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SYNTHESIS REPORT

ClimMobil - Judicial and policy responses to climate change-related mobility in the European Union with a focus on Austria and Sweden (KR18AC0K14747)

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List of Abbreviations

Art.	Article
AsylGH	Asylgerichtshof (Asylum Court, Austria)
BFA	Bundesamt für Fremdenwesen und Asyl (Federal Office of Immigration and Asylum, Austria)
BMI	Bundeministerium für Inneres (Federal Ministry of the Interior, Austria)
BVwG	Bundesverwaltungsgericht (Federal Administrative Court, Austria)
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
COI	country of origin information
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
IPA	Internal Protection Alternative
Sec.	Section
VfGH	Verfassungsgerichtshof (Constitutional Court, Austria)
VwGH	Verwaltungsgerichtshof (Supreme Administrative Court, Austria)

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EXECUTIVE SUMMARY

There is growing evidence that environmental/climate change is becoming an increasingly important factor with regard to human mobility. Climate change has an impact on economic, social and political drivers of mobility and leads to the increased displacement of people. However, there is a **broad agreement on the existence of a normative protection gap** concerning **cross-border movements.** The legal status of persons arriving in Europe in the context of climate change is still inadequately addressed. The research project ***ClimMobil – Judicial and policy responses to climate change-related mobility in the European Union with a focus on Austria and Sweden*** aimed at investigating the **current and potential scope of international protection as well as humanitarian forms of protection** for persons displaced in the context of climate change into the EU, in particular to **Austria and Sweden**. The project was carried out between October 2019 and May 2022, funded by the Austrian Climate and Energy Fund (KR18AC0K14747, ACRP 11th Call), and implemented by the Ludwig Boltzmann Institute of Fundamental and Human Rights in Vienna/Austria in collaboration with the Raoul Wallenberg Institute of Human Rights and Humanitarian Law in Lund/Sweden.

In order to gain insight into how the protection gap is addressed in Austria and in Sweden not only the **relevant national legal and institutional framework** was reviewed but also **judicial decisions on international and humanitarian forms of protection** (in the Swedish case also migratory categories and visa provisions) **containing disaster-related keywords were identified and analysed**. This synthesis report **comparatively reviews the results of the case studies** in Austria and Sweden **in relation to the normative protection gap** and the **ways of addressing this gap by effectively applying international and European law** while taking into account similarities and differences concerning the institutional and legal frameworks of Austria and Sweden.

The analysis showed that there is a **non-negligible number of people who seek protection in Europe for reasons related to disasters and climate change**. The main countries of origins of the sample of decisions chosen for a detailed analysis in both countries were Somalia and Afghanistan. The **narratives by claimants concerning the disaster situations were very similar**. Disaster was typically brought forward by the claimant as well as discussed and assessed by the court as **one among several factors** (such as general security or economic situation or factors relating to the individual situation including family status and support, gender, age, profession, health, wealth, clan membership and several others). It was not the disaster as such but the **impact of the disaster**, in particular on the supply situation, which was brought forward by the claimant or considered by the judge. The existence of **an internal relocation alternative was often identified as a barrier to the granting of a legal status** in those cases where disasters were considered by the Austrian and Swedish courts.

The situation in the **two case study countries differs concerning the legal frameworks** assessed. Although both countries **transposed the EU Qualification Directive** and have provisions on international protection in their national laws, the following differences were relevant:

- Sweden had a non-harmonised category of international protection based on environmental disaster until 2021 in its law**,** which was however hardly applied in practice.
- Austria's transposition regarding subsidiary protection does not conform to the EU Qualification Directive. Austrian law does not require an actor of serious harm in the country of origin as demanded by the jurisprudence of the CJEU on Art. 15 Qualification Directive. In Austria, subsidiary protection is granted if a 'real risk' of a violation of Arts. 2 or 3 ECHR exists.

- The Swedish case study also considered migratory categories and visa provisions, e. g. family reunification, student visa, humanitarian forms of protection.

Important **differences** could also be discerned concerning the **legal practice of addressing disasters** in relation to **subsidiary protection** and **non-refoulement**:

- Judges of Austrian courts engaged in much greater detail than their Swedish counterparts with the question of how subsidiary protection applies in the context of disasters.
- Although only a few Austrian decisions actively addressed eligibility for refugee status (and then typically reached the conclusion that environmentally-related harm did not amount to persecution), the caseload contained rich legal reasoning and disaster-relevant country of origin information relating to eligibility for subsidiary protection, and protection from *refoulement* (in particular the caseload relating to claimants from Somalia).
- In contrast to this detailed level of engagement, the Swedish caseload does not reflect any consideration of eligibility for refugee status, and only one case contained more than cursory consideration of eligibility for subsidiary protection.

Level of judicial engagement proprio motu: Austrian judges proactively considered the relevance of disasters in individual cases, at times recognizing a procedural obligation to do so. Consequently, *proprio motu* consideration of environmental pressures represented 73 percent of the Austrian case load, with only 37 percent of cases involving disaster-related claims expressly articulated by the applicant. In contrast, only a handful of the Swedish cases involved judges examining environmental factors on their own initiative. The vast majority of relevant claims within the Swedish caseload involved applicants expressly relying on disasters or other environmental pressures as part of their application to enter and/or remain in Sweden.

Use of country of origin information (COI): COI was almost always included in the Austrian decisions. In particular, in many Somalian cases, long and comprehensive text modules addressed the impact of the disaster on the humanitarian situation, health situation, and parts of the population in situations of particular vulnerability. In many cases concerning claims from Somalia, judges provided an often detailed summary of COI material in the section on legal reasoning before addressing specifically how the applicant might be affected by the environmental factors/disaster. In contrast, specific COI was rarely referred to in the Swedish caseload, with decisions at best making general reference to 'the country information'.

Outcomes: In Austria, subsidiary protection was granted in 42 percent of the cases when disaster was explicitly mentioned by the applicant, even though protection was not necessarily granted because of the disaster claim. In Sweden, of the 140 international protection claims expressly relying on disaster, only seven claims (5 per cent) were granted subsidiary protection, and only one of these decisions was based specifically on post-disaster conditions, with the remainder firmly grounded in an assessment of conflict-related risks.

Overall, 91 percent of all 181 Swedish appeals were dismissed. In Austria, 53 percent of the 646 Austrian appeals were dismissed.

Is the Protection Gap Addressed? From the Austrian case study, it appears that the protection gap is addressed in the asylum procedure only at the subsidiary protection level, but not at the level of humanitarian protection or refugee status. In the context of subsidiary protection, the jurisprudence of the Supreme Administrative Court and the Constitutional Court has clarified that disasters including

droughts and relevant COI must be taken into account when conducting a risk assessment according to Article 3 ECHR upon return. This jurisprudence has and had an impact on the caselaw of the appellate court. Still, it was mainly with regard to decisions of the appellate court relating to the country of origin Somalia where it appeared that disasters and relevant COI were carefully considered. There is still room for improvement in relation to other countries of origin.

In Sweden, there is no clear legal protection for people who fear being exposed to disaster-related harm in their countries of origin. The Refugee Convention was not considered in any of the cases reviewed, and subsidiary protection was only granted in one case that had clear connections to a threat of physical, gender-based violence. The non-harmonized provision that extended protection to people unable to return home in the context of an 'environmental disaster' was routinely invoked by claimants, but often ignored in judicial decisions. When the provision was considered, the claimant's circumstances were never found to satisfy the relevant requirements. The provision was repealed in 2021, having been suspended since 2016. Country of origin information was inconsistently considered in the cases reviewed, and rarely in depth.

1 INTRODUCTION

This synthesis report was written in the context of the research project ***ClimMobil – Judicial and policy responses to climate change-related mobility in the European Union with a focus on Austria and Sweden*** (October 2019-April 2022), funded by the Austrian Climate and Energy Fund (KR18AC0K14747, ACRP 11th Call), and implemented by the Ludwig Boltzmann Institute of Fundamental and Human Rights in Vienna/Austria in collaboration with the Raoul Wallenberg Institute of Human Rights and Humanitarian Law in Lund/Sweden.

The starting point for ClimMobil was the growing evidence that disasters[1] and climate change is becoming an increasingly important factor with regard to human mobility. Climate change has an impact on economic, social and political drivers of mobility and leads to the increased displacement of people (IPCC). However, there is a **broad agreement on the existence of a normative protection gap** concerning **cross-border movements.** The legal status of persons arriving in Europe in the context of disaster and climate change is still inadequately addressed.

As long as this normative protection gap persists, **existing international law**, in particular international refugee law and international human rights law, **has to be implemented effectively**. In this context, it is necessary to clarify the scope of existing legal frameworks. There is **little knowledge what role environmental factors including the impacts of climate change play** – often in interrelation with inequalities – **in decisions granting international protection in Europe at national level**. There is also little knowledge if and how the legal assessment of environmental factors in asylum proceedings changed over the last years and **whether there are differences and/or similarities of assessing environmental factors at the national level of different EU Member States**. Apart from that, it is also to be analysed whether and to what extent environmental factors play a role in the granting of **humanitarian forms of protection**.

Therefore, **ClimMobil** aimed at investigating the **current and potential scope of international protection as well as humanitarian forms of protection** for persons displaced in the context of disasters and climate change in the EU, in particular in **Austria and Sweden** as examples of EU Member States. In a first step the status quo at the global level (Refugee Convention, principle of non-refoulement under international human rights law) was analysed. A focus was laid on a **regional European level**. In a second step, relevant EU law, in particular the EU Qualification Directive, was assessed. In analysing the scope of international protection, social factors, such as inequality and discrimination, that are important dimensions concerning the impact of climate change in general and in the context of climate change-related mobility in particular, were taken into account.

For the purpose of embedding the legal questions into a broader international policy framework, the **latest international institutional and policy developments** in the context of climate/environmental

[1] The underlying assumption of this project is that disasters do not happen 'naturally' (see also definition of 'disaster' of the United Nations Office for Disaster Risk Reduction (UNDRR): a 'serious disruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability and capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts.') but that the extent and impact of disasters depend on many different underlying factors including policy interventions affecting the resilience and coping capacity. See also Jane McAdam, 'Building International Approaches to Climate Change, Disasters, and Displacement' [2017] SSRN Electronic Journal, 3 accessed 24 October 2019.

change-related mobility (e.g. Platform on Disaster Displacement, Task Force on Displacement) and their **relevance and implications for Austria and Europe** were analysed. As the core part of the project, **case studies on Austria and Sweden** as two EU Member States were conducted to explore and analyse the situation at national level. Here also alternative forms of protection were reviewed, in particular in relation to Art. 8 of the European Convention on Human Rights (ECHR) (e.g. humanitarian protection). National legal frameworks and jurisprudence were assessed in the light of international law and EU legal standards.

This synthesis report **analyses and compares the results of the two case studies** and identifies **commonalities and differences** between the two case study countries in general and concerning the application of international and European law in particular. In doing so, the report **comparatively reviews the results of the case studies in relation to the normative protection gap** and the **ways of addressing this gap by effectively applying international and European law** while taking into account similarities and differences concerning the institutional and legal frameworks of Austria and Sweden.

Structure of the Synthesis Report

This synthesis first discusses the so-called protection gap and the ways forward to address this protection gap at a global, regional and national level (chapter 2). In the following, a focus is laid on the findings of the ClimMobil project, in particular the two case studies. Chapter 3 delivers details on the two case studies (countries of origin; relevant national legal and institutional frameworks; details on the modalities regarding the case law analysis). Chapters 4-7 look in detail at different ways to address the so-called protection gap in the case study countries: Chapter 4 discusses whether or to what extent the case law analysed in Sweden and Austria relating to the implementation of the Refugee Convention serves to address the protection gap. Chapter 5 focuses on the role of subsidiary protection in Austria and Sweden to address the protection gap. Chapter 6 looks at the relevance of humanitarian forms of protection and chapter 7 finally at other ways to address this gap.

2 THE PROTECTION GAP

From an international law perspective, there is a broad agreement among legal scholars that with regard to external displacement in the context of disasters and climate change a **normative protection gap**[2] – or 'some protection gaps'[3] – exist(s). This was also confirmed in the context of the state-led **Nansen Initiative**[4] or more recently in documents of the UN Human Rights Council.[5] While there is no 'complete legal void',[6] international law does 'not address critical issues such as admission, access to

[2] Jane McAdam, *Climate change, forced migration, and international law* (1st ed. Oxford University Press 2012) 5; Jane McAdam, 'From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement' (2016) 39(4) UNSW Law Journal 1518, 1523; Walter Kälin and Nina Schrepfer, 'Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches' (2012). UNHCR Legal and Protection Policy Research Series <https://www.refworld.org/docid/4f38a9422.html>

[3] Jane McAdam, 'Building International Approaches to Climate Change, Disasters, and Displacement' (2016) 33(2) WYAJ 1, 9.

[4] Nansen Principle No. IX, Nansen Principles available at www.regjeringen.no/upload/UD/Vedlegg/Hum/nansen_prinsipper.pdf (25 January 2019).

[5] Human Rights Council, 'The Slow onset effects of climate change and human rights protection for cross-border migrants' (22 March 2018) A/HRC/37/CRP.4 para 64.

[6] McAdam, 'Building International Approaches to Climate Change, Disasters, and Displacement' (n 3) 9.

basic services during temporary or permanent stay, and conditions for return'.[7] Movements in the context of slow-onset climate change processes pose a particular challenge in this context.[8] In 2018, the International Law Association adopted the 'Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise'[9] containing for instance Principle 7 on 'Migration of Affected Persons' or Principle 9 on 'Cross-Border Displacement of Affected Persons'.

The Nansen Initiative **Protection Agenda** [10] offers a toolbox of effective practices to prevent displacement, to help people at risk, and to protect persons displaced. The Agenda focuses on domestic, bilateral and regional responses with regard to **admission and stay of cross-border disaster-displaced persons**, e.g. granting of visas or temporarily suspending visa requirements; prioritizing the processing of regular migration categories; relying upon free movement schemes, suspending documentation requirements in disaster situations; granting temporary entry and stay through humanitarian visas or other exceptional migration measures. The Agenda also mentions the **reviewing of asylum applications and granting of refugee status or similar protection under human rights law**; the exploration whether and under what circumstances regional instruments on refugee and human rights law can and should be interpreted as applying to cross-border disaster-displacement situations; and the **reviewing and harmonisation of existing humanitarian protection measures at (sub-)regional levels**.[11] Although the Protection Agenda was endorsed by 109 governmental delegations, including those of Austria, Sweden and the EU, and although **governments are encouraged to include the Agenda in national laws and policies**, active steps are not taken to include the Agenda in national laws and policies in Austria and Sweden or at EU level. Furthermore, it has been criticised, that '[w]ith regional consultations focusing predominantly on "South-South" mobility, the **legal situation of people who are displaced in the global North in the context of disasters and climate change remains under-explored**.'[12]

None of the international legally binding instruments in the areas of migration, refugee protection or environment/climate change deals adequately with the legal status of persons crossing international borders in the context of disasters and climate change.

Despite several proposals to establish a new legal and/or institutional framework[13] that would close the gap (some in the context of the UNFCCC[14]), there is a lack of political will to establish a new legally

[7] Nansen Initiative (2015) *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change*, Volume I, para 28.

[8] Human Rights Council (n 5); Jane McAdam and others, 'International Law and Sea-Level Rise: Forced Migration and Human Rights' (Fridtjof Nansen Institute 2016) FNI Report 1/2016 <http://www.kaldorcentre.unsw.edu.au/sites/default/files/FNI-R0116.pdf>

[9] International Law Association, 'International Law and Sea Level Rise: Report of the International Law Association Committee on International Law and Sea Level Rise' (2018), part III.

[10] Nansen Initiative (2015) *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change*, see http://www.nanseninitiative.org (8 January 2019).

[11] Nansen Initiative (2015a), para 47.

[12] Matthew Scott, 'Finding Agency in Adversity: Applying the Refugee Convention in the Context of Disasters and Climate Change' (2016) 35(4) Refugee Survey Quarterly 26, 29 accessed 24 October 2019, emphasis added.

[13] E.g. Simon Behrman and Avidan Kent (eds), *'Climate refugees': Beyond the legal impasse?* (Routledge studies in environmental migration, displacement and resettlement, Routledge, an imprint of the Taylor & Francis Group 2018); David Hodgkinson and others, 'Towards a convention for persons displaced by climate change: Key issues and preliminary responses' (2009) 6(56) IOP Conf Ser: Earth Environ Sci 562014.

[14] e.g. Phillip D Warren, 'Forced Migration after Paris COP21: Evaluating the "Climate Change Displacement Coordination Facility"' (2016) 116(8) Columbia Law Review 2103, 2103; Angela Williams, 'Turning the Tide: Recognizing Climate Change Refugees in International Law' (2008) 30(4) Law & Policy 502.

binding framework addressing this normative gap.[15] It is broadly agreed that 'it is premature to push for a new standard-setting agreement at the global level' given the unwillingness of states to develop such an instrument and the fact that this may distract from the 'need for […] new domestic and regional laws to facilitate migration, and/or to provide more predictable responses in situations of displacement'.[16] McAdam refers to the necessity for 'effective practices and legislative change at the local, national, bilateral, and regional levels, which together form part of a global effort' which would 'not rule out the progressive development of the law at the international level.'[17]

Again, the lack of political will to implement existing law was identified as an obstacle in developing effective practices:

> *'[…] existing human rights law mechanisms possess the capacity to encompass the kinds of harms (holistically conceived) faced by people fleeing the impacts of disasters or climate change. Just because they are not being used in this way does not necessarily mean that there is a legal gap, but rather that States and decision-makers are not (yet) prepared to extend them to their full capacity.'*[18]

In this regard Principle VII of the Nansen Principles states that '[t]he existing norms of international law should be fully utilized'. Thus, current international law, in particular international refugee law and international human rights law, has to be implemented effectively.[19] In this context, it is necessary to clarify the scope of existing legal frameworks.[20]

3 Background to the Case Studies

The case studies of Austria and Sweden formed the basis for answering the question what role environmental factors play in decisions on international protection and humanitarian forms of protection and to what extent the implementation of existing laws serves to address the protection gap at national level. This chapter provides background information to the two case studies. It will briefly review academic literature on climate change- and disaster-related mobility in Austria and

[15] Jane McAdam, 'The Normative Framework of Climate Change-Related Displacement' (2012) 5 <https://www.brookings.edu/research/the-normative-framework-of-climate-change-related-displacement>; Jane McAdam, 'Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer' (2011) 23(1) International Journal of Refugee Law 2, 15–18; Jane McAdam, 'Climate Change-related Displacement of Persons' in Cinnamon P Carlarne, Kevin R Gray and Richard Tarasofsky (eds), *International climate change law* (Oxford University Press 2016) 533: The lack of political will became evident in 2011, when UNHCR tried to get States to commit to developing a global guiding framework 'to assess the protection gaps created by new forms of forced displacement, especially environmentally-related cross-border displacement'. At a special Ministerial Meeting only five of 145 States (Norway, Germany, Costa Rica, Mexico, and Switzerland) were willing to do so 'notwithstanding the fact that they were not even being requested to commit to the creation of a soft law instrument, much less a treaty'.

[16] McAdam, 'From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement' (n 2) 1540ff.

[17] McAdam, 'Building International Approaches to Climate Change, Disasters, and Displacement' (n 3) 9.

[18] McAdam, 'Climate Change-related Displacement of Persons' (n 15) 533.

[19] See also Nansen Initiative (2015b) Global Consultation Conference Report, 110-111, available at https://www.nanseninitiative.org/wp-content/uploads/2015/02/GLOBAL-CONSULTATION-REPORT.pdf (25 January 2019): The EU delegate emphasised that '[t]he goal now is to see how existing law can be applied more effectively to environment-induced migration, filling gaps not with more rules, but with practical guiding principles, based on sound research and comparisons of experience.' See also 'Nansen Principles on Climate Change and Displacement' (2011), Principle 7: '[t]he existing norms of international law should be fully utilized, and normative gaps addressed '.

[20] See also Nansen Initiative (2015) 78-79: The Austrian representative at the Global Consultations of Nansen Initiative stated that given the limited application of international and regional human rights law, '[c]larification of the existing legal framework and the further development of alternative strategies and tools to ensure that the human rights of disaster-displaced persons are protected, including by taking into account humanitarian grounds, will have to be given priority.'

Sweden, give an overview of relevant national legal and institutional frameworks and will provide information on the main countries of origin of applicants in Swedish and Austrian asylum procedures. Finally, an overview of the decisions analysed and how they were selected is given.

3.1 Academic Discussion on Climate Change/Environmental Factors, Mobility and Legal Protection in Relation to Austria/Sweden

There is no previous in-depth academic engagement on the question of how Austrian and Swedish authorities deal with claims on international protection relating to cross-border displacement in the context of disaster and climate change. Texts that do reference Sweden all point to the provision that expressly provides for a subsidiary form of international protection to people unable to return to their home countries owing to an 'environmental disaster' (*miljökatastrof*). However, this provision has been suspended since 2016,[21] and was removed from the Aliens Act in 2021.[22] Concerning Austria, hardly any academic literature mentions climate change-related mobility towards Austria or addresses the question how the legal system is dealing with applications for international protection in Austria in which climate- and environmental-related factors play a role.[23]

3.2 Relevant National Legal Frameworks

Overview

While both case studies analysed decisions on international protection and humanitarian forms of protection,[24] the Swedish case study in addition also looked at immigration categories and visa provisions, e.g. family reunification, student visa under the Swedish Aliens Act (*Utlänningslagen*).

While both countries transposed the EU Qualification Directive in their respective national laws, following differences exist in relation to the frameworks on international protection:

First, unlike Austria, Sweden had a special provision on disaster displacement until 2021, which was however hardly applied in practice (in 50 per cent of cases where applicants explicitly mentioned a disaster, the disaster provision was not applied).

Second, Austria's transposition regarding subsidiary protection in Sec. 8 Asylum Act seems not to be in line with the EU Qualification Directive: In contrast to Art. 15b Qualification Directive as interpreted by the CJEU,[25] the eligibility criteria in Sec. 8 Asylum Act do not mention a requirement of an actor of

[21] See Lag (2016:752) om Tillfälliga Begränsningar av Möjligheten att Få Uppehållstillstånd i Sverige.

[22] See Regeringens Proposition 2020/21:191: Ändrade Regler i Utlänningslagen, 51. See also Matthew Scott and Russell Garner, 'Nordic Norms, Natural Disasters and International Protection: Swedish and Finnish Practice in European Perspective' (2022) 91 *Nordic Journal of International Law* 101.

[23] Some newspaper articles in the past reported about individual cases. A EMN-report briefly mentions that 'Austrian law … has no separate status for individuals seeking protection who have left their countries due to natural disasters or climatic conditions' (Maria-Alexandra Bassermann, 'Overview of National Protection Statuses in Austria', European Migration Network, 2019, https://www.emn.at/wp-content/uploads/2019/09/emn-national-report-2019_national-protection-statuses.pdf. A reported published by the Austrian Integration Funds in 2009 (*Matthias Jurek and Susanne Regina Weber,* 'Umweltmigration' (ÖIF Dossier 7/2009) <https://www.integrationsfonds.at/publikationen/oeif-dossiers>) only cursorily mentions the topic.

[24] In Austria, the granting of humanitarian forms of protection is reviewed in the context of the asylum procedure.

[25] *M'Bodj* (2014) C-542/13 (Court of Justice of the European Union); *M.P.* (2018) C-353/16 (Court of Justice of the European Union).

serious harm in the country of origin for granting subsidiary protection. This caused different interpretations by asylum authorities including the Federal Administrative Court (BVwG) and the Supreme Administrative Court (VwGH). In November 2018, the VwGH stated in a decision concerning the case of a Somali applicant that it would be contradictory to the Qualification Directive if subsidiary protection is granted when serious harm is not caused by an actor.[26] In May 2019 the VwGH clarified that in Austria the granting of subsidiary protection based on Sec. 8 Asylum Act did not require the involvement of an actor and that the existence of a real risk of an Art. 3 ECHR violation was sufficient.[27] The Court stated that it was not possible to interpret Sec. 8(1) Asylum Act 2005 in conformity with the Directive. The VwGH also held that the non-application of Sec. 8 Asylum Act was not permissible since the EU Qualification Directive, which was not completely or not correctly transposed into national law, cannot be applied directly only to the detriment of an applicant.[28] Also the Constitutional Court (VfGH) held that subsidiary protection status must be granted when a person would face a real risk of an Art. 3 ECHR violation in his or her country of origin – irrespective of whether this real risk is caused by an actor.[29]

The decisions of the VwGH and VfGH show that the Austrian legislator did not transpose the provisions of the Qualification Directive into the Austrian Asylum Act correctly. So far, no amendment regarding Sec. 8 Asylum Act and the eligibility criteria of subsidiary protection status has been proposed. In case the Directive was transposed correctly, persons facing a real risk of an Art. 3 ECHR violation but not meeting the requirements of the Directive, would need to be treated at least equally as persons who cannot be returned for reasons based on Art. 8 ECHR.[30] Hence, some form of protection status would need to be granted.

Both countries are bound by international human rights treaties, international refugee law and EU law.

Constitutional Law

The **ECHR** is directly applicable constitutional law in Austria and can be relied on before any authority or court. In Austria, the ECHR rights play a prominent role in the jurisprudence of the VfGH and the VwGH in asylum and migration procedures. In Sweden, the ECHR has the status of law and features prominently in decisions of the Migration Court of Appeal.

In Austria, the VfGH clarified that the rights guaranteed by the **EU Fundamental Rights Charter** (CFREU) may serve as a standard of review for constitutional norm review proceedings and can also be invoked in individual complaints when the Charter rights equal 'constitutionally guaranteed

[26] VwGH 21 November 2018, Ra 2018/01/0461 with reference to VwGH 6 November 2018, Ra 2018/01/0106. In this particular case the legal question if an actor is required for granting subsidiary protection was still not relevant for the outcome of the decision since the VwGH accepted the alternative reasoning of the BVwG.
[27] VwGH 21 May 2019, Ro 2019/19/0006. See also VwGH 27 June 2019, Ra 2019/14/0138.
[28] VwGH 21 May 2019, Ro 2019/19/0006.
[29] VfGH 4 December 2019, E1199/2019; VfGH 12 December 2019, E2746/2019; VfGH 12 December 2019, E1170/2019; VfGH 10 March 2020, E2570/2019 ua. By not granting the status of beneficiary of subsidiary protection contrary to Sec. 8 (1) Asylum Act – even though it found an imminent violation of Art. 3 ECHR - the BVwG has violated the constitutionally guaranteed right to equal treatment of foreign nationals among themselves (Art. I(1) BVG-Rassendiskriminierung). This would also not be contradicted by the case law of the ECJ (ECJ 18 December 2014, Case C-542/13, M'Bodj) since the Member States are expressly granted the possibility of granting residence rights on other humanitarian grounds (VfGH 4.12.2019).
[30] Sebastian Frik and Jakob Fux, 'Subsidiärer Schutz und die Akteursproblematik - Vorgaben für eine unions- und gleichheitsrechtskonforme Novellierung' [2019] migralex 43, 53–54.

rights'.[31] The asylum procedure falls under the scope of application of the CFREU since EU law is implemented.[32] The VfGH has regularly relied on the CFREU and the respective case law of the CJEU.

Laws Regulating International Protection

In transposition of the EU Qualification Directive, the **Austrian Asylum Act** defines an application for international protection as an application for refugee or subsidiary protection status.[33] In contrast to Sweden, Austria does not have an international protection status for persons displaced by disasters.[34]

- The eligibility criteria for **refugee status** (more precisely, the 'status of a person entitled to asylum') refer to the refugee definition of the Refugee Convention.[35]
- The eligibility criteria for **subsidiary protection** refer to inter alia Arts. 2 or 3 ECHR, and not to the Qualification Directive[36] (for details regarding the conformity challenge regarding the Qualification Directive see above).

The status of a person entitled to asylum and subsidiary protection status are not to be granted if an 'internal flight alternative' (Sec. 11 Asylum Act) is available and reasonable. The two prerequisites for the assumption of an internal flight alternative is that 1) the asylum seeker can be guaranteed protection (no well-founded fear of persecution; conditions for granting subsidiary protection not met) in a part of his country of origin and 2) that he or she can reasonably be expected to stay there.

Apart from that, the Austrian Federal Constitutional Act on the Rights of Children states that '[t]he well-being of the child shall be the primary consideration in respect of all measures affecting children that are taken by public and private institutions'.[37]

Until 2021, the **Swedish Aliens Act** provided **three categories of international protection**. The first two categories correspond to the categories 'refugee' and 'person in need of subsidiary protection' under the Qualification Directive. The third category applying to '**persons otherwise in need of protection'** includes people who, because of an armed conflict or severe conflicts in the country of origin, feels a well-founded fear of being subjected to serious abuses, or who are unable to return home in the context of an '**environmental disaster**.'[38] With this third category, Sweden is one of only three countries in the world with a legal provision that specifically extends international protection to

[31] VfGH 14 March 2012, U 466/11 et al.
[32] Ibid., paras. 47ff.
[33] Sec. 2(1) item 13 Asylum Act.
[34] Maria-Alexandra Bassermann, 'Overview of National Protection Statuses in Austria' (European Migration Network, 2019), 21.
[35] Sec. 3(1) Asylum Act refers to the refugee definition of the Refugee Convention and states that refugee status must be granted 'if it is satisfactorily established that the alien would be at risk of persecution in the country of origin as defined in article 1 A (2) of the Geneva Convention on Refugees.' The Refugee Convention was ratified by Austria in 1955, see BGBl 55/1955.
[36] Sec. 8 Asylum Act: 'Subsidiary protection status shall be granted […] if the alien's rejection at the border, forcible return or deportation to his country of origin would constitute a real risk of a violation of Article 2 or Article 3 ECHR or of Protocol No. 6 or Protocol No. 13 to the ECHR or would represent a serious threat to his life or person as a result of arbitrary violence in connection with an international or internal conflict.'
[37] BGBl I 4/2011, Art. 1, last sentence.
[38] There are further qualifications which specify that state as well as non-state actors can be the responsible parties for the enumerated persecution. Additionally, even if the alien's state of origin is capable of offering protection, international protection can still be claimed if the origin state's protection is not of an "effective and permanent nature" (Chapter 4, § 1, pg.11, 2005:716). This clause regarding the "effective and permanent nature" of protection in an alien's state of origin is repeated again in two further forms of protection; "subsidiary protection" and persons "otherwise" in need of protection.

persons displaced across borders in the context of disasters.[39] The Swedish provision, which was **suspended in 2016 and repealed in 2021**, is found in **Chapter 4, §2a (2) Aliens Act** ('Persons otherwise in need of protection'):

> *'A person otherwise in need of protection in this law is a non-citizen who in other cases than those set out in 1 or 2 §§ finds herself outside the country that she is a citizen of because he or she… is unable to return to her home country due to an environmental disaster.'*

The proposition that introduced this provision into the Aliens Act confirms that cases of the type envisaged by the provision have not yet been encountered in Sweden, and that it is not possible to comprehensively define the circumstances in which it would apply. However, some guidance is provided:

> *'it must be a case of sudden disaster which means that it is contrary to the demands of humanity to, at least immediately, send someone to the country where the disaster occurred. On the other hand, the provision does not refer to the case where severe supply problems arise in a country due to a continuous deterioration of the conditions for food production'*[40]

Additionally, the proposition further limits in what cases this protection can be applied by invoking the concept of internal relocation:

> *'it is not uncommon that a whole country would not be affected [by environmental disaster] and that there is therefore an internal escape option. In such cases there is of course no need for refuge in Sweden*.'[41]

Thus, the protection in cases of 'environmental disaster' that Chapter 4, *§* 2a (2) provides, is where a sudden disaster overwhelms a country so completely that no place an affected person can safely travel to in their home country is available, or where individual factors preclude the possibility of internal relocation.

Chapter 12 of the Aliens Act prohibits *refoulement* in situations where a person who has not established eligibility for refugee status or subsidiary protection nevertheless faces ill-treatment of the kind outlined at Art. 15 of the Qualification Directive and Art. 1A(2) of the Refugee Convention.

Chapter 1 s.10 of the Aliens Act, which is framed as a 'portal paragraph' for the 1989 UN Convention on the Rights of the Child, requires the best interests of the child to be specifically considered in cases concerning children.

Legislation Providing for a Legal Status on Humanitarian or Compassionate Grounds

Both countries have legislation providing for a legal status on humanitarian or compassionate grounds, an option for cases that do not qualify for international protection:

Sweden has legislation providing for a legal status on humanitarian or compassionate grounds[42] which was slightly amended as part of the 2021 change. Chapter 5 s. 6 of the Aliens Act (*Utlänningslagen*) stipulates that '[i]f a residence permit cannot be given on other grounds, a permit may be granted to

[39] Finland and Italy are identified as the only two other EU Member States with such provisions, and Finland removed its provision in 2016. See A. Kraler, C. Katsiaficas, and M. Wagner, Climate Change and Migration: Legal and Policy Challenges and Responses to Environmentally Induced Migration (European Parliament, 2020).
[40] Sveriges Riksdag, Svensk Migrationspolitik i Globalt Perspektiv (Prop. 1996/97:25) 100-101.
[41] ibid.
[42] Chapter 5, section 6 of the Aliens Act.

a foreign national if, in light of all the circumstances, there are such exceptionally compassionate circumstances that he or she should be permitted to remain in Sweden.' A somewhat lower threshold of 'particularly compassionate circumstances' (*särskilt ömmande omständigheter*) is applied to children. Proposition 2013/14:216 established that this provision must be interpreted in line with the Convention on the Rights of the Child. The Migration Court of Appeal (Migrationsöverdomstolen) has established that the assessment under Chapter 5 sec. 6 must entail an assessment of whether any enforced removal would amount to a violation of Art. 8 ECHR.[43]

Relevant factors include 'health status, adaptation to life in Sweden, and the situation in the country of origin'. Prior to a change in 2005, this 'exceptionally compassionate circumstances' ground was called the 'humanitarian reasons' ground. Interestingly, despite express reference to the situation in the country of origin, neither the preparatory works nor subsequent jurisprudence from the Migration Court of Appeal has considered the relevance of disasters to the application of this provision.

In Austria, a residence title for reasons of Art. 8 ECHR[44] must be granted if a deportation is found permanently inadmissible because the right to private and family life would be violated (Sec. 55 Asylum Act). Eight of the nine criteria which should be taken into account in the assessment of a private and family life (Sec. 9 BFA-VG) concern the situation of the applicant in Austria;[45] one criteria obliges the authorities to take into account the applicant's **ties to his or her home country**. In this context the VwGH held in several decisions that consideration must also be given to the question if the applicant has the **possibility of creating a livelihood upon return** to the country of origin.[46] In the other residence titles for particularly exceptional circumstances (Sec. 56 Asylum Act) environmental factors in the country of origin will not play a relevant role since the eligibility criteria deal with the situation or the behaviour of the applicant in Austria[47] or can only be granted to a very limited group of persons and environmental factors in the country of origin do not play a relevant role.[48]

3.3 Relevant National Institutional Frameworks and Procedures

In the **Austrian asylum procedure** administrative law applies. Special procedural rules for the asylum procedure exist. The first instance is the Federal Office of Immigration and Asylum (BFA), which is a public authority subordinated to the Federal Ministry of Interior (BMI). Asylum seekers who are admitted to the regular procedure must be questioned in detail about the reasons for fleeing their

[43] MIG 2012:13.

[44] It can be granted either through a 'residence permit' (*Aufenthaltsberechtigung*) or a 'residence permit plus' (*Aufenthaltsberechtigung plus*) (Sec. 55(2) Asylum Act). A 'residence permit plus' is granted when the foreign national works and has a certain income or when (s)he has passed Module 1 of the Integration Agreement which includes a German language test (A2 level). Sec. 55(1) Asylum Act. Whereas both residence permits are valid for one year, only the 'residence permit plus' guarantees unlimited access to the labour market. Neither the 'residence permit' nor the 'residence permit plus' can be extended after one year, however aliens are allowed to apply for the residence title 'Rot-Weiß-Rot Karte plus' based on Sec. 41a Settlement and Residence Act.

[45] E.g. the level of integration or the actual existence of a family life.

[46] See the case law with regard to Sec. 9 para. 2 no. 5 BFA-VG: VwGH 27 November 2018, Ra 2018/14/0083; VwGH 17 November 2018, Ra 2018/14/0301 mwN; VwGH 12 November 2015, Ra 2015/21/0101; VwGH 31 August 2017, Ra 2016/21/0296; VwGH 12 November 2015, Ra 2015/21/0101; VwGH 31 January 2013, Zl. 2012/23/0006. This case law is weakened by a VwGH decision from 2016 in which the Court held that 'difficulties in re-establishing a livelihood in the home country do not have the effect of decisively increasing the interests of remaining in Austria, but are rather to be accepted in the public interest of an orderly immigration system', see VwGH 30 June 2016, Ra 2016/21/0192.

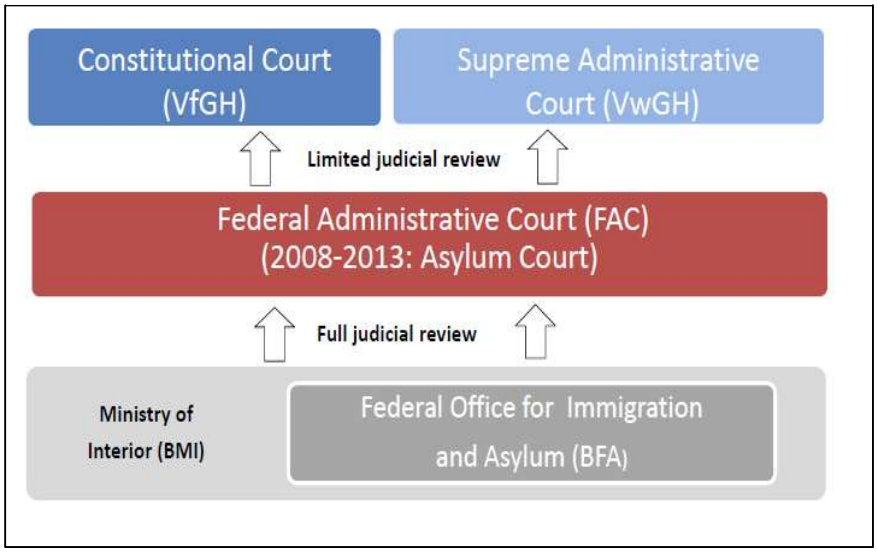
[47] Sec. 56(1) Asylum Act.

[48] Sec. 58 Asylum Act.

country. Further, the authorities are obliged to investigate ex officio all relevant country of origin information (COI) if this is necessary for the assessment of the need for international protection.[49]

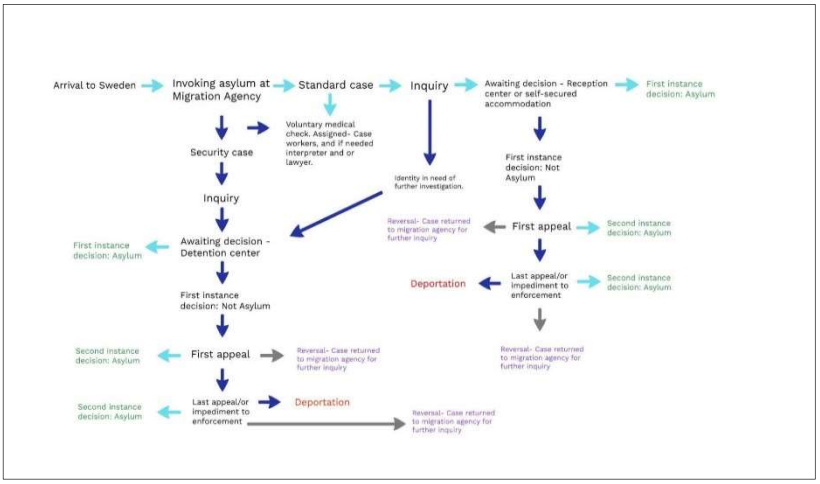
In case the BFA dismisses the application, the asylum seeker has the right to lodge a complaint before the BVwG which is independent from the BFA as well as the BMI.[50] Appeals against first-instance rulings are decided by a single judge. In contrast to BFA case workers, all BVwG judges have a legal background. In case the BVwG dismisses an appeal, the asylum seeker can ask for limited judicial review of the BVwG decision before the VwGH (only review of legal issues of fundamental significance) or before the VfGH (violations of rights protected by constitutional law). Jurisprudence of the VwGH and of the VfGH on the topic disasters/inter-national protection exists (see below, chapter 5.1).

FIGURE 1 THE AUSTRIAN ASYLUM SYSTEM (GRAPH BY FLORIAN HASEL)



After arrival in **Sweden**, the applicant officially makes his or her case known to the Migration Agency.[51] The Migration Agency then provides the applicant with a caseworker, and where needed, interpreters and/or legal counsel. The applicant can appeal against the first instance decision from the Migration Agency before the Migration Court (second instance). There is the opportunity to appeal the second instance decision to the Migration Court of Appeal, but only

FIGURE 2 THE SWEDISH ASYLUM SYSTEM (GRAPH BY RUSSELL GARNER)



[49] Sec. 18 (1) Asylum Act. In this context the VwGH has clarified that asylum seekers do not have a general right which would oblige the asylum authorities or the competent Court to conduct or arrange research in the country of origin. An asylum seeker has such a right only when this is 'necessary' and it is up to the competent authority or Court to determine when this is the case (see VwGH 19 June 2019, Ra 2018/01/0379).

[50] The BVwG has replaced the Asylum Court in 2014 as the court of appeal against first instance asylum decisions.

[51] Swedish Migration Agency, *Asylum-from application to decision,* available at https://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/Applying-for-asylum/Asylum---from-application-to-decision.html

in cases where it has been determined that the case has potential to help guide further decisions in the lower courts.[52]

The Migration Courts are a part of the Administrative Courts of Stockholm, Gothenburg, Lulea and Malmö. The composition of a Migration Court includes both legally qualified judges and lay judges, usually with one legally qualified judge and three law judges. Simpler cases can be decided by a single judge.[53] When the court is comprised of one legally qualified judge and three lay judges, each judge has a vote of equal weight in deciding the case. In the case of a tie, the legally qualified judge is the tiebreaker. In contrast to Austria, in Sweden there is no jurisprudence of supreme court on the topic of environment-related migration. However, there is primary law requiring judges to carefully examine cases and provide reasons for the decisions they take.[54]

3.4 Main Countries of Origin of Applicants in Swedish and Austrian Asylum Procedures

In both country case studies, decisions on international protection were assessed. To put the case law sample in a larger national context, this section will present national data on applications for international protection.

From January 2010 to December 2020, Austria received a total of 285,175 applications for international protection.[55] During the same period, 513,847 persons applied for international protection in Sweden.[56] In both countries, more men applied for international protection than women (70.3 percent of the applicants were men and 29.7 percent women in Austria,[57] and 65.6 percent men and 34.4 percent women in Sweden.[58])

Between 2010 and 2020, Austria and Sweden had the same top 3 countries of origin – Afghanistan, Syria and Iraq.[59] In Austria, in the past ten years Syrians had the highest acceptance rate – in average ranging between 77 percent (in 2011) and 92 percent (in 2017).[60] Also applications of asylum seekers from Iran and Somalia had relatively high annual acceptance rates in the majority of the ten-year time period. Applications by asylum seekers from Afghanistan never had an annual acceptance rate above

[52] Gerhard Wikrén and Håkan Sandesjö, Utlänningslagen : med kommentarer (Wolters Kluwer, 2017).
[53] Ibid, 57.
[54] See Ulrik Von Essen, Förvaltningsprocesslagen m.m.: En Kommentar, 7th edn. (Wolters Kluwer, 2017), 376.
[55] This number is compiled from an overview of asylum application by the Austrian Federal Ministry of Interior (BMI, Asylstatistik 2020, 4 available at https://www.bmi.gv.at/301/Statistiken/files/Jahresstatistiken/Asyl_Jahresstatistik_2020.pdf
[56] This number is compiled from data provided by the Migrationsverket, available at https://www.migrationsverket.se/English/About-the-Migration-Agency/Statistics/Asylum.html
[57] This percentage was calculated on the basis of figures that are available at https://www.bmi.gv.at/301/Statistiken/
[58] This percentage was calculated on the basis of figures that are available https://www.migrationsverket.se/English/About-the-Migration-Agency/Statistics/Asylum.html
[59] From 2010 to 2020, the main countries of origin of asylum seekers in Austria were Afghanistan (66,235), Syria (63,086) and Iraq (22,997) (source: BMI, Jahresstatistiken, available at https://bmi.gv.at/301/Statistiken). From 2010 to 2020, the three most common countries of origin for asylum seekers in Sweden were Syria (123,857), Afghanistan (65,823) and Iraq (37,783).
[60] See BMI, Jahresstatistiken. In the annual statistics of the BMI a 'positive decision' means that a protection status (refugee status, subsidiary protection status, humanitarian status) is granted or a deportation ban was issued (Sec. 50 FPG).

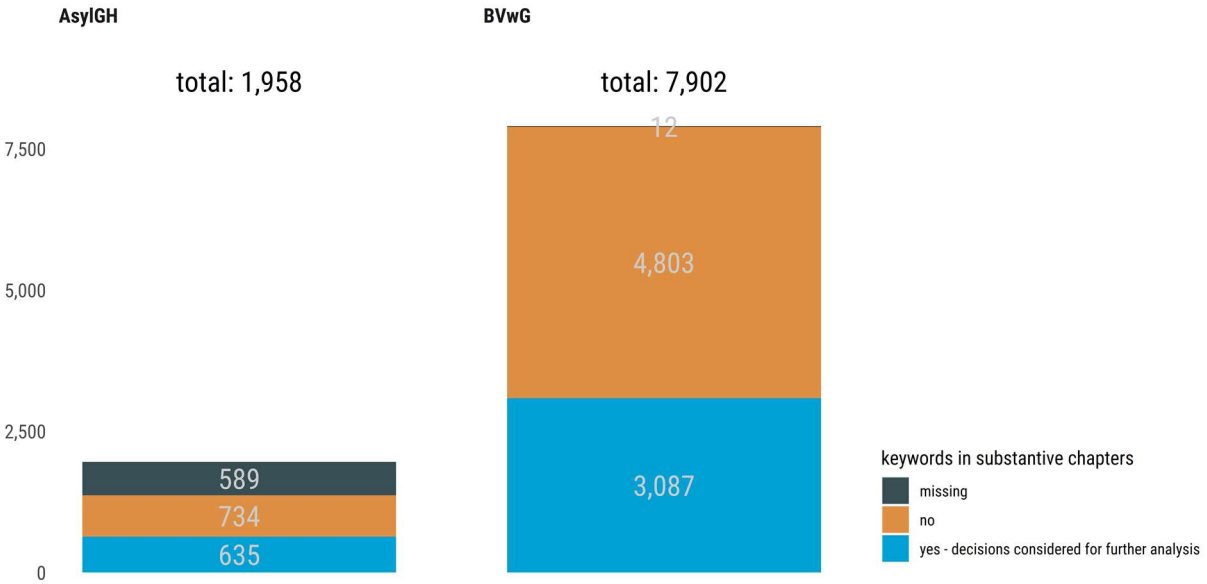
53 per cent. In Sweden, from 2010-2019 the average proportion of applicants granted asylum was 47 percent.[61]

Regarding Sweden, it can be ruled out that large numbers of people who expressly relied on a fear of exposure to environmentally-related harm were granted international protection by the Migration Agency without having to appeal. These judicial decisions reviewed for this research typically attach the decisions of the Migration Agency. These decisions reflect a consistent approach by the Migration Agency to dismiss claims for international protection in this context. There is no reason to suspect that a different approach would have been taken in other cases.

In Sweden, statistics are not collected on the number of claims for international protection that relate to disasters or other environmental pressure. However, a keyword search of judicial decisions from 2006-2019 revealed 792 cases containing hazard-related keywords, although most of these were not directly related to the case. Of the 181 Swedish cases where an individual **relied expressly on the disaster** to support an application to enter or remain in Sweden, only **140** were framed as **claims for international protection**. The **remaining 41 cases turned on questions of immigration law, such as student visa extension or family migration cases**.

In Austria, the asylum statistics published by the Federal Ministry of Interior do not provide information on specific factors that play a role in the asylum procedures including environmental factors. However, a search of the database '*Rechtsinformationssystem des Bundes'* (RIS)[62] revealed that almost 10,000 decisions on international protection between beginning of 2008 and 18 June 2020 (uploaded to the RIS database before 3 May 2022) contain such keywords (see graph below).

FIGURE 3 NUMBER OF AUSTRIAN DECISIONS WITH KEYWORDS IN SUBSTANTIVE CHAPTERS (GRAPH BY ROLAND SCHMIDT)



Periods considered: AsylGH: from 01 Jan 08 to 31 Dec 13, BvWG from 01 Jan 14 to 18 Jun 20.
Substantive chapters: 'Beweiswürdigung' and 'Rechtliche Beurteilung'.
data: www.ris.bka.gv.at

[61] Migrationsverket, *Avgjorda asylärenden 2010-2020.* This is a compilation of statistics made up of "Avgjorda asylärenden 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019".
[62] Legal database of the Republic of Austria providing information on Austrian law and case law.

However, the results of the search are limited by the fact that the results are restricted to decisions of the appellate court, i.e. the BVwG and its predecessor, the former Asylum Court (AsylGH) (2008-2013). Decisions of the Federal Office for Immigration and Asylum (BFA), the first instance authority (its predecessor Bundesasylamt (BAA) until 2013), are not available in this database. In addition, as judges of the BVwG have the option to orally announce the decisions and, if not required by the complainant or their legal representative, they may only upload the judgment but not the reasoning of the decision. When environmental factors play a role in decisions which are only orally announced, these decisions will not be included in the results when searching the RIS database for environment- and disaster-related keywords.

3.5 Case Law Analysis

3.5.1 Overview of Case Law containing Disaster-related Keywords

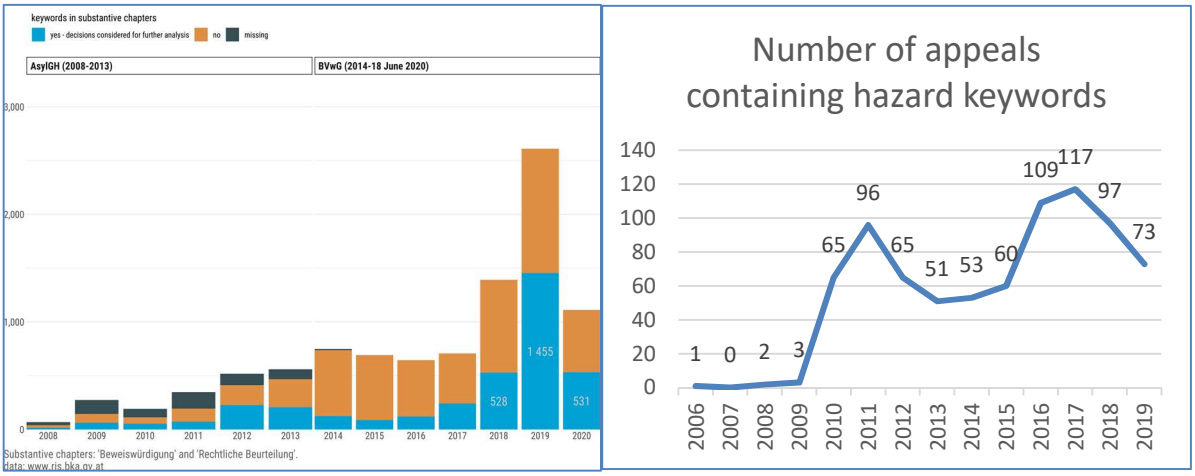
The methodological approach chosen for the study was a qualitative content analysis of case law, preceded by a purposive sampling of relevant and available Austrian and Swedish case law concerning international protection and humanitarian forms of protection. For this purpose, keywords related to disasters as well as climate change were inserted for a search in national caselaw databases.

In both countries, keywords such as drought, flood, cyclone, hurricane, climate change, earthquake, sea level[63] were selected and used for a search in the legal databases.[64] The search revealed for Austria that out of 9,860 decisions in the period between 1 January 2008 and 18 June 2020, which contained such keywords, 3,722 decisions contained disaster-related keywords in substantive parts of the decision (consideration of evidence, legal reasoning). The Swedish search revealed that between 1 January 2006 and 31 December 2019 792 immigration and asylum cases contained hazard keywords in some part of the decision.

[63] The German keywords used for the search were 'Dürre' (drought), 'Katastrophe' and 'Disaster' (disaster), 'Hunger' (hunger/famine), 'Flut', 'Überflutung', 'Überschwemmung' and 'Hochwasser' (flood/flooding), 'Erdbeben' (earth quake), 'Hurrikan', 'Wirbelsturm' and 'Orkan' (hurricane, typhoon and cyclone), Klimawandel and Erderwärmung (climate change and global warming), Erdrutsch (land slide), 'Anstieg des Meeresspiegels' (sea-level rise), 'Waldbrand' and 'Buschfeuer' (forest fire and wildfire).
The Swedish terms were: klimatförändring (climate change), cyklon (cyclone), torka (drought), jordbävning (earthquake), svält/hungersnöd (famine), översvämning (flood), orkan (hurricane), jordskred/jordras (landslide), havsnivå (sea level), tsunami.

[64] Austria: "Rechtsinformationssystem des Bundes" (RIS) is a legal database of the Republic of Austria providing information on Austrian law and case law and contains decisions of the appellate court, that is the former AsylGH (until 2013) and the BVwG. Sweden: JPInfonet database containing decisions from the Swedish migration courts.

FIGURE 4 NUMBER OF DECISIONS IN AUSTRIA WITH KEYWORDS IN SUBSTANTIVE CHAPTERS (GRAPH BY ROLAND SCHMIDT) AND NUMBER OF APPEALS CONTAINING HAZARD KEYWORDS IN SWEDEN (GRAPH BY RUSSELL GARNER)



SELECTION OF SAMPLE – METHODOLOGY

The two case studies differed regarding the size of the sample:

In the period from 2006 to 2019, only 792 **Swedish judicial decisions** contained a hazard keyword *somewhere* in the text. In some of these cases, the hazard keyword only appeared in the appended decision letter from the Swedish Migration Agency, rather than in the judicial decision itself. In the vast majority of cases, closer analysis revealed a claim that did not in any way relate to a fear of being exposed to environmentally-related harm in the claimant's country of origin. For instance, in some cases the claimant is recorded as having referenced an earthquake that took place decades ago. Others make reference to hunger or famine, but the conditions referred to relate either to generalized poverty, or the consequences of armed conflict, with no connection to a particular hazard event such as drought. Just under 200 cases were directly relevant to the claim, of which 181 were cases where an individual relied expressly on the disaster to support an application to enter or remain in Sweden. 140 of these cases were framed as claims for international protection and the remaining 41 cases turned on questions of immigration law, such as student visa extension or family migration cases. In seven other cases, disaster was only addressed as part of an assessment of whether an internal relocation alternative was available in Afghanistan.

In the **Austrian case study**, the starting point for selecting cases for analysis were the 3,722 decisions containing disaster-related keywords *in substantive parts of the decisions*. A first perusal of these cases revealed that cases concerning complainants from Afghanistan, Somalia, Pakistan, India, Nepal were relevant for the purpose of the case study. As the number of cases differed considerably with regard to the country of origin, different strategies were adopted to narrow down the number of relevant case load. Concerning cases from Afghanistan – the country with 1,249 cases – a total of 200 second instance decisions were selected according to criteria temporal distribution, gender, different judges as well as cases where the complainants and/or their legal representative brought forward the disaster. A first screening of more than 1,000 cases referring to complainants from Pakistan showed that mainly cases with the keyword 'flood' were relevant for the purpose of the case study. 81 cases were selected for further analysis. A first review of the 346 Somalian decisions revealed that environmental factors played an important role in most decisions. Thus, all Somalian decisions were selected for further analysis. Due to the small number, all decisions from India (5, all 'flood') and Nepal (14, all 'earthquake') were considered for the qualitative analysis. In total, the Austrian caseload

consisted of 346 Somalian cases, 200 Afghanistan cases, 81 Pakistan cases, 14 Nepal cases and 5 Indian cases, in total 646 decisions.

3.5.2 Overview of Sample – Quantitative Data

In this section, an overview of the Swedish and Austrian sample is provided.

TYPES OF DECISION

Concerning the Austrian case study, the majority of the analysed decisions were appeals against first instance asylum decisions (587 cases). In addition, the sample consisted of 56 devolutions and three appeals in status withdrawal procedures.

Regarding the Swedish case study, the majority of cases (140) concerned appeals against decisions of the Swedish Migration Agency to refuse to grant international protection. Of these 140 cases, a small number were applications for a residence permit on the basis of 'non-returnability' (*verkställighetshinder*) (8 cases), and several cases concerned 'upgrade' appeals (2 cases), where individuals had been granted subsidiary protection but appealed, arguing that they were entitled to recognition of refugee status. All three categories were analyzed as part of the 'international protection' caseload. The remaining 41 cases concerned immigration categories without any claim for international protection. This caseload consisted primarily (32 cases) of different family immigration sub-categories, including spouse, parent and dependent relative. Approximately 60 per cent of these family cases were applications to enter Sweden from abroad, and the remaining 40 per cent were submitted by people already in Sweden. The remaining eight cases concerned applications to extend student visas (6 cases), and applications based on a connection to Sweden not based on a family relationship (2 cases).

GENDER/FAMILY STATUS

In Austria, 556 decisions (86.1 per cent) concerned adult men, 43 decisions (6.7 per cent) adult women and 25 decisions (3.9 per cent) parent(s) with child(ren). Only a few decisions concered minors, couples or siblings.

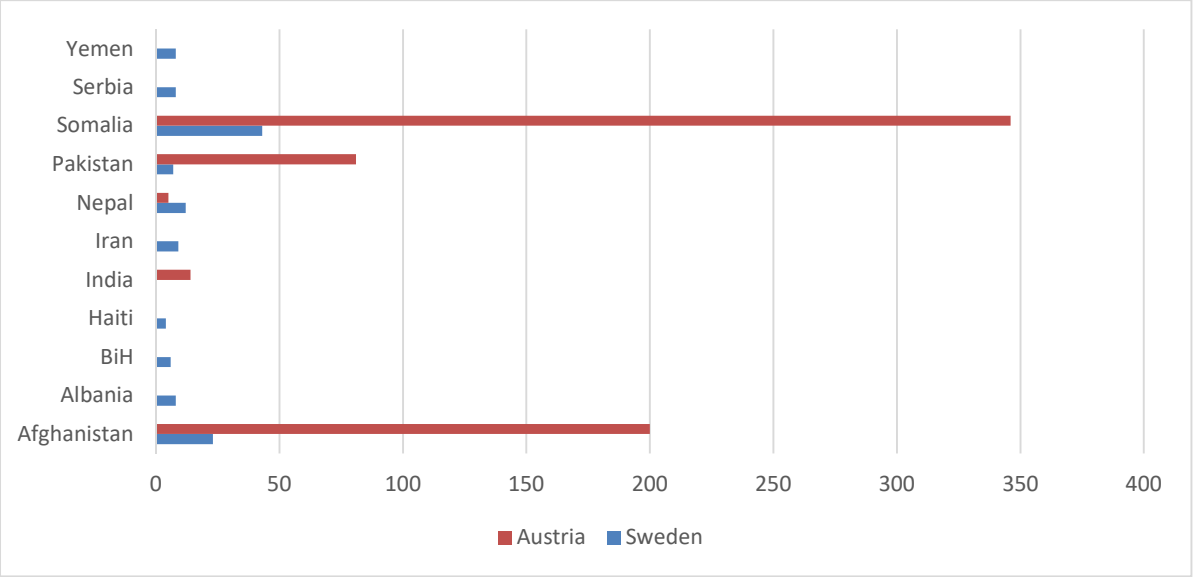
In Sweden, 92 decisions (50 per cent) concerned adult men, 36 decisions (20 per cent) concerned adult women, 23 (13 per cent) concerned families with children, 10 (less than 1 per cent) concerned children (all but 1 were boys) and 7 (less than 1 per cent) concerned families without children, or whose accompanying children were already adults.

COUNTRIES OF ORIGIN

In Sweden, the countries of origin of the claimants were Somalia (43 cases), Afghanistan (23 cases), Nepal (12 cases), Iran (9 cases), Albania (8 cases), Serbia (8 cases), Yemen (8 cases), Pakistan (7 cases), BiH (6 cases) and Haiti (4 cases).

In Austria, the countries of origin were Somalia (346 cases), Afghanistan (200 cases), Pakistan (81 cases), India (14 cases) and Nepal (5 cases).

FIGURE 5 COUNTRIES OF ORIGIN OF CLAIMANTS



EXPLICIT REFERENCE

In the Austrian case study, in 36.5 percent of the sample decisions the claimant/legal representative **explicitly referred to a disaster or other environment-related issue** as – in most cases one amongst other – **factors for either leaving the country or as a reason why the person could not return** to the country of origin.[65] It was not always apparent in the decisions if there was a causality between the bringing forward of environmental factors by the claimant/legal representative and the reaction of the court, even when the decisions were analysed qualitatively. This was due to the fact that the court was obliged to examine the general situation in the country of origin in the course of the non-refoulement assessment. The quantitative data collected revealed that in 41.5 percent of the 'explicit reference'-cases, a subsidiary protection status was granted. In 52.7 percent of these cases the appeal was dismissed. In seven of the 15 cases, which were remitted to a lower instance, disaster and environmental factors were mentioned by complainants/legal representatives.

Out of the 160 Swedish cases identified, 140 were cases in which the claimant expressly relied on a fear of disaster-related harm in support of a claim for international protection. Of the 140 claims, 124 (89 percent) were dismissed on appeal. Only two of the 16 successful appeals contained detailed judicial consideration of how the law applies to the facts of the case. In the remaining 14 cases, the disaster element of the case was either not considered at all by the Court, or it was touched upon only in a cursory manner.

In Sweden, the disaster types mentioned most in analysed decisions were famine, flood, earthquake and drought.

In Austria, disasters brought forward were drought, flooding, 'natural' disasters in general, famine, earthquakes, rainfalls, cyclone and locust plague.

[65] It has to be noted that the reviewed decisions contain a summary of the previous proceedings which differ considerably in length and detail in summarizing the complainant's submission.

OUTCOME

Of the 181 relevant Swedish cases, 165 (91 per cent) were dismissed. For the remaining ten per cent of cases (16 cases), three resulted in recognition of refugee status (but not for reasons related to the disaster), seven resulted in the grant of subsidiary protection (but only one for reasons expressly related to the disaster), one was recognized as a stateless person, one was granted a residence permit on 'compelling and compassionate reasons' grounds (not related to disaster), one was granted a residence permit as the parent of a child established in Sweden, and three were remitted.

Of the 646 analysed Austrian cases, 343 (53.1 per cent) were dismissed, 268 complainants (41.5 per cent) was granted a subsidiary protection status, 18 complainants (2.8 per cent) was granted a humanitarian protection status, in two cases a refugee status was granted (but not for reasons related to the disaster) and 15 cases (2.3 per cent) were remitted to a lower instance.

TABLE 1 OUTCOME OF DECISIONS IN AUSTRIA AND SWEDEN

	Austria	Sweden
Appeal/case dismissed	343 (53.1%)	165 (91%)
Subsidiary protection granted	268 (41.5%)	7 (3.9%)
Refugee status granted	2 (<1%)	3 (1.7%)
Case remitted to a lower instance	15 (2.3%)	3 (1.7%)
Other	18 (2.8%	3 (1.7%)

4 ADDRESSING THE PROTECTION GAP BY GRANTING REFUGEE STATUS?

The Austrian and the Swedish case study both show that if environmental factors or disasters were considered by the Courts, then they were framed as economic issues. Still, in most Swedish cases the disaster was not considered at all. None of the 160 claims for international protection were considered by the Court under the eligibility requirements for recognition of refugee status.

In contrast to the Swedish caseload, in some of the Austrian decisions it was assessed whether refugee status was to be granted in relation to a disaster. However, the Austrian Court usually argued that the harm feared would not qualify as persecution. Environmental factors or disasters played – if at all – only a marginal role in the assessment relating to refugee status. In cases disasters – which had been brought forward by the applicant or complainant and/or mentioned in the COI – were considered, **no detailed assessment** was made and these factors were **regarded as being not relevant for granting asylum.**[66]

[66] E.g. BVwG 23 January 2020, W163 2227315-1; 28 February 2020, W163 2227235-1; Asylum Court, 19 December 2011, C7 315 067-1/2008.

As already mentioned, in most of the Austrian cases where the Court considered a disaster, it was framed **as an economic issue**, e.g. as something leading to economic difficulties such as job loss or loan debts in a case where the business was destroyed by disaster, which the Courts regarded as being **not relevant** for granting asylum:[67] To begin with, the harm would **not qualify as persecution** since a general situation such as a 'desolate economic and social situation' in the context of a disaster could only lead to the granting of refugee status if it **deprived of any livelihood** (complete loss of livelihood or a 'massive threat to livelihood'; e.g. not the case if flood destroyed rented house). In this context, the BVwG[68] referred to jurisprudence of the VwGH.[69] In none of the decisions analysed the Court found a situation to fulfill these criteria. In addition, the Court argued, that it would lack a **connection to a persecution ground**.[70] In very few cases the complainants or their legal representatives argued that the complainant belonged to a particular social group because they were flood victims belonging to the social group of 'socially weak persons who were not able to rebuild their livelihoods on their own after the total destruction of their livelihoods by the flood' (Pakistan)[71] or 'the group of poor people affected by the drought and its consequences' (Somalia).[72] The Court did not accept such arguments.

In a few Austrian cases, COI showed that the environmental factor had an **impact on inter-community/ethnic tensions**: In some cases, Afghans from the Hazara ethnic group argued that they feared persecution by the Kuchi nomads (predominantly Pashtuns). COI confirms that there exists a long-standing conflict over access to pastureland intensified inter alia by the drought. However, the Court never saw a connection to a persecution ground – even if membership to a minority group (Hazara) was brought forward by the complainant.[73] Although some COI reports stated that the Kuchi-Hazara conflict had an ethnic dimension the Court held that the conflict over access to pastureland would affect every resident equally and no causal link to a Convention ground could be determined.[74]

In most Austrian cases a certain disaster (e.g. drought or flood) was assessed only in relation to the granting of subsidiary protection but not in relation to refugee status.

Thus, judicial decision makers in Austria and Sweden did not demonstrate either an awareness of judicial and academic work that identifies the kinds of circumstances in which claims may succeed, or an interest in seeking to develop interpretation in this direction.

5 Addressing the Protection Gap by granting Subsidiary Protection?

This chapter deals primarily with results from the Austrian case study as in the Swedish case study disasters played only a marginal role with regard to the granting of subsidiary protection status. In the

[67] E.g. Asylum Court 20 June 2012, E11 426996-1/2012; Asylum Court 12 January 2010, C9 231765-0/2008.
[68] E.g. BVwG 28 June 2017, W235 2117647-1; BVwG 19 November 2019, W222 2211765-1.
[69] A generally desolate economic and social situation cannot be used as a sufficient reason for granting asylum (e.g. VwGH 14 March 1995, 94/20/0798; VwGH 17 June 1993, 92/01/1081). Economic disadvantages can only be relevant if they deprive of any livelihood (see e.g. VwGH 9 May 1996, 95/20/0161; 30 April 1997, 95/01/0529, 8 September 1999, 98/01/0614).
[70] E.g. Asylum Court 24 July 2012, A5 422794-1/2011.
[71] Asylum Court 25 May 2012, E11 422862-1/2011.
[72] BVwG 14 February 2019, W240 2187484-1.
[73] Asylum Court 11 February 2013, B13 428146-1/2012; BVwG 29 March 2016, W163 1418143-1.
[74] BVwG 29 March 2016, W163 1418143-1.

Swedish case study, only eight of the 160 Swedish cases resulted in the granting of subsidiary protection. Even though a disaster was mentioned by claimants in these cases it was not considered by the court except in case UM22726-10 where a young woman from Haiti obtained subsidiary protection on the basis of a clearly established risk of sexual violence in camps in the aftermath of an earthquake in Haiti.

The limited number of appeals relating to Somalia, even in the year when a famine had been declared, needs to be understood in relation to the general approach Sweden took to claims for international protection for people from Somalia in 2011. Following a decision from the Migration Court of Appeal in February 2011 (MIG 2011:4), individuals who could establish that they came from southern or central Somalia were automatically eligible for international protection under Sweden's non-harmonized category relating to generalised violence (Chapter 4, section 2a Swedish Aliens Act). Consequently, in 2011, 63 per cent of all decisions on international protection for applicants from Somalia were positive. Notably, MIG 2011:4 focuses exclusively on the security situation in the country, making no reference to drought or famine. The approach may well have been different if the case had been decided later in the year, as famine was not officially declared until July 2011.

In the Austrian case study, disasters were mainly addressed in the context of subsidiary protection. They were considered as relevant factors in the real risk assessment (Art. 3 ECHR) and/or concerning the assessment of the availability and reasonableness of an internal protection alternative (IPA). As already mentioned above, in Austria the relevant threshold for granting subsidiary protection is mainly Art. 3 ECHR (Sec. 8 Austrian Asylum Act). Here the unique situation exists that no actor of serious harm in the country of origin is required arising from the incorrect transposition of the Qualification Directive in Austria.

5.1 Role of Disasters/Environmental Factors in the Real Risk Assessment of Austrian Decisions

The disasters taken into account in the real risk assessment (Art. 3 ECHR) in the Austrian decisions were droughts (Afghanistan, Somalia), floods (Afghanistan, India, Pakistan, Somalia), earthquake (Nepal), cyclone (Somalia) and locust plague (Somalia). It depended very much on the country of origin and – to a certain extent – also on the judge how and to what extent disasters were taken into account.

ROLE OF JURISPRUDENCE OF SUPREME COURTS

In Austria, the jurisprudence of the VwGH plays an important role in relation to the assessment according to Sec. 8 Asylum Act (subsidiary protection): According to the VwGH, the return to the country of origin can constitute a violation of Art. 3 ECHR if the person affected does **not have a livelihood** there, i.e. the **basic needs of human existence** of the particular individual person **cannot be met**. In this context, not a disaster per se but the impact on the **supply situation** is relevant:

> '*The removal of an alien to the country of origin can also constitute a violation of Art. 3 [ECHR] if the person concerned **does not have a livelihood there, i.e. the basic needs of human existence (in relation to the individual case) cannot be met.** According to the case law of the ECtHR, such a situation can only be assumed under **exceptional circumstances**. The **mere possibility** of a violation of Art. 3 [ECHR] caused by the circumstances of life is **not sufficient** (…). Rather, in order to substantiate an imminent violation of*

> *Art. 3 [ECHR], it is necessary to **explain in detail and specifically why such exceptional circumstances exist** ….'*[75]

The VwGH refers in this regard to the case law of the ECtHR and the **requirement of exceptionality** ('exceptional circumstances'). The mere possibility of a violation of Art. 3 ECHR caused by the circumstances of life is not sufficient. Rather it is necessary to explain in detail and specifically that such exceptional circumstances exist.[76] In general, the risk must be assessed in a **holistic** way, i.e. the '**personal situation'** in relation to the **general human rights situation** in the country of origin.[77] The VwGH emphasized that the mere reliance on a COI report which **reports a drought does not suffice** to conclude that there is a real risk of a violation of 3 ECHR resulting from the lack of livelihood in a specific city.[78] However, the **supply situation** there could be relevant – therefore country reports and findings of the Court are necessary in this regard.[79]

From the jurisprudence of the **VfGH** it follows that in the assessment relating to subsidiary protection under Sec. 8 Asylum Act, disasters and relevant COI have to be taken into account. In several decisions the VfGH found a **violation** of the complainant's constitutionally guaranteed **right to equal treatment of foreign nationals among themselves**[80] because **disasters** were **not taken into account** in the assessment relating to subsidiary protection or because the Court failed to investigate essential points: The VfGH ruled, for instance, that the **drought in Somalia** and **the poor supply situation and country reports** had to be taken into account in the assessment relating to subsidiary protection (Art. 3 ECHR).[81] In the context of the Pakistan flood disaster of July/August 2010, the VfGH stated that authorities were obliged to **assess the situation after a disaster profoundly** and to explain on which **sources** the authority's findings were based (e.g. the finding that a certain area was not affected by a disaster); to **use only up-to-date sources** of COI.[82] The VfGH criticized that while the file of the Asylum Court contained a map of Pakistan showing the flood zones and affected districts, the Asylum Court failed to address the situation of the complainant's presumed place of origin in any way (for instance by referring to this map and/or by conducting relevant research on the internet).[83] The VfGH also held in a very recent decision concerning a Somali woman and her minor child that **COI must always include child-specific information**. In this particular case, findings on the care and risk situation for minors in the context of the precarious security situation and drought situation were missing.[84]

[75] VwGH 25 May 2016, Ra 2016/19/0036, emphasis added. See also VwGH 17 September 2019, Ra 2019/18/0273; VwGH 25 April 2017, Ra 2017/01/0016; VwGH 18 October 2018, Ra 2017/19/0200; Similar VwGH 6 November 2009, 2008/19/0174; VwGH 21 August 2001, 2000/01/0443 ('… the exceptional circumstances repeatedly emphasized by the ECtHR, which must be present in order to make the removal of an alien … appear to be contrary to Art. 3 ECHR with regard to circumstances outside the responsibility of the state, require a particularly detailed description of the circumstances of the person concerned, both in the receiving country and in Austria.').

[76] E.g. VwGH 6 November 2009, 2008/19/0174. See also VwGH 21 November 2018, Ra 2018/01/0461; VwGH 25 April 2017, Ra 2016/01/0307, mwN; VwGH 25 May 2016 Ra 2016/19/0036; VwGH 7 September 2016, Ra 2015/19/0303; VwGH 8 September 2016, Ra 2016/20/0063; VwGH 23 March 2017, Ra 2016/20/0188.

[77] See e.g. VwGH 17 September 2019, Ra 2019/14/0160. Difficult living conditions are not sufficient.

[78] VwGH 23 October 2019, Ra 2019/19/0282.

[79] VwGH 23 October 2019, Ra 2019/19/0282.

[80] Art. I BVG zur Durchführung des internationalen Übereinkommens über die Beseitigung aller Formen rassischer Diskriminierung, BGBl 390/1973.

[81] VfGH 12 December 2019, E1170/2019.

[82] VfGH 19 September 2011, U256/11.

[83] VfGH 19 September 2011, U84/11.

[84] VfGH 9 June 2020, E 1954/2019-17, E 1964/2019-16.

Regarding the controversy concerning the requirement of an actor of serious harm in the country of origin and the respective case law of the Supreme Administrative Court and Constitutional Court see chapter 3.2.

ANALYSIS OF CASES OF BVWG

The analysed sample of decisions reveals that disasters, in particular droughts, floods, or an earthquake, were assessed by the court in relation to Art. 3 ECHR (Sec. 8 Asylum Act) on different levels: They were taken into consideration with regard to their impact on the **general** supply, economic and security **situation in the country of origin**. The impact of the disaster also played a role when the court assessed the specific **individual situation** of the complainant: For instance, the disaster had an impact on the family or social network support, the health situation, the job situation and ability to work, or wealth. As other relevant issues for the individual situation, factors such as gender, age, education, care obligations, language skills were assessed.

The Austrian caseload relating to the countries of origin Somalia and Afghanistan contained reflections regarding the **conflict-disaster nexus** (see also below). In several cases both conflict and disaster led to the granting of subsidiary protection. Austrian cases also discussed whether supply issues in a conflict context could establish the requisite human agency for subsidiary protection. Such reflections were necessary during the period of time when the VwGH held that subsidiary protection must only granted if the risk was associated with human agency (November 2018 until May 2019; for details see above chapter 3.2).[85] This had no equivalent in Swedish jurisprudence, where subsidiary protection was extremely rarely considered and the conflict-disaster nexus weakly developed (often a single sentence in Somali cases).

In the following main features of the Austrian caseload will be presented:

5.1.1 Afghanistan

With regard to sample decisions relating to the country of origin Afghanistan, disasters only played a **minor role** in the **real risk assessment**. In most cases, they were primarily considered when assessing whether an internal protection alternative (IPA) was available and reasonable (see below 5.2).

The factors taken into account most often in the real risk assessment of the sample decisions were the security situation, the possibility to secure a livelihood, the existence of a family and/or support network, the state of health of the applicant and the ability to work. In some cases, the Court took into account if the applicant grew up outside of Afghanistan or lived abroad for several years. In a few cases also the chances of the applicant to be supported by the Afghan Government were considered. Similarly, the probability of (financial) assistance by NGOs and international organizations (UNHCR, IOM) upon return to Afghanistan was taken into account in some decisions.

Drought was mentioned only in 13 decisions in the real risk assessment, floods only in three decisions (out of a sample of 200 decisions). In most of these cases, the Court evaluated the **impact of the disaster situation** (in particular on the supply situation) as **not severe enough** for creating a real risk of violating Art. 3 ECHR (no 'dramatic supply situation' regarding food or supply situation at least

[85] During the periof of 'controversy', in some decisions of the BVwG it was argued that the poor supply situation – also connected to the drought situation – and the lack of emergency mechanisms could be seen mainly as consequences of the armed conflict and therefore constitute a real risk of an Art. 3 ECHR violation and a 'serious harm' within the meaning of Art. 15 b EU Qualification Directive.

'fundamentally secure'[86]). Sometimes the legal reasoning referred in this context to COI – however, not always the content and exact source were clear.[87] The Court referred to increasing poverty also due to the drought, but found that given the personal circumstances of the specific complainant (education, professional experience and family support possibilities) and help from organizations and government was not deprived of basic livelihood.[88] Several decisions stated that the reference to a general drought situation in the provinces Herat and Balkh leading to the collapse of agriculture in the UNHCR guidelines was 'too vague' to create a real risk within the meaning of Art. 3 ECHR.[89]

Only in **two cases** relating to families with children the impact of the drought was regarded as **severe enough** in order to qualify for subsidiary protection status: One case concerned a woman with seven children, one of whom was 4.5 years old and another child was diagnosed with epilepsy. In the legal reasoning the Court referred to malnourishment of children due to drought.[90] In the second case subsidiary protection was granted to a man with health problems and his two minor daughters given the difficult economic situation 'especially due to the drought' in the cities of Kabul, Herat or Mazar-e-Sharif, combined with the lack of a support network in Afghanistan.[91]

5.1.2 Somalia

Disasters – in most cases droughts – were an issue in all decisions referring to Somalian complainants selected for analysis and even played an **important role in the real risk assessment** in many of them. However, the spectrum of judicial scrutiny concerning the disaster situation in the legal reasoning ranged from short paragraphs or sentences on the impact of the disaster (mostly of the drought) on the supply situation,[92] to detailed, in-depth and extensive analyses of the temporal development of the disaster and its various impacts.[93] Almost all Somalia decisions were substantiated with **detailed and extensive COI** which were often integrated in the legal reasonings. Sometimes reference to the important IPC (Integrated Food Security Phase Classification) levels was made.

The disasters taken into account were drought, rain and floods, a cyclone and locust plague:

DROUGHT

Impact on the supply situation

The **disaster** discussed **most frequently** in the real risk assessment of Somalian cases was the **drought**. The drought was primarily thematised in terms of its impact on the supply situation and the different consequences thereof in addition to and in interrelation with other aspects of the **general situation**

[86] BVwG 23 November 2018, W252 2157090-1. In this decision, while the Court noticed major problems of the water supply agency in the province and that the realisation of basic social and economic needs would be only possible to a very limited extent due to the drought, it found the supply to be at least fundamentally secure.
[87] E.g. BVwG 26 April 2019, W155 2173071-1. Similarly, in another decision the Court reasoned that while the situation, especially in Herat, was tense due to the number of IDPs and the drought, sources – which were, however, not mentioned in the decision – would not indicate that basic supply was generally no longer guaranteed or that the health care system had collapsed (BVwG 9 September 2019, W171 2158499-1).
[88] BVwG 21 November 2018, W231 2130465-1.
[89] See e.g. BVwG 20 December 2019, W156 2222474-1.
[90] BVwG 14 June 2018, W264 2167964-1.
[91] BVwG 19 September 2019, W272 2198119-1.
[92] E.g. BVwG 20 January 2017, W159 2137661-1; BVwG 11 October 2018, W183 2186001-1; BVwG 6 March 2019, W211 214635-1.
[93] BVwG 22 March 2017, W236 2118484-1; BVwG 7 September 2018, W237 2175112-1; BVwG 10 September 2018, W237 2150380-1.

in the country of origin, such as the security or the economic situation. For example, in several decisions the 'major importance' of 'the persistently poor supply situation in the entire country, which can be attributed to periodically recurring periods of drought with hunger crises, to the extremely inadequate health care as well as inadequate access to clean drinking water and the lack of a functioning sewage system' was emphasized.[94] The impact of the drought was also discussed regarding the **specific individual circumstances** of the complainant. Concerning the individual situation, factors such as the existence of family and social networks in the country of origin, the family status, gender, age, clan membership, profession, education, or wealth played an important role.

There were decisions in the sample where **personal circumstances** in the light of **the tense supply situation** reached the threshold of a real risk of violating Art. 3 ECHR since the livelihood of the complainant was not regarded to be secured. Thus, the security situation was not important in the legal reasoning.[95]

Conflict-Disaster Nexus

In many cases, subsidiary protection was granted due to personal circumstances in light of a **difficult security and supply situation due to the drought** (**conflict-disaster nexus**). The fragile security situation was evaluated in addition to the tense supply situation, using text modules such as: 'In addition to this still precarious security situation in the complainant's region of origin, the currently extremely tense general basic supply situation (drought, food shortage) must also be included in the assessment.' [96] In some cases, the disaster and security situation was discussed as being interdependent. In several decisions, it was noted that the drought was a factor in the fighting or that the precarious security situation led to difficulties concerning the supply of persons affected by the drought.[97] In some decisions it was explicitly mentioned that conflict parties purposively hampered humanitarian aid.[98]

Individual circumstances

The Court stated in several decisions that not 'all people in Somalia are equally affected by the drought and the food shortage and it must be reviewed in each individual case whether the asylum seeker is affected'.[99] Personal circumstances taken into account in most cases was the **availability of family support in Somalia**.[100] In one case it was emphasised that 'the complainant […] does not have a reliable family network' and that 'the food shortage, which has become dramatic due to the persistent drought, is also affecting the complainant's region of origin, so that if the complainant were to return there would be a serious risk that he would find himself in a hopeless situation.'[101] There were many

[94] E.g. BVwG 10 June 2016, W189 2119453-1.
[95] E.g. BVwG 16 February 2018, W211 2172503-1. This decision which referred in the legal reasoning to reports on the drought disaster in Somalia (e.g. FSNAU Technical Release, OCHA Humanitarian Bulletin) concluded that '[i]n view of the still documented precarious supply situation and the non-existing support options by family members, … the complaining party would not be able to earn a subsistence living with the necessary probability in the event of a return …'. The Court stressed that there was 'no need to address other reasons for granting the status of beneficiary of subsidiary protection, because the notorious crisis in provision already leads to this'.
[96] E.g. BVwG 10 September 2018, W103 2155449-1.
[97] BVwG 26 February 2018, W236 2166107-1.
[98] BVwG 25 February 2019, W252 2160243-1.
[99] E.g. BVwG 16 April 2018, W251 2163052-1; BVwG 17 April 2018, W251 2163775-1; BVwG 15 May 2018, W251 2158856-2.
[100] BVwG 19 October 2017, W236 2133329-1; BVwG 16 March 2017, W234 2137556-1; BVwG 30 October 2017, W234 2147484-1; BVwG 6 November 2017, W196 2138677-1; BVwG 7 February 2018, W111 2134519-1; BVwG 26 February 2018, W236 2166107-1; BVwG 6 December 2019, W196 2145451-1.
[101] BVwG 12 April 2018, W183 2174515-1.

similar cases, in which the BVwG argued – referring to the tense supply situation due to the drought – that the complainant would not find a stable family network or other social network in Somalia upon return who could support him or her to secure basic needs. In several cases it was also discussed in what way the family in the country of origin was affected by the disaster and therefore (un)able to support the complainant.[102] But there were also several decisions dismissing the appeal, which argued that the family of the complainant could be assumed to support the returnee.[103]

Another social support system frequently discussed in Somalian decisions was **clan membership:** It was considered whether the complainant was a member of a minority or majority clan,[104] whether the complainant might face discrimination with regard to access to livelihood[105] or work[106] due to his or her clan membership and whether the clan was able to support the returnee in the context of the tense supply situation.[107]

The Court differentiated between the affectedness by the drought and famine of different population groups, such as the **inhabitants of rural areas and cities, in particular farmers and nomads**:[108] It argued that a complainant from a city was 'not likely to be significantly affected by the drought and famine' since there were 'no reports that the famine has also reached the cities' so that the complainant could be expected to return to the capital of Somaliland.[109] Subsidiary protection was granted for instance because the complainant's family lived exclusively from farming and was therefore particularly affected by the prevailing drought. The mother could not be expected to sustain herself and the three siblings as well as the complainant during the drought disaster by farming on small fields, especially since the family was not wealthy and could not afford to send the complainant to school: '[d]ue to the prevailing and established drought disaster and the very precarious supply situation, especially in southern and central Somalia, it must be assumed that the complainant's life and physical integrity would be threatened if he were to return to his home state of Somalia, ….'[110] In another case, subsidiary protection was granted inter alia because of the complainant's membership in a minority clan and – being a farmer growing vegetables – his dependency from farming. The Court saw a real risk of an Art. 3 violation '[i]f one takes into account that in southern / central Somalia there is a precarious security situation as well as a generally poor basic supply situation (drought, food shortage), which hits the complainant particularly hard as a member of a minority clan and farmer'.[111] In yet another decision it was taken into account that the complainant's family had also left the home region and the farm and had had to move to a camp, as 'the last harvest from the farm of the family

[102] E.g. BVwG 27 September 2019 W196 2164577-1; BVwG 4 July 2017, W252 2137673-1.
[103] BVwG 6 September 2017, W189 2147837-1.
[104] BVwG 15 May 2018, W251 2158856-2; BVwG 14 February 2019, W240 2187484-1; BVwG 21 February 2020, W215 2168869-1; BVwG 15 May 2017, W159 2135073-1.
[105] BVwG 17 May 2017, W159 2124047-1.
[106] BVwG 17 May 2017, W149 1416847-1; BVwG 12 January 2017, W236 2125435-1.
[107] BVwG 17 May 2017, W252 2145398-1; BVwG 15 May 2018, W251 2158856-2.
[108] BVwG 24 July 2017, W189 2135074-1; BVwG 4 July 2017, W252 2137673-1; BVwG 11 July 2017, W251 1430100-3; BVwG 26 July 2017, W252 2145185-1; BVwG 20 February 2018, W196 2129809-2; BVwG 16 October 2017, W234 2147288-1; BVwG 13 February 2019, W189 2167630-1.
[109] BVwG 17 August 2016, W149 1416847-1. The Court concluded that the complaint would therefore 'find[.] an acceptable general security situation and a social network in the event of his return there, so that there is no real risk of inhuman treatment within the meaning of Art. 3 ECHR due to a lack of livelihood or as a returnee to a main combat zone of the civil war.'
[110] BVwG 7 June 2017, W251 2137996-1.
[111] BVwG 16 July 2017, W159 2124047-1.

practically failed' and that in case of a return of the complainant to Somalia, it could not be assumed, that he would be supported by his family with food.[112]

The gender of the complainant also played a role in assessing whether the person concerned might be specifically affected by the disaster.[113] In many cases, single, young, healthy men without duties of care were assumed not to belong to a particular vulnerable group where it could be 'recognized that the tense supply situation will affect his person to an extent that would put him in a situation that could be described as inhuman and degrading'.[114] Other factors assessed in relation to personal circumstances were, for example, the level of education – people with poorer education were mostly assumed to face particular challenges in the context of the difficult supply situation;[115] coming from a wealthy or poor background;[116] being in danger of being internally displaced in case of return as IDPs are assessed as being particularly affected by the impact of the drought;[117] health – complainants with health issues were assumed to be in particular danger due to the precarious supply situation;[118] age,[119] ability to work or absence from Somalia.[120]

DROUGHT INTERRUPTED BY RAINFALLS AND FLOODS

From mid-2018 onwards, the Somalia decisions reflected a change in the weather conditions,[121] even though this change was assessed differently by the judges. Some followed a cautious approach, for instance when the further course of the drought situation was regarded as uncertain since the impacts of the rainy season could not be assessed yet and ruled out with the necessary certainty that food shortages could lead to an existence threatening effect on the complainant and his family.[122] One decision of September 2018 stated that '[a]lthough the situation is currently expected to ease … this has not yet occurred' and that the drought situation would continue, that the fear of famine would persist and the basic supply of food would not be guaranteed. Referring to COI the Court stated that the complainant's region of origin was massively affected by the currently prevailing drought and the accompanying food shortage. Based on that the Court stated that it could not 'assume with the necessary certainty that the complainant's family would be able to take him back without further ado or provide him with sufficient support in the event of his return.'[123]

[112] BVwG 8 September 2017, W 211 2144925-1.
[113] BVwG 4 September 2018, W159 2183569-1; BVwG 26 February 2018, W236 2166107-1; BVwG 2 July 2018, W111 2150759-1; BVwG 17 January 2019, W237 2135618-1; BVwG 2 August 2018, W196 2139782-1; BVwG 7 October 2016, W221 2109554-1; BVwG 18 November 2015, W105 1403806-1; BVwG 6 October 2016, W211 2109416-1; BVwG 8 October 2019, W256 2191557-1.
[114] BVwG 30 January 2020, W215 2130159-1.
[115] BVwG 28 February 2018, W196 2147476-1; BVwG 22 January 2019, W111 2164163-1; BVwG 16 March 2017, W234 2137556-1 (n 105); BVwG 24 October 2017, W236 2138621-1.
[116] BVwG 15 November 2020, W215 2131347-1; BVwG 23 April 2018, W196 2148887-1; BVwG 19 September 2019, W215 2157824-1.
[117] BVwG 12 December 2018, W111 2165566-1; BVwG 19 December 2018, W251 2181680-1; BVwG 22 January 2019, W237 2160963-1; BVwG 17 November 2019, W237 2135618-1.
[118] BVwG 3 June 2015, W149 1432367-1; BVwG 13 October 2017, W159 2139776-1; BVwG 3 January 2018, W103 2148233-1; BVwG 19 March 2020, W211 2211662-1; BVwG 3 January 2020, W211 2199621-1; BVwG 30 January 2020, W215 2130159-1.
[119] BVwG 14 November 2018, W252 2149983-1; BVwG 21 November 2018, W161 2179942-1; BVwG 10 January 2019, W111 2133977-2; BVwG 21 February 2020, W215 2168869-1.
[120] BVwG 17 November 2017, W235 2127415-1; BVwG 9 April 2018, W235 2116878-1; BVwG 26 July 2018 W196 2134007-1; BVwG 27 September 2019, W196 2164577-1.
[121] BVwG 2 July 2018, W111 2150759-1; BVwG 16 July 2018, W159 2133954-1; BVwG 7 September 2018, W237 2175112-1.
[122] BVwG 10 September 2018, W103 21554499-1.
[123] BVwG 10 September 2018, W103 2155449-1.

Whereas until mid-2018 most complainants from Somalia were successful with their appeals, afterwards most decisions reflected the **easing of the drought and supply situation through the rainfall of spring 2018** constituting one reason for an increase in the dismissal of appeals. Some decisions contained a very detailed elaboration on the consequences of the rain for returnees (by reference to IPC levels). They argued that due to the rain and subsequent easing of the supply situation, the humanitarian situation in Somalia was not so dire any longer that *every* returnee would be at real risk of a violation of Art. 3 ECHR (but that the tense food supply, security and humanitarian situation in large parts of Somalia could in individual cases stand in the way of return).[124] Also the different impact of the rainfall on different regions was discussed in the analysed decisions.[125]

Some decisions included in their assessment the **new challenges of the rain** in form of **floods** in some regions. Recurring text modules in legal reasonings addressed the impact of the floods of autumn 2019 on inhabitants and returnees and the response by humanitarian actors (by referring to COI). It was assessed whether complainants came from the areas concerned and thus affected by the impact of the flooding in case of return. In one decision the legal reasoning mentioned that '[a]fter last year's devastating drought disaster, Somalia's two main rivers have now burst their banks and caused the most severe flooding' and that '[t]his general basic supply situation (drought, post-flood situation and food shortage) must also be included in the assessment'. The Court concluded that '[a]gainst this background, too, the complainant would face a real risk of inhuman treatment within the meaning of Article 3 of the ECHR'.[126]

However, already in March 2020 decisions reflected the recurrence of the drought with its impact on the food supply situation. The Court reasoned in one decision – after having referred to COI on the drought and its impact – that '[w]hile the most recent information reports an improvement in grain harvest and livestock numbers following a good rainy season, 1.3 million people are still affected by supply shortages and are classified as level IPC 3', that '[t]he risk of damage due to the locust infestation remains high', that '[d]epending on the failure of the next Gu season or the development of the locust plague, there is also a threat of the situation deteriorating again'. The Court argued that the supply situation in Somalia and Somaliland remained volatile and a sustainable improvement of the food supply in the region could not yet be assumed. The Court concluded that 'the absolute numbers of people at risk of food insecurity in his home region do not allow the assumption that the complainant would not be specifically affected by this supply problem'[127] – this despite the fact the complainant belonged to a majority clan and had family members in his region of origin.[128]

LOCUST PLAGUE AND CYCLONE

In 2020, the locust plague constituted a new environmental factor in the real risk assessments of four decisions. In two decisions of March 2020, subsidiary protection status was granted. Both decisions mentioned the locust plague together with the drought situation, the rain and the poor supply situation. The locust plague was seen as an additional problematic factor that might lead to a

[124] BVwG 7 September 2018, W237 2175112-1..

[125] BVwG 24 January 2019, W215 2013294-2. The Court argued that the complainant's region of origin was particularly affected by the positive consequences of the rain on the supply situation.

[126] BVwG 10 September 2018, W240 2189309-1.

[127] Reference to figures according to which in the complainant's region of origin out of a population of 1.32 million, 322,000 people would be classified in IPC level 2 and 135,000 in IPC level 3, and that these figures would be expected to increase by June 2020.

[128] BVwG 18 March 2020, W211 2217305-1.

deterioration of the supply situation[129] and, thus, add to a real risk of a violation of Art. 3 ECHR.[130] A decision dismissing the appeal stated that while the supply situation would be 'additionally strained by the displacements in the context of the current flood situation ….', the '[t]he extent to which the locust plague will have a concrete impact on food production can only be vaguely predicted; however, according to the findings, the collapse of food production is not expected'.[131]

There was also one reference to a cyclone in the real risk assessment in a decision of December 2019. However, the Court stated that the complainant came from a location not affected by the cyclone.[132]

5.1.3 Pakistan, Nepal and India

With regard to sample decisions relating to the country of origin **Pakistan** (most decisions rendered in 2012 and 2013 by the Asylum Court; no protection status granted), the flood disaster played a role only as a factor with regard to the general situation in the country of origin. However, the disaster situation was not evaluated as being a relevant factor for creating a real risk of violating Art. 3 ECHR since the decisions assumed that the places of origin were not or only slightly affected by the disaster. While it was always argued that the home city/region of the complainant was not affected by the flood disaster of 2010, this was **poorly backed up with COI**. It was the VfGH which clarified in 2011 that authorities were obliged to use up to date COI in this context.

With regard to the 14 **Nepal** cases, several decisions explicitly referred to the earthquake of 2015 in the real risk-assessment. While most of the decisions rendered in 2015 mentioned the earthquake in relation to the general situation in Nepal as a barrier to return and as a factor impacting on family support network and on the capacity of the state to support, in subsequent decisions the earthquake was not mentioned as a reason *per se* not to return anymore.[133] Instead, the earthquake was mentioned – if at all – in the context of the availability of a supporting family network.

Concerning the few cases from India, disaster plays only a minor role in the real risk-assessment.

5.2 Role of Disasters/Environmental Factors in the Assessment of an Internal Protection Alternative (IPA)

Asylum and subsidiary protection status are not to be granted if an 'internal flight alternative' (Sec. 11 Asylum Act) is available and reasonable. The two prerequisites for the assumption of an internal flight alternative are that 1) the asylum seeker can be guaranteed protection (no well-founded fear of persecution; conditions for granting subsidiary protection not met) in a part of his country of origin and 2) that he or she can reasonably be expected to stay there.[134]

[129] BVwG 18 March 2020, W211 2217305-1; BVwG 19 March 2020, W211 2211662-1.
[130] BVwG 26 May 2020, W159 2117946-2.
[131] BVwG 16 June 2020, W237 2170712-1.
[132] BVwG 5 December 2019, W215 2147286-1.
[133] E.g. BVwG 3 August 2017, W175 2015425-1. BVwG 13 February 2019, W169 2214275-1: 'The general situation alone does not provide sufficient indications that it would be sufficiently likely that the complainant would be threatened within the meaning of Sec. 8 of the Asylum Act in the event of a return.'
[134] Art. 8 EU Qualification Directive allows Member States to 'determine that an applicant is not in need of international protection' if the person has in a part of the country of origin no well-founded fear of persecution or is not at real risk of serious harm or has access to protection and and the area is safely accessible and he or she can reasonably be expected to settle there. According to Art. 8(2), in the assessment Member States must 'have regard to the general circumstances

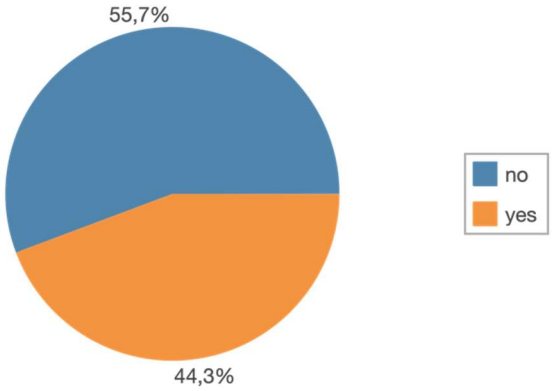
According to the jurisprudence of the VfGH authorities are obliged to assess the situation after a disaster profoundly and to clarify whether there is a possibility of internal relocation. In this context it must be explained on which sources the authority's findings are based (e.g. the finding that a certain area was not affected by a disaster); only up-to-date sources of information regarding the country of origin must be used.[135] In relation to the availability of an IPA, authorities must clarify whether the complainant has the possibility of settling in parts not affected by the disaster only based on a well-founded assessment of the situation.[136]

According to the VwGH, for a reasonable IPA, the absence of torture or inhuman or degrading treatment at the relocation site is not sufficient. Rather, it must be possible for the person to gain a foothold in the area of the IPA after any initial difficulties and to lead a life there without undue hardship, as other compatriots can do. Whether this is the case requires an **assessment of the general circumstances** in the country of origin and the **personal circumstances** of the asylum seeker. Ultimately, this is a decision in the individual case, which must be made on the basis of sufficient findings on the expected situation of the asylum seeker in the area in question as well as his safe and legal accessibility.[137]

Analysis of BVwG jurisprudence (sample)

In 44.3 percent of the analysed Austrian decisions, disaster was mentioned or discussed as a factor when assessing the option of an IPA. However, the reasoning differed considerably depending on the country of origin and judge.

FIGURE 6 DISASTER IS MENTIONED IN IPA ASSESSMENT



In 81 percent of decisions concerning the country of origin **Afghanistan** the drought situation was mentioned or discussed in the assessment whether an IPA was available in the cities Mazar-e-Sharif, Herat or Kabul. In most of these decisions the Court saw in the return to the home region a real risk of violating Art. 3 ECHR due to the dangerous security situation, but an IPA to one of the Afghan cities mentioned above was regarded as available and reasonable. It was argued, for instance, that the drought was affecting the basic supply of goods in Mazar-e Sharif and Herat, but '*not to an extent that would make it unreasonable or even impossible … to rebuild his livelihood there.*'[138] In some cases, the Court

prevailing in that part of the country and to the personal circumstances of the applicant'; in this context Member States must obtain ‚precise and up-to-date information … from relevant sources, such as the United Nations High Commissioner for Refugees and the European Asylum Support Office'.

[135] VfGH 19 September 2011, U256/11, para. 1.2.2.

[136] VfGH 19 September 2011, U84/11. In view of the exceptional situation in Pakistan as a result of the flood disaster of July/August 2010, it would not be sufficient for the Asylum Court to content itself with referring to contradictory statements made by the complainant about his place of origin and to merely refer in general terms to the fact that the complainant 'according to his own statements also has relatives in other parts of Pakistan, for example a cousin in the major city of Karachi, which was or is not affected by the floods'.

[137] VwGH 23 January 2018, Ra 2018/18/0001-5. IPA in Kabul was at stake. With reference to VwGH 8 August 2017, Ra 2017/19/0118, with further references.

[138] BVwG 28 December 2018, W271 2170952-1.

acknowledged that the drought situation was 'tense' but not severe enough. From 2019 the judges held in some cases that rainfalls had ended the drought.

Concerning decisions referring to complainants from **Somalia**, a disaster was mentioned or discussed in the context of an IPA in 35.8 percent of the analysed sample cases. Only in very few decisions of these decisions, a disaster (drought, flood, locust plague) was mentioned as (almost) the exclusive factor in the IPA assessment. For example, the following quote refers to drought and floods:

> *'An internal protection alternative cannot be expected because of the precarious security situation that still prevails in Somalia and the poor food supply across the country in connection with the drought and meanwhile floods, furthermore, the complainant has never lived in Mogadishu (where the supply situation would be a little better) and has no social or family safety net there that would be able to support him.'*[139]

Disasters and environmental factors such as droughts, floods, rainfalls, earthquakes, 'natural events' or also locust plagues were mostly mentioned in addition or in relation to other factors in IPA assessments. The most frequent factors were the impact of the disaster on the supply situation in the relocation site, the (in)availability of support by family members or other relatives and social contacts, clan membership, the security situation (violence, fighting, terrorist attacks etc.), health situation and health provision, accessibility of the region where the claimant might be relocated, the situation of IDPs, discrimination, minority status, gender, family status, age, employability, local knowledge, school education and other individual qualifications and characteristics were increasingly addressed in the assessment of the IPA. In particular, concerning young, healthy, male complainants, various IPA assessments argue that the disaster situation does not have an impact on everyone in the same way. In this context, the decisions repeatedly refer to the phrase of a 'healthy young man' who can be expected to relocate elsewhere:

> '*The complainant is from XXXX in Galguduud province, which …) is also severely affected by the poor supply situation due to the drought situation. (…) the complainant can be reasonably referred to relocation to other parts of Somalia, specifically to the capital Mogadishu, for the following reasons, according to the above-mentioned country findings on Mogadishu in conjunction with the personal circumstances of life as described by the complainant himself: The complainant is an adult, young, healthy man who had already spent four months in Mogadishu before leaving the country. (…) Nor have any facts emerged according to which it would not be possible for the healthy and able-bodied complainant to build up a livelihood in the event of his return.*'[140]

Thus, the assessment of more 'contextual' factors or general conditions in the country of origin as well as the individual characteristics and situations and their relevance in the context of the disaster for the individual case was also evaluated in the IPA assessment.

Disasters did not play a role in relation to assessment of IPA in cases referring to complainants from **India** or **Nepal**.

In **Pakistan** cases, the existence of an IPA was used as additional argument after having already argued that no real risk existed in case of return because the home province was not or only slightly affected by the disaster (flood). The relevance and reasonableness of the new relocation site – if it was mentioned – was not assessed in detail. In some cases, after stating that the possibility of relocation

[139] BVwG 21 August 2018, W159 2166202-1.
[140] BVwG 24 April 2019, W221 2191550-1.

existed, a possible relocation place affected less by the flooding – sometimes a city, sometimes only a region – was mentioned.

> *'Taking into account his individual situation (a healthy young man with a social network through his family members in Pakistan), it is not evident why it should not be possible and reasonable for the complainant to secure his livelihood in Pakistan, even in other places or in other parts of Pakistan, (…).'*[141]

6 Addressing the Protection Gap by Humanitarian Forms of Protection?

In contrast to the Austrian situation, in Sweden some claims for international protection in the context of disasters and climate change were considered in the legal category of compelling and compassionate circumstances (5 kap. 6 §) by judicial decision-makers in Sweden.[142] As noted earlier, the very limited engagement with this provision in claims based on adverse environmental conditions in the country of origin is surprising, considering one of the elements is precisely conditions in the home country (in addition to health grounds and strength of ties to Sweden). As noted earlier, however, disasters and other environmental factors do not feature in preparatory works underpinning this provision either.

In Austria, a ruling of the VwGH of 2017 states that when weighing the interests according to Art. 8 ECHR, the **question of the possibilities to create a livelihood** in the case of a return to the country of origin must also be taken into account under the aspect of 'ties to the country of origin' (Sec. 9(2) item 5 BFA-VG 2014).[143] With regard to the country of origin Somalia, the VwGH held in 2017 that there was a 'notorious drought catastrophe in Somalia and the prevailing food shortage there'[144] and the authorities or the BVwG had to **assess the consequences thereof** with regard to the specific situation of the applicant. The recent case law by the VwGH (2021) indicates that **difficulties** a returning person would encounter **in rebuilding an existence in the home country** (and which could be influenced by environmental factors) **should not play a decisive role** weighing up the interests pursuant to Art. 8 ECHR:

> *'It is true that, according to the case law of the Supreme Administrative Court, the question of whether the foreign national can create a livelihood for himself/herself by returning to his/her country of origin can be of importance in the weighing of interests. However, such questions are **not relevant in every constellation** within the framework of the overall assessment to be made. As the Supreme Administrative Court has expressed in several cases … **difficulties that the foreign national***

[141] Asylum Court 28 January 2013, E3 428327-1/2012.

[142] In UM8443-16, Court considered the 2015 earthquake in Nepal but concluded that, despite it creating a difficult situation for people, 'some time has passed since the earthquake happened, and the Migration Court considers that neither the earthquake nor the current situation in the country are such as they would constitute such particularly compassionate circumstances that he should be permitted to stay in Sweden.
In UM6424-17, an unaccompanied minor from an unstated country sought asylum based on fear of authorities in the home country. Earthquake happened when claimant was in Sweden. Expressly relied upon by claimant. Rejected under 4 kap 2a§ (even though suspended by temporary law) as well as 5 kap 6§, with some reasoning. Then considers 5 kap. 6, noting no health problems, and no noteworthy adaptation to life in Sweden. Then, with regard to the situation in the home country, notes that the Court does not consider that 'the situation in the home country and the earthquake that took place there constitutes particularly compelling circumstances.'

[143] VwGH 31 August 2017, Ra 2016/21/0296.

[144] VwGH 31 August 2017, Ra 2016/21/0296; VwGH 21 December 2017, Ra 2017/21/0135.

> ***will encounter in rebuilding an existence in the home country are not capable of decisively strengthening the interest in remaining in Austria****, but are rather to be accepted …in the public interest of an orderly alien system …. It is in line with the case law of the Supreme Administrative Court that the* ***question of whether the foreign national can create a livelihood for himself upon return to his country of origin can also be of importance in the context of the weighing of interests from the point of view of the ties to the country of origin*** *(Sec. 9(2) item 5 BFA-VG)…'.*[145]

In **none of the analysed decisions** of the Austrian sample **environmental factors or disasters were considered** by the appellate court **when weighing up the interests pursuant to Art. 8 ECHR**. When humanitarian protection was granted based on Sec. 55 Asylum Act, disasters or environmental factors were never mentioned as a relevant factor in the legal assessment. It is striking that also in those cases where the judge had mentioned a 'tense situation' due to the drought in Afghanistan in the context of the IPA assessment, such environmental factors and disasters were never taken into account in the legal assessment for humanitarian protection.

7 Addressing the Protection Gap by Other Means

7.1 Sweden: International Protection, 'Environmental Disaster'

Until summer 2021, Sweden had legislation providing for international protection in the context of disaster displacement.

Of the 160 Swedish cases analysed, 37 applied the criteria for the grant of a residence permit to a person 'otherwise in need of international protection' owing to an 'environmental disaster' under 4 kap. 2a §. This number was surprising given the fact that 140 claims expressly relied on a fear of disaster-related harm to support claims for international protection, and in all 160 cases disaster was at least of more than peripheral relevance to the claim. In those cases where the law was applied, the most detailed assessment amounted to no more than consideration of the eligibility criteria with reference to the preparatory works, and perhaps some brief reflections on general country of origin information. The decisions often reflected no application of the law to the specific facts of the individual case, and frequently lacked reasoning to support the conclusions reached.

None of the 160 claims for international protection were granted protection under 4 kap. 2a§. Two of the 37 appeals to apply the criteria of 4 kap. 2a§ resulted in recognition of eligibility for the grant of a residence permit on other grounds. In UM5901-11, discussed above, the claimant established eligibility for subsidiary protection under 4 kap. 2§. In UM30-17 the claimant established eligibility to remain in Sweden on the basis of her family relationship, which had developed during the period when she had been seeking international protection.

[145] VwGH 7 June 2021, Ra 2021/18/0167, emphasis added.

7.2 Other Forms

Forty-one claims of the Swedish cases concerned exclusively immigration law categories, and a further six (counted as international protection claims) also included an immigration law component. Spouse, dependent relative, parent, student, and employment categories were reflected amongst these cases.

One claim for international protection resulted in an appeal outcome leading to the grant of a residence permit on other grounds. UM30-17 reflects a situation where an **immigration category**, rather than an international protection category, was relied upon in order to secure the right to remain in Sweden in the context of a disaster. The case is highly significant, as it includes consideration of the risk of gender-based violence in a disaster displacement camp setting and application of international refugee and human rights law standards in that context. It also applies 4 kap. 2a § in a very cursory way, as well as 5:6. Ultimately status secured on the basis of **family ties** to a child. The Court only considers the disaster as the backdrop to the case, rather than considering the risk of exposure to disaster-related harm on return.

8 CONCLUSIONS

The research project **ClimMobil – Judicial and policy responses to climate change-related mobility in the European Union with a focus on Austria and Sweden** showed that there is already a non-negligible number of people seek to enter and/or remain in European countries where disaster plays a role. Against this backdrop the question whether and how European countries address the so-called protection gap is gaining in importance. In order to gain insight on how the protection gap is addressed in the two case study countries Austria and in Sweden, not only the **relevant national legal framework** was reviewed but also **judicial decisions concerning application for international and humanitarian forms of protection containing disaster-related keywords were identified and analysed**. The analysis showed that the situation in the two case study countries is very different, even potentially reflecting two extremes on a spectrum. The Austrian cases reflected a far deeper engagement by the judiciary with the potential relevance of disasters to claims for international protection than the Swedish cases, notwithstanding the fact that Sweden had introduced a non-harmonized category of international protection based on environmental disasters.

The differences relate to the distinctive features of the national legal frameworks, but also to how the legal frameworks are interpreted and applied as well the level of judicial engagement proprio motu, the use of COI and the outcome of the juridical process.

Distinctive features of the national legal frameworks

Although both countries **transposed the EU Qualification Directive** and have provisions on international protection in their national laws, the following differences were relevant:

- Sweden had introduced a non-harmonised category of international protection based on environmental disaster until 2021**,** which was however hardly applied in practice.
- Austria's transposition regarding subsidiary protection does not conform to the EU Qualification Directive. In Austria, there is no actor of whom serious harm emanates necessary as would be

required by the jurisprudence of the CJEU on Art. 15 Qualification Directive. Subsidiary protection is granted if a 'real risk' of a violation of Arts. 2 or 3 ECHR exists.

- The Swedish case study also considered migratory categories and visa provisions, e. g. family reunification, student visa, humanitarian forms of protection.

Interpretation and application of legal frameworks

Important differences could also be discerned concerning the **legal practice** of addressing disaster in relation to **subsidiary protection and non-refoulement**:

- Judges in Austrian courts engaged – at least in relation to certain countries of origin – far more closely than their Swedish counterparts with the question of how subsidiary protection applies in claims for international protection in the context of disasters.
- Although few Austrian decisions actively address eligibility for refugee status (and then typically reached the conclusion that environmentally-related harm did not amount to persecution), the caseload contains – at least in relation to the country of origin Somalia – rich legal reasoning and disaster-relevant country of origin information relating to eligibility for subsidiary protection, and protection from *refoulement*.
- In contrast to this rich level of engagement, the Swedish caseload does not reflect any consideration of eligibility for refugee status, and only one case contained more than cursory consideration of eligibility for subsidiary protection.

Level of judicial engagement proprio motu

Austrian judges proactively considered the relevance of environmental pressures in individual cases, at times recognizing a procedural obligation to do so. Consequently, *proprio motu* consideration of environmental pressures represented 73 per cent of the Austrian case load, with only 37 per cent of cases involving disaster-related claims expressly articulated by the applicant. In contrast, only a handful of the Swedish cases involved judges examining environmental factors on their own initiative. The vast majority of relevant claims within the Swedish caseload involved applicants expressly relying on disasters or other environmental pressures as part of their application to enter and/or remain in Sweden.

Use of country of origin information

Country of origin information (COI) was almost always included in the Austrian decisions. In particular, in many Somalian cases, long and comprehensive text modules addressed the impact of the disaster on the humanitarian situation, health situation, and parts of the population in situations of particular vulnerability. In many cases concerning claims from Somalia, judges provided an often detailed summary of COI material in the section on legal reasoning before addressing specifically how the applicant might be affected by the environmental factors/disaster. In contrast, specific COI was rarely referred to in the Swedish caseload, with decisions at best making general reference to 'the country information'.

Outcomes

In Austria, subsidiary protection was granted in 42 per cent of the cases when disaster was explicitly mentioned by the applicant, even though protection was not necessarily granted because of the disaster claim. In Sweden, of the 140 international protection claims expressly relying on disaster, only 7 claims (5 per cent) were granted subsidiary protection, and only one of these decisions was based

specifically on post-disaster conditions, with the remainder firmly grounded in an assessment of conflict-related risks.

Overall, 91 per cent of all 181 Swedish appeals were dismissed. In Austria, 53 per cent of the 646 Austrian appeals were dismissed.

Similarities between the two case study countries

As indicated above, the analysis showed that there is already a **number of people who seek protection in Europe where disasters play a role**. The main countries of origins of the sample of decisions chosen for a detailed analysis in both countries were Somalia and Afghanistan. The **narratives by claimants concerning the disaster situations were very similar**. Disaster was typically brought forward by the claimant as well as discussed and assessed by the court as **one among several factors** (such as general security or economic situation or factors relating to the individual situation including family status and support, gender, age, profession, health, wealth, clan membership and several others). It is not the disaster as such but the **impact of the disaster**, in particular on the supply situation, which was brought forward by the claimant or considered by the judge. **Internal relocation was often identified as a barrier to protection** in those cases where disaster was considered by the Austrian and Swedish courts.

Is the Protection Gap Addressed?

From the Austrian case study, it appears that the protection gap is addressed in the asylum procedure only at the subsidiary protection level, but not at the level of humanitarian protection or refugee status. In the context of subsidiary protection, the jurisprudence of the Supreme Administrative Court and the Constitutional Court has clarified that disasters including droughts and relevant COI must be taken into account when conducting a risk assessment according to Article 3 ECHR upon return. This jurisprudence has and had an impact on the caselaw of the appellate court. Still, it was mainly with regard to decisions of the appellate court relating to the country of origin Somalia where it appeared that disasters and relevant COI were carefully considered. There is still room for improvement in relation to other countries of origin.

In Sweden, there is no clear legal protection for people who fear being exposed to disaster-related harm in their countries of origin. The Refugee Convention was not considered in any of the cases reviewed, and subsidiary protection was only granted in one case that had clear connections to a threat of physical, gender-based violence. The non-harmonized provision that extended protection to people unable to return home in the context of an 'environmental disaster' was routinely invoked by claimants, but often ignored in judicial decisions. When the provision was considered, the claimant's circumstances were never found to satisfy the relevant requirements. The provision was repealed in 2021, having been suspended since 2016. Country of origin information was inconsistently considered in the cases reviewed, and rarely in depth.