided falls far below international standards that would be considered adequate.[241] Although the provision could be applicable to disaster-related migration cases, preparatory material indicates that Section 18 refers to exceptional situations and that an assessment based on several different circumstances of the individual case may be decisive for success.[242]

In the event that the Agency is unable to issue a residence permit in accordance with section 18 SAA, the applicants themselves can invoke new circumstances that would require the SMA to re-examine the case. These "subsequent applications" due to impediments to enforcement are regulated in Section 19 of Chapter 12 of the SAA. According to the case law of the CJEU,[243] "new circumstances" refer to circumstances and findings that occurred after the decision became final or to circumstances and findings that already existed beforehand but were not invoked by the applicant.[244] The main difference between Sections 18 and 19 is that Section 19 limits the circumstances on which the applicant can rely to those that would give rise to international protection (see Sections 1 to 3 of Chapter 12 SAA).[245] This means that the applicant can only invoke disaster-related new circumstances that would lead to a violation of the principle of non-refoulement or situations that would result in the granting of refugee status.[246] Section 19 therefore does not cover practical, medical or other humanitarian grounds that

[240] Kälin and Schrepfer (n 35) 66.

[241] ibid.

[242] 'Prop. 2004/05:170' (n 215) 299.

[243] The case law of the CJEU is relevant here, as the Swedish provision in Chapter 12, Section 19 is based on Article 40 of the Asylum Procedures Directive, see Sandesjö and Wikrén (n 192), Chapter 12, Section 19; see for the Directive Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast) 2013 (L 180/60) ('Asylum Procedure Directive').

[244] *XY v Bundesamt für Fremdenwesen und Asyl* [2021] CJEU C-18/20 para 36.

[245] See Article 2(q) Asylum Procedure Directive, see also Sandesjö and Wikrén (n 192), at Chapter 12, Section 19.

[246] See Chapter 12, Sections 1-3 SAA.

would constitute an obstacle to enforcement. If the requirements of Section 19 are met, the Agency must reopen the case and review the question of the residence permit.[247]

One example of a subsequent application due to the negative effects of climate change on agriculture, water and food is the case of a Somali family. It involved a single father with seven children, five of whom were minors. The eldest children, aged 18 and 20, were looking after the family as the father had problems with his eyesight and was illiterate.[248] Their application for a residence permit was rejected by the Agency. After the decision came into effect, they argued that they could not return to their home country, relying mainly on the effects of climate change in Somalia. Their representative stated that:

> "Climate change in the part of the world to which the family will be deported has led to serious changes in living conditions. There is no prospect of improved conditions in the next 50 years. Researchers believe the trend is in the opposite direction. Somalia is experiencing the worst drought in 40 years. Almost half of the population is suffering from food shortages and the UN is expected to declare famine in several areas. More and more missed rainy seasons are expected, and millions of livestock have died. During the drought, one million people have fled their homes and diseases are spreading in the wake of the famine."[249]

The SMA accepted the family's claim that climate change and its consequences constituted "new circumstances" that had not previously been invoked.[250] However, in its reasoning, the Agency emphasised that situations that may constitute an obstacle to enforcement should be an exception and the circumstances invoked by the applicants did not constitute such an exceptional situation. Therefore, there was no obstacle to enforcement and no residence permit could be granted.[251] The Agency has not commented on Chapter 12, Section 18(2) of the SAA, which stipulates that the threshold for medical or humanitarian grounds constituting an obstacle to enforcement is lower for children than for adults. The family appealed to the SMC, rely-

[247] See Chapter 12, Section 19(2) SAA, see also 'Subsequent Applications' (*Asylum Information Database | European Council on Refugees and Exiles*) <https://asylumineurope.org/reports/country/sweden/asylum-procedure/subsequent-applications/> accessed 30 January 2024.

[248] *UM 173-23*; *UM 175-23*; *UM 170-23*, the first two cases concern the two eldest children, the last case concerns the father and the five minor children, see all three cases at 2.

[249] Since the three cases of the family are structured and reasoned in the same way, see *UM 170-23* (n 248) as an example for all cases, at 3 of the attached decision of the SMA.

[250] ibid, see the attached decision of the SMA at 4.

[251] ibid, see the attached decision of the SMA at 4-5.

ing on the same disaster-related grounds. However, the Court agreed with the SMA in its brief judgement and dismissed the case.[252]

Six months later, the family turned to the Agency again, claiming that climate change and the increasingly difficult circumstances in Somalia constituted an obstacle to enforcement.[253] However, the SMA did not address the invoked disasters in its reasoning and therefore decided not to reopen the case.[254] The family appealed the SMA's decision again, arguing before the SMC that Somalia is particularly vulnerable to disasters, resulting in the Somali people having great difficulties with their agriculture and water resources.[255] The Court considered their application under Chapter 12, Section 19 of the SAA and concluded that the applicants had already referred to climate change and its impact on their lives in Somalia in their subsequent application six months earlier and that these circumstances were therefore not new. Consequently, the requirements for re-examination of the case under section 19 could not be met and the SMC dismissed their second appeal as well.[256]

The following can be stated in relation to the case of the Somali family: Firstly, their repeated attempts to prevent the enforcement of their expulsion order by invoking the consequences of climate change emphasise their disaster-related distress. Secondly, the decisions fail to take into account the best interests of the child. The authority briefly touched on the best interests principle when it found that the time the family had spent in Sweden after the rejection of their application for a residence permit until the appeal was lodged did not constitute an obstacle to enforcement. In contrast, however, the best interests of the child were not taken into account when it came to the question of whether the newly mentioned consequences of drought and climate change in general constituted an obstacle to enforcement under Chapter 12, Section 18 of the SAA. As discussed, the deprivation of socio-economic rights in the context of a disaster, even if subject to a very high threshold, may give rise to a non-refoulement obligation of the sending state. Less high requirements apply to the obstacle to enforcement on humanitarian grounds. Both thresholds appear to be more likely to be met when children are affected, as they are more vulnerable to the negative effects of climate change.[257] In a UNICEF report from August 2021, UNICEF categorised Somali children as the fourth most vulnerable to disaster risks worldwide.[258] The ranking is based on the intersection between children's exposure to disasters in their country and their vulnerability to these disas-

[252] ibid 2–3.
[253] *UM 2449-23/UM 2451-23/UM 2452-23*, see attached decision of the SMA at 3.
[254] ibid, see the attached decision of the SMA at 4-5.
[255] ibid 2.
[256] ibid 3–4.
[257] 'The Climate-Changed Child' (n 228) 7.
[258] 'The Climate Crisis Is a Child Rights Crisis: Introducing the Children's Climate Risk Index' (UNICEF 2021) 79 (Table 1).

ters.[259] Not only is Somalia particularly affected by disasters such as droughts and floods and the spread of disease,[260] but children's vulnerability to these disasters is also very high due to a lack of adequate water, health care and social protection.[261] The Agency had several sources available in its database *(Lifos)*, which is used by the Agency for COI, that generally point to the impact of climate change on the human rights of the Somali population,[262] as well as information dealing with the consequences of climate change for children living there.[263] This shows that the SMA had material available to assess the information provided by the applicants in more detail, taking into account the best interests of the child.[264] Thirdly and finally, the SMA could have reopened the case on the basis of humanitarian grounds. Granting humanitarian protection to persons who are abroad[265] at the time of the disaster is an effective practice identified in the Protection Agenda. The Agenda further states that this practice should be applied if the persons concerned would experience extreme hardship if returned to their home country as a result of the disaster.[266] Arguably, the threshold of "extreme hardship" may have been reached in the case of the Somali family, particularly in view of the explanations regarding the best interests of the child.

Nearly 50% of the selected subsequent applications invoked Covid-19 and its consequences as new circumstances. The applicants mostly referred to the closed airports or lack of flight alternatives,[267] high infection rates in their country of origin combined with low medical care[268] and/or their own health condition.[269] Overall, while the decision-makers did not completely

[259] ibid 73–4.

[260] 'The Climate Crisis Is a Child Rights Crisis: Introducing the Children's Climate Risk Index' (n 258), see Chapter 2.

[261] ibid, see Chapter 3.

[262] See e.g. 'Country Policy and Information Note Somalia: Security and Humanitarian Situation in Mogadishu' (Home Office (UK) 2022) Version 1.0, at 3.2.1, 3.2.8, for the intersection of disasters and vulnerability see 3.9.2 and 3.11.9; see also 'World Report 2022' (Human Rights Watch 2021) 32nd annual World Report 593, 599.

[263] With regard to climate change and children, the following source was available at Lifos 'Children and Armed Conflict in Somalia' (UNSC 2022) Report of the Secretary-General S/2022/397 paras 12, 92.

[264] Chapter 12, Section 18 SAA allows a discretion in terms of the best interests of the child principle, see 'Prövning Av Barns Bästa' (n 218) 20.

[265] The drought mentioned by the applicants began and was present in the country while the applicants were in Sweden. Therefore, they could be considered cross-border displaced persons *sur place* and thus fall under the effective practice explained in the following.

[266] See 'Protection Agenda Vol. I' (n 19) para 65.

[267] See e.g. regarding closed airports in Lebanon *UM 18072-20*; or see *UM 29630-21* in which an Australian national claimed that his home country is completely closed due to Covid-19. or see *UM 4044-20* in which the applicants claim that the Afghan embassy is closed due to the Covid outbreak and therefore does not issue travel documents.

[268] See e.g. a case of family from Bangladesh *UM 3389-21*; see for a case of an Armenian family *UM 1494-20*.

[269] See as an example *UM 3638-21* which deals with a 95 year old Afghan national with several illnesses; see also *UM 1494-20* (n 268) for a women with a reduced lung capacity.

ignore the Covid-related applications, they did not assess them in detail either, but rather stated in one sentence that the circumstances invoked did not constitute an obstacle to enforcement and dismissed all cases. With regard to obstacles to enforcement that could constitute a violation of the principle of non-refoulement, no applicant who invoked his/her state of health met the high threshold set out in the ECtHR's case law on medical cases. However, the decision-makers could have considered applying the *predominant cause* threshold by taking into account the argument that climate change-induced disasters are state-caused and that the spread of disease increases as climate change progresses.[270] There is research on how and that climate change may indeed have contributed to the occurrence and transmission of Covid-19.[271] This calls into question the categorisation of Covid-19 as a "natural phenomenon" and instead suggests that states could be seen as causing the Covid-19 related impediments.

Similar to the previous sections, it can be summarised that the disaster component was not discussed by the SDMs in light of the emerging norms, nor is it evident that they considered the best interest principle in the context of disasters.

3.5 Visitors

The broad understanding of protection outlined in the introduction allows for the inclusion of immigration categories such as visitors in the analysis of the application of emerging norms by SDMs. This is because if they are used by a disaster displaced person to enter and (temporarily) reside in a country other than the country affected by the disaster, they can offer protection from a practical perspective. Accordingly, the Protection Agenda identifies effective practices aimed at protecting disaster-displaced persons, e.g. through the granting of visas.[272]

3.5.1 Visa Application

6 of the 75 cases concerned appeals against rejected Schengen visa applications. The requirements for granting a Schengen visa are regulated in the EU Visa Code, to which the SAA refers.[273] With regard to disaster-affected persons, it is worth recalling the effective practice of the Protection Agenda, which proposes "granting visas that authorise travel and entry upon arrival for people from disaster-affected countries or temporarily suspending visa requirements".[274]

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[270] 'Climate Change 2007 - Human Health' (n 51) 393.

[271] Saloni Gupta, Barry T Rouse and Pranita P Sarangi, 'Did Climate Change Influence the Emergence, Transmission, and Expression of the COVID-19 Pandemic?' (2021) 8 Frontiers in Medicine 769208, 3–7.

[272] 'Protection Agenda Vol. I' (n 19) para 47.

[273] See Chapter 3, Section 1 Swedish Alien Act.

[274] 'Protection Agenda Vol. I' (n 19) 47.

Concerning the selected cases, Turkish nationals appealed against the rejection of Schengen visa applications by the Swedish Consulate General in Istanbul following the earthquakes in February 2023. The appellants stated in their applications that they were affected by the earthquake, either psychologically[275] or in the form of losing their home.[276] The purpose of the visa was justified by the fact that they wanted to visit their family in Sweden[277] or simply to recover. None of the appeals were successful. The judges did not take into account the earthquake or the fact that the applicants were affected by it. Instead, they decided in all cases that they had reasonable doubts about the visa applicant's intention to leave Sweden before the expiry of the visa applied for. All appeals were therefore dismissed. It can therefore be concluded that Swedish decision-makers did not make use of the effective practice of the Protection Agenda with regard to visa applications in a disaster context.

3.5.2 Visa Extension

In 17 cases, it was a question of extending a visa and applying for the extension from Sweden because a disaster had occurred in the applicant's country of origin. The applicants' referred to floods (2) and situations related to Covid-19 (15) in their home countries as the reason why they wanted to stay in and apply for the extension from Sweden.[278] Chapter 5, Section 10 of the SAA provides for a temporary residence permit for work, study, or visit purposes. This is based on the general rule that the application for a residence permit must be submitted before entering Sweden (Chapter 5, Section 18 of the SAA). According to Section 19, however, it is possible to apply for a residence permit for a temporary stay after entry if there are "compelling reasons" *(vägande skäl)* for an extension. All of the selected cases in this section concerned this exception.

The Swedish Migration Court of Appeal has ruled that compelling reasons must be assessed as part of an overall assessment. Aspects that should be taken into account in this assessment include (i) the duration of the residence permit applied for, (ii) the reasons why a longer residence permit was not initially applied for, and (iii) consideration of whether the stay is of a temporary nature.[279] The preparatory work clarifies that there are only grounds for granting a residence permit for visits of up to one year in exceptional cases.[280] In March 2020 the Agency has issued a legal opinion stating that the effects of the Covid-19 pandemic in the form of general difficulties in travelling to the home country or a lack of flight alternatives in particular

[275] See *UM 4250-23/UM 4498-23*.

[276] See *UM 9544-23*.

[277] See *UM 9829-23*; *UM 3968-23*.

[278] The applicants affected by the floods and the majority of the applicants referring to the Covid-19 situation in their home country were in Sweden at the time of the disaster. Therefore, they can be considered as disaster displaced persons *sur place*.

[279] *MIG 2008:15*.

[280] 'Propo. 1994/95:179' (1995) 67.

are considered to be compelling reasons for extending a visitor's residence permit.[281] Even though this may at first glance lead to applications in this context being approved, all applications analysed were dismissed. The reason given was the fact that the visit would otherwise last longer than one year and would therefore no longer be of a temporary nature.[282] In this context, the Swedish Migration Court of Appeal ruled that only in exceptional cases should a stay of more than one year be granted.[283] Difficulties in travelling to the home country, the risk of infection while travelling or other reasons linked to Covid-related conditions in the home country were not considered to justify such an exception in any of the selected cases.

After the validity of the legal opinion discussed had expired, an applicant in *UM 2680-21* pointed to the general situation in Thailand due to Covid-19 and to ongoing flooding in her hometown as a reason for extending her stay.[284] The SMA found that neither the floods nor the arguments related to Covid were sufficient to meet the compelling reasons threshold.[285] The applicant was therefore forced to return to her country affected by the disaster to apply for a new residence permit for a visit.

In two of the 17 cases, a residence permit based on family ties was applied for in addition to a residence permit for a visit. In the case *UM 2008-21*, a man from South Korea referred to his relationship with his Swedish partner in order to obtain a residence permit. He also applied for the exception of not having to apply in his home country (South Korea) because the situation there was very difficult due to Covid-19.[286] In *UM 185-21*, a Russian woman applied for a residence permit on the basis of her relationship with her spouse. In addition, she argued that her case would fulfil the requirements of Chapter 5 Section 19 of the SAA due to her autoimmune disease (Covid-19 risk group) and the associated risk of infection when travelling home.[287] In both cases, the Court dismissed the appeal on the grounds that the reasons given did not justify an exception to the general rule; both applicants had to submit their application from their home country.[288]

Overall, it can be said that the Agency's legal opinion on Covid-19-related reasons was a step in the right direction, as it provided practical protection in a disaster context. Ultimately, however, it had no impact on applicants who had been in Sweden for more than a year in the selected cases. In addi-

[281] 'Ansökningar Om Visering Och Uppehållstillstånd För Besök Med Anledning Av Coronautbrottet (Covid-19)' (Migrationsverket 2020) Rättsligt ställningstagande SR 08/2020 (updated 05/2020) 3.
[282] See e.g. *UM 9768-20*; *UM 24297-20*; *UM 3807-21*; *UM 359-21*; *UM 257-21*.
[283] *MIG 2008:15* (n 279).
[284] *UM 2680-21*, see the attached decision of the SMA at 3.
[285] ibid, see the attached decision of the SMA at 4.
[286] *UM 2008-21* 2–3.
[287] *UM 185-21* 2–3.
[288] *UM 2008-21* (n 286) 3–6; *UM 185-21* (n 287) 4–7.

tion, the legal opinion was only valid for a certain period of time; in none of the applications submitted after the legal opinion and examined in this thesis were Covid-related reasons recognised as sufficient for an extension of the visit.

3.6 Conclusion

The aim of this chapter was to answer the question of whether decision-makers in Sweden apply emerging norms in cases of disaster displacement. The analysis showed that the SDMs completely ignored the applicant's disaster-related arguments in a quarter of the selected cases. In the vast majority of cases, decision-makers addressed the disaster claim only cursorily, e.g. by stating in one sentence that the disaster did not change the outcome of the decision. Only in very few cases was the issue of displacement by a disaster dealt with more thoroughly. Moreover, many decisions lacked relevant information about the country of origin, not to mention that the best interests of the child were consistently not considered in relation to the applicants' disaster claims. Given this general lack of engagement by SDMs with the disaster component in the selected cases, it is not surprising that neither the *Teitiota* case nor the relevant ECtHR's jurisprudence in *predominant cause* cases was used for interpretation purposes. With the exception of the legal opinion on reasons considered compelling in the context of Covid-19 (which ultimately had no impact on the disaster-affected applicants examined in this thesis), the Agency has not issued any legal opinions or interpretative guidance on cases involving disaster displacement. Neither the SMA nor the SMCs take into account any of the effective practices identified in the Protection Agenda, nor did decision-makers refer to the UNHCR's legal considerations when assessing applications for international protection. In short, it can therefore be concluded that the SDMs in the selected cases did not apply the identified emerging norms at all.

4 Exploring the Results

It is recognised that the normative developments identified in this thesis are not hard law, but developments that appear to be at the norm emergence stage. However, Sweden has endorsed the Protection Agenda, falls under the jurisdiction of the ECtHR, has ratified the ICCPR and the Optional Protocol on Individual Complaints, as well as the Refugee Convention.[289] As the identified emerging norms serve, among other things, as interpretative guidance for these binding international and regional conventions, it can be reasonably expected that the decision-makers in the respective cases refer to the relevant sources in cases of disaster displacement. Nevertheless, it was found in the previous chapter that the SDMs have not applied the emerging norms in any case. This chapter attempts to explain why they have not been applied. In doing so, the attitude of Swedish decision-makers towards the emerging norms is explored with regard to structural and litigation-related influences on the decision-makers as well as factors relating to the decision-makers themselves. The chapter concludes with the observation that the explanatory approaches presented probably all contribute to the answer. However, a final conclusion cannot be drawn due to a lack of available and relevant material.

4.1 Structural Explanations

In order to determine whether the non-application of the normative developments is only an issue in Sweden, a comparison with other European countries seems useful. However, existing disaster displacement case studies on Italy, Austria and Germany do not elaborate on the question of whether the national courts engage with the normative developments. Based on the section on the Italian approach to disaster displacement in this thesis, it can be concluded that Italy may not need to resort to international (emerging) norms, as Italian legislation provides for explicit and multiple protection statuses for disaster displaced persons.[290] Research on Austrian and German courts shows that they generally deal with disaster displacement claims more thoroughly than Swedish courts. However, the studies do not mention whether the courts deal with the normative developments in question.[291] With regard to general engagement with European case law, a study of 13 European countries reveals that the Scandinavian supreme courts are among those that cite the case law of the ECtHR the least compared to supreme courts of other European countries.[292] Firstly, this could be an indication that the lack of engagement with European case law is not a purely

[289] 'View the Ratification Status by Country or by Treaty: Sweden' <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=168&Lang=en> accessed 22 March 2024.

[290] See section 2.4.2.

[291] See for a study on Austrian cases e.g. Mayrhofer and Ammer (n 30); for a study on German cases see e.g. Schloss (n 30).

[292] Wind (n 161) 286.

Swedish phenomenon. Secondly, however, a comparison between the Scandinavian supreme courts shows that the Swedish supreme courts cite the ECtHR the least.[293] Against this background, it can be stated that citations by lower instances, such as the SMA and the SMCs to the *predominant cause* cases of the ECtHR would have been a major exception.

Research conducted by *Wind* supports the observation that Sweden has a particularly restrictive attitude towards the application of international law compared to other Scandinavian countries. *Wind* hypothesised that the legitimacy of international courts is based on the type of democracy of the country concerned, which in turn is reflected in the citation of international treaties, conventions, and courts as well as international case law by national courts.[294] The distinction between types of democracy is based on *Dworkin's* distinction between "majoritarian" and "constitutional" democracies. Countries belonging to the first type of democracy generally have no tradition of constitutional/judicial review, as elected parliamentary majorities are not considered subject to judicial review. Countries belonging to a constitutional democracy believe that strong review powers are constitutive for a "true" democracy.[295] *Wind* concludes that the Scandinavian countries all tend to be majoritarian democracies, with Sweden and Denmark having no tradition of judicial review.[296] Norwegian democracy, on the other hand, contains aspects of constitutional democracy and is more open to exercising judicial review.[297] In her study *Wind* analysed the citation frequency of Scandinavian supreme courts in relation to references to international courts and treaty bodies, as well as to international treaties and conventions, in order to find out whether there are differences between the Scandinavian countries.[298] The results of the study confirm that the type of democracy, or in particular the application of judicial review is decisive for national courts citing international legal sources: the Norwegian Supreme Court referred to international law and court decisions far more frequently than the Swedish supreme courts and the Danish Supreme Court.[299] Interesting for this thesis is also the fact that the Swedish supreme courts did not cite the HRC once during the

[293] The Swedish Supreme Administrative Court cites the ECtHR the least (less than 50 citations) compared to the Swedish Supreme Court (less than 100) and the Supreme Courts of Denmark (less than 100) and Norway (between 350 and 400) see ibid 4.

[294] Marlene Wind, 'Laggards or Pioneers? When Scandinavian Avant-Garde Judges Do Not Cite International Case Law: A Methodological Framework' in Marlene Wind (ed), *International Courts and Domestic Politics* (CUP 2018) 330.

[295] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (OUP 1999) 17; Wind (n 294) 326.

[296] It is worth highlighting that Swedish courts theoretically have the possibility of judicial review, however, it is seen as problematic by politicians and judges themselves and rarely practised, see Wind (n 161), footnote 25 at p. 287.

[297] Wind (n 294) 330; see for a similar view Martin Sunnqvist, 'The Changing Role of Nordic Courts' in Laura Ervo, Pia Letto-Vanamo and Anna Nylund (eds), *Rethinking Nordic Courts* (Springer Nature 2021) 168–170.

[298] Wind (n 294) 330.

[299] ibid 334–7.

study period 1961-2014.[300] It is therefore not surprising that the SMA and the SMCs did not refer to the *Teitiota v. New Zealand* decision in their decisions on disaster displacement. Overall, from *Wind's* study can be concluded that Swedish judges are perceived as unwilling to give legitimacy to international law and courts by citing them, which can be attributed to the prevailing Swedish type of democracy and the lack of a strong tradition of judicial review.

A similar picture emerges from a Nordic[301] characteristic, namely that of the judiciary's loyalty to the legislator. It is argued that although there is judicial review practice in these countries,[302] they all strive to avoid conflicts between the supreme courts and the parliament.[303] This is due to the perception of parliaments as democratically elected legislators and the associated high recognition of their legitimacy. This also means that the judiciary does not have the last word on the law, but the legislator.[304] In keeping with this view, preparatory work is highly respected as it represents the will of the parliamentary majority. Its application is therefore a common practice among Nordic lawyers and judges.[305] This loyalty to the legislator has not only contributed to the failure of the Swedish disaster displacement provision,[306] but also provides an explanation as to why the emerging norms have not been applied. Neither existing legislation in Sweden nor preparatory work recognise the need to grant protection to disaster displaced persons. Applying the normative developments would therefore represent a deviation from the will of the legislator, which SDMs are not prepared to do.

The explanatory approaches can be summarised by noting that a limited use of international treaties and jurisprudence is similarly widespread in Scandinavian countries. However, Sweden contrasts with Norway and Denmark in that Supreme courts make even less reference to international sources. This is due to the fact that Swedish judges are reluctant to give legitimacy to international sources of law. This is in line with Swedish majoritarian democracy and the associated Nordic loyalty to the legislature, which sees its own parliament as the primary legal actor.[307]

[300] Wind (n 161) fig 4.

[301] I.e. Sweden, Denmark, Norway, Finland and Iceland.

[302] Letto-Vanamo is in agreement with Wind that Norway has the most developed judicial review practice compared to the other Nordic respectively Scandinavian countries, see Letto-Vanamo (n 169) 29–30.

[303] ibid 30.

[304] ibid 29.

[305] ibid 25, 31.

[306] See section 2.4.1.

[307] Letto-Vanamo (n 169) 29.

4.2 Litigation-Related Explanations

The second explanatory approach refers to the mobilisation and litigation by domestic actors to explain the engagement of domestic courts with international law in their decisions.[308] Studies show that the question of whether and to what extent judges invoke international law can be influenced by the parties in court proceedings.[309] It is argued that well-reasoned arguments assist judges in considering the international material relevant to the case.[310] With regard to the selected cases, it is noted that claimants and their (public) counsel rarely presented well-reasoned arguments and did not refer to emerging norms in any of the cases. The apparent lack of engagement by claimants with emerging norms may be due to the fact that the question of whether and to what extent claimants invoke international law depends on several "intervening variables".[311] For this thesis, the variables of whether the claimants are legally represented and procedural factors are relevant.[312] While applicants who appealed the agency's decisions and claimed refugee status, subsidiary protection status or protection on humanitarian grounds were consistently represented by a public counsel (or a privately paid lawyer), this was not the case for the remaining categories.[313] In addition, it is argued that the competences of public counsels in Sweden can vary greatly, so that some protection seekers have to deal with lawyers who may lack essential (international) legal knowledge.[314] On top of this, empirical research shows that some Swedish public counsels in asylum cases have had problems being adequately paid for their work, which has led them to reduce their efforts for the applicant.[315] Other problems cited by public counsels are the time pressure during hearings, which makes it difficult for them to adequately argue a case or support it with additional information.[316]

With regard to the general significance of mobilisation and strategic litigation for asylum seekers, the case of gender-based asylum in the United States ("US") should be mentioned. While legal changes occur mainly from the top down, i.e. through Supreme Court decisions and new laws, the inclusion of gender as a ground for asylum in the US has been achieved from the

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[308] Jasper Krommendijk, 'Domestic Gatekeepers of International Enforcers? National Courts' Engagement with Decisions of International Human Rights Courts and Treaty Bodies' in Rachel Murray and Debra Long, *Research Handbook on Implementation of Human Rights in Practice* (Edward Elgar Publishing 2022) 184–5.

[309] 'Mapping the Engagement of Domestic Courts with International Law' (ILA 2006) Final Report para 78.

[310] ibid.

[311] Krommendijk (n 308) 185.

[312] Lisa Conant and others, 'Mobilizing European Law: Journal of European Public Policy' (2018) 25 Journal of European Public Policy 1376, 7–8.

[313] See for the right to public counsel in Sweden Chapter 18 of the SAA.

[314] Livia Johannesson, 'In Courts We Trust: Administrative Justice in Swedish Migration Courts' (Doctoral dissertation, Department of Political Science, Stockholm University 2017) 103.

[315] ibid 106.

[316] ibid 107.

bottom up. Through large-scale litigation over many years and the support of domestic actors such as human rights activists, immigration lawyers, law professors, as well as by training of asylum officers and with the use of non-normative instruments such as gender asylum guidelines and policy guidance, asylum cases were won in lower courts.[317] This eventually led to a positive precedent before the Board of Immigration Appeals in 2014.[318]

In Sweden, however, a similar approach does not seem to be pursued. The fact that there were only 75 cases within four years that attempted to obtain protection due to disasters and the mostly poor reasoning of these applications indicates that there is no evidence of strategic litigation regarding disaster displacement in Sweden. Nor do there appear to be any norm entrepreneurs in Sweden acting as a driving force for a bottom-up approach. One could even go further and argue that the domestic norm entrepreneurs are failing in their task in view of the norm dynamics theory. According to the theory, they are of particular importance in the norm emergence phase, as they are supposed to persuade norm leaders to adopt new norms and thus redefine the standard of appropriateness.[319] However, in none of the decisions analysed did the legal advisors rely on the identified emerging norms. Therefore, the lack of active norm entrepreneurs in Sweden and the associated weak strategic litigation in disaster displacement cases could be a possible factor influencing the non-application of normative developments by decision-makers.

However, the conclusions drawn in this section are subject to a certain degree of uncertainty. Firstly, the analysis of the selected cases is based on limited material, namely only the written decisions of the Agency and the SMCs. Relevant written and oral submissions made by the applicant and counsel during the proceedings may not have been included in the final written decision and therefore could not be considered in this thesis. It therefore remains unclear whether the applicants actually did not refer to any emerging norms in any way or whether these were merely not reflected in the decisions. Secondly, the influence of the claimant party should not be overestimated due to the loyalty of the Swedish judiciary vis-à-vis the legislature. Again, neither the existing Swedish legislation nor the preparatory works contain (references to) emerging norms. From the point of view of a loyal SDMs, there is therefore no motivation to apply them or to refer to them even when the claimants invokes them.

[317] In 2018, the decision was reversed, see Deborah Anker, 'The History and Future of Gender Asylum Law and Recognition of Domestic Violence as a Basis for Protection in the United States' (2020) 45 Human Rights Magazine 14, 15–6; Deborah Anker, 'Women Refugees and the Development of US Asylum Law: 1980-Present' (2022) 41 Refugee Survey Quarterly 420, 434.

[318] See *Matter of A-R-C-G- et al* [2014] Board of Immigration Appeals 26 I & N Dec. 388.

[319] See section 2.1.

4.3 Decision-Maker Related Explanations

Lastly, and in terms of explanations that focus on the decision-makers themselves, the claim that Swedish judges are sceptical about asylum applications could offer another plausible explanation for the why question. As mentioned in the second chapter, *Johannesson* argues that Swedish decision-makers do not follow the "liberal paradox", meaning they are not guided by a "logic that strives for inclusive immigration policies".[320] In her study she found that Swedish migration judges and litigators from the SMA equate impartiality with scepticism towards asylum claims.[321] Significantly, in none of the cases selected for this study was the possibility of granting refugee status to disaster displaced persons seeking protection considered. In contrast to the legal considerations of the UNHCR, according to which disaster displaced persons can indeed qualify as refugees, the complete disregard of refugee status eligibility in the selected cases may reflect the scepticism of decision-makers towards asylum applications of disaster displaced persons.

Looking even more closely at the decision-makers themselves, one of the explanations for the lack of consideration of international law could lie in the capacity of the judges. Research suggests that language skills and work experience abroad encourage engagement with non-native sources.[322] In addition, legal training that includes international human rights law and its components, such as the General Comments and Views, increases the possibility of judicial engagement with these sources.[323] With regard to the Swedish context, reference can be made to a study on country of origin information in Swedish migration cases.[324] In this study, Swedish judges were asked about the use of country of origin information in their decision-making processes. They expressed frustration that not all available information is translated into Swedish, stating: "It is a Swedish process, but we have to sit and read in English and decide about people's, well not life and death, but sometimes actually, in another language than our mother tongue."[325] Although English proficiency in Sweden is generally quite high,

[320] Johannesson (n 170) 1165.

[321] See the relevant part in section 2.4.1 which is based on Johannesson (n 170).

[322] It is expected that the younger generation of judges will bring about a change in this respect, see Antje Wiener and Philip Liste, 'Lost Without Translation? Cross-Referencing and a New Global Community of Courts' (2014) 21 Indiana Journal of Global Legal Studies 263, 279; see also Basil Markesinis and Jorg Fedtke, 'The Judge as Comparatist' (2005) 80 Tulane Law Review 11, e.g. at pp. 34, 38 and 107; with regard to the output of UN treaty bodies see 'Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies' (ILA 2004) Berlin Conference para 182.

[323] Machiko Kanetake, 'UN Human Rights Treaty Monitoring Bodies Before Domestic Courts' (2018) 67 The International and Comparative Law Quarterly 201, 229.

[324] See Martin Joormann, 'Asylum Case Adjudication in Sweden, Country of Origin Information and Epistemic Violence' in Stine Piilgaard Porner Nielsen and Ole Hammerslev (eds), *Transformations of European Welfare States and Social Rights* (2023).

[325] ibid 136–7.

the non-translation of the normative developments could be a contributing factor explaining why they are not applied.

4.4 Conclusion

This chapter has attempted to answer the question of why Swedish decision-makers do not apply the normative developments identified in their decisions. Various arguments have been discussed that offer explanations for judges' attitudes towards the application, citation and engagement with international sources of law, and it has been shown that many factors have an influence on the behaviour of judges. Importantly, the sources used for this chapter focussed on international law, human rights law and *inter partes* binding judicial decisions and the attitude of judges towards them. However, the emerging norms identified in this thesis are at the beginning of the norm life cycle and therefore have a lower status and are not considered sources of international law.[326] Furthermore, not only court judgments but also decisions of the SMA were analysed. This means that the findings from the sources used to answer this research question provide stronger evidence for the non-application of normative developments by the SMDs. This is because, for example, if judges do not apply international sources due to their loyalty to the legislator, it is even less likely that they use normative developments that are not in line with the *travaux préparatoires*. This also applies to the studies that have analysed the behaviour of the Swedish supreme courts: If international law is not applied at the level of the supreme courts, it is even less likely to be applied in the lower courts or even by the SMA.

Even though a strong explanatory power is assumed, it should be noted that the data of the empirical studies used were not collected for the exact purpose of the research question. Furthermore, the available material was also limited, namely to the written decisions of the SDMs. Consequently, the explanations found represent possible factors rather than clear facts about the actual mindset of decision-makers. Further qualitative empirical research is therefore needed to provide a definitive answer on decision-makers' attitudes towards the emerging norms.

[326] Sources of international law within the meaning of Article 38 of the Statute of the International Court of Justice.

5 Conclusion

Disasters force people to move so that they can exercise their human rights, and as climate change intensifies, the number of people seeking protection from disasters is expected to increase. While disaster-induced displacement often occurs within a region, it is clear that there is already movement of people displaced by disasters to Europe that requires to be addressed. This thesis has shown that norms are emerging that improve the protection of interregional disaster displaced persons, but that these do not play a role in Swedish decision-making. This conclusion and possible reasons for the non-application have been presented in three chapters in this thesis.

In the second chapter, the model of the norm life cycle was applied in order to determine at what stage the efforts to address the lack of an explicit basis for legal protection are at. While at the European level, since the EU Commission's working document, efforts to address the displacement of disaster-affected people in Europe have completely faded into the background, after 2013 the EU's focus has shifted to its external dimension. With regard to the national level, the Swedish disaster displacement provision was presented, and its failure discussed. The fact that the Swedish approach cannot be based solely on the regressive European developments was demonstrated by the Italian and Austrian approaches to the protection of disaster displaced persons by means of national provisions and an evolutionary interpretation approach respectively. Developments at the international level stand out from developments at other levels as they provide authoritative guidance for decision-makers and state-supported policy instruments. Most important were the effective practices identified in the Protection Agenda, the UNHCR's legal considerations on refugee status recognition in the disaster context, as well as the HRC's decision in the *Teitiota v. New Zealand* case and the ECtHR's jurisprudence on *predominant cause* cases. However, it was found that they did not (yet) persuade the destination states of the global North, so that the normative developments were categorised in the norm emergence stage.

In the third chapter, 75 Swedish migration cases were analysed with regard to the application of the previously identified emerging norms. On the one hand, the case study has confirmed what other European case studies in this area have shown, namely that people actually seek protection in Sweden due to the consequences of disasters in their countries of origin. On the other hand, the chapter showed that in the vast majority of cases, Swedish decision-makers did not address the disaster-related claims of those seeking protection or did so only in a cursory manner. This finding is congruent with the results of the two case studies on which this thesis is based. Significantly, the Swedish disaster displacement provision was still in force during the period covered by these studies. However, this should not lead to the misinterpretation that even a norm that has reached the stage of domestic norm

internalisation does not improve the protection of disaster displaced persons. Rather, the vague wording, the lack of interpretative guidance for decision-makers and the high threshold of the provision should be recalled. Finally, the analysis demonstrated by means of example cases that the application of the normative developments would have been appropriate for the decisions on protection. But since the decision-makers in none of the selected cases addressed the emerging norms, it was concluded that they were not applied at all.

The final chapter responded to the findings of the fourth chapter and addressed the question of why Swedish decision-makers did not apply the normative developments in any case. The question arose because, firstly, Sweden has approved the protection agenda and, secondly, the remaining emerging norms identified represent a significant authoritative guidance for Sweden's convention commitments. The outlined explanations led to the conclusion that (i) structural aspects, such as the fact that Swedish courts favour preparatory work over international law due to the prevailing democratic system in Sweden, (ii) litigation-related aspects, such as the unutilised influence of domestic norm entrepreneurs and (iii), decision-maker-related factors, such as their scepticism towards the eligibility of disaster displaced persons as refugees, may have played a role in the decision-makers' disregard. However, further empirical research is needed to understand why Swedish decision-makers in lower instances generally pay little attention to international law and in particular to emerging norms on disaster displacement. The results could contribute to a greater engagement with international law materials in Sweden. This would benefit those who seek protection due to disasters and cannot wait for norm internalisation.

In a changing climate, destination states such as Sweden and their decision-makers in asylum and migration matters must not turn a blind eye to emerging norms aimed at improving protection for those affected. Otherwise, the next “migration crisis” is just around the corner.

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