LUISS

Dipartimento di Giurisprudenza

Cattedra di European Union Law

Environmental Migration: Towards the Development of a European Legal Framework

Chiar.mo Prof. Daniele Gallo

RELATORE

Chiar.mo Prof. Giacomo Biagioni

CORRELATORE

Camilla Migliosi
Matr. 165313

CANDIDATA

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INTRODUCTION

In recent years, the nature, dynamics, and scale of environment-related migration have changed dramatically, and there is a growing recognition that environment-induced migration is likely to become one of the twenty-first century's challenges, which must be addressed to ensure the respect of human rights and sustainable development. Disasters, environmental degradation, and climate change are highly influencing global human migration patterns as much as the UN Secretary-General António Guterres has cautioned that "*we are sleepwalking towards climate catastrophe*". [1]

Lately, the European Commission has outlined that "*disaster, the adverse effects of climate change and environmental disasters have a profound impact on human mobility. One of the most sever aspects of it is displacement, forcing the affected persons to flee their homes in the wake of destruction of their houses, assets and livelihoods".*[2]

Considering the potential impact of environmental migration within the European Union, it appears crucial to examine the EU's position on the matter. Arguably, despite the issue has been recognised on multiple occasions by almost all EU institutions and actors, [3] no directly applicable legal framework or entity entrusted with the task of creating one exists. Notwithstanding the push for climate action with the implementation of the European Green Deal [4] and, in its climate diplomacy at COP28, the pledge for overarching climate goals [5] encompassing more ambitious positions on the global climate agenda, migration triggered by environmental

[1] United Nations News, '*UN chief warns against 'sleepwalking to climate catastrophe'* (21 March 2022) available at https://news.un.org/en/story/2022/03/1114322 accessed 09 February 2024

[2] European Commission Staff Working Document, *Addressing displacement and migration related to disasters, climate change and environmental degradation* SWD(2022) 201 final, at 6

[3] See, for example: European Commission Staff Working Document, *Climate change, environmental degradation, and migration* Accompanying the document communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *An EU Strategy on adaptation to climate change*, SWD(2013)138 or or European Parliament Directorate General for Internal Policies, Policy Department Citizen's Rights and Constitutional Affairs C, *Climate refugees: legal and policy responses to environmentally-induced migration* PE 462.422 (2011)

[4] European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions *The European Green Deal* COM(2019) 640 final

[5] Council Conclusions, '*Preparations for the 28th Conference of the Parties (COP28) of the UNFCC* (Dubai, 30 November – 12 December 2023)' ANNEX 14285/23

factors does not represent a specific concern to be tackled but it only continues to generate reactive and short-term responses, making it challenging to move beyond crises and possible future migration patterns.

The possibility that climate change will force more and more people to leave their country of origin and move across borders [6] will make the EU face new migrant flows whose prevention will depend on effective measures to, on the one hand, mitigate climate change and, on the other, to support the protection of environmental migrants. Indeed, the effects of climate change directly affect human beings and utterly take hold of their living conditions, affecting the enjoyment of fundamental human rights, from the right to life to the rights related to a decent standard of living: "*when people lack access to food, water and other necessities, in order to survive, they may attempt to move internally or across borders"*. [7]

The acknowledgement that the consequences of environmental change will progressively condition the enjoyment of human rights, confronts the EU with the fact that its fundamental values can be affected by the phenomenon of environmental migration. Indeed, the multifaceted and intersectional nature of the phenomenon at stake does not completely reflect and subsume any of the traditional branches of law and, possibly, it falls under the scope of application of diverse legal frameworks. Among those, international and EU asylum law, human rights law and environmental law do provide relevant protection for the rights of environmental migrants. Although these existing norms might protect the rights of environmental migrants within an extensive and substantial interpretation of the provisions, the broader challenge lies in gaps at the European levels in law and policy, the lack of effective implementation and understanding of the connection between human rights and the underlying reasons for environmental migration. Arguably, the EU

[6] Although most estimates refer to internal migration, multiple studies have taken into account cross-border displacements: J. McAdam, '*Climate Change, Forced Migration and International Law'* Oxford University Press (2011) and Migration Data Portal, '*Environmental Migration'* (2023) available at https://www.migrationdataportal.org/themes/environmental_migration_and_statistics accessed 08 February 2024

[7] Commissioner for Human Rights, '*Addressing human rights protection gaps in the context of migration and displacement of persons across international borders resulting from the adverse effects of climate change and supporting the adaptation and mitigation plans of developing countries to bridge the protection gaps'* A/HRC/38/21 (21 April 2018), at 4-5

competencies pertain both to the migratory and environmental spheres [8] and, therefore, the EU could be the ideal avenue for the implementation of overarching complete and effective strategies and provisions to tackle the issue. Nevertheless, as it stands today, the EU's policy on environmental migration is the outcome of diverse actions in different policy sectors such as migration, environment, development cooperation, and humanitarian aid that independently address the issue inconsistently and incoherently. This narrative makes environmental migrants fall into a limbo in which none of the existing EU provisions can directly and efficiently grant the protection needed.

This legal research will analyse the EU's current efforts to address environmental mobility. It addresses the complex relationship between climate change and migration and maps out the EU's multilateral policy developments on the topic. The current protection system in the European Union and its Member States will be overlooked to assess to what extent people displaced by environmental disasters can be granted protection.

The legal challenges to the implementation of an effective protection system that a substantial interpretation of various branches of law can provide to environmental migrants will be analysed.

The reasons underlying the choice of an EU focus are laid down in the foundational values of the Union: a shared determination to build a world founded on the respect and promotion of human rights both in its internal and external policies. An environmental migratory movement can affect the enjoyment of a set of human rights, such as the right to life, the right to asylum and the prohibition of torture and inhumane or degrading treatment or punishment, all safeguarded in the EU *acquis,* or the general rights of migrants, linked with the Member States' obligations towards them as expressed by the Treaties and by relevant legislation on the matter. Consequently, a responsibility to implement measures to preserve the rights of environmental migrants arises at the EU level as a foundational value to be coherently addressed and respected in all policy sectors. A focus on the EU legal framework will prove to be necessary to understand how its migration and climate

[8] The EU is competent to act in the area of asylum and immigration under Articles 67, 77-80 TFEU and in the environmental one under Articles 11 and 191-193 TFEU

actions can be effective in safeguarding the legal position of the category of migrants this thesis refers to.

The arguments underlying the analysis that will be addressed in this thesis are twofold. On the one hand, it will highlight the ambiguities related to the link between climate change and migration and the multifaceted nature of this phenomenon, which is reflected in the absence of an internationally agreed definition of the migratory movement and a specific legal framework and protection against displacement. It will be underlined how the phenomenon under study, due to its compound and cross-sectional nature, cannot be regulated through measures taken in one single legal area and the provisions applicable are the result of an extensive interpretation. To this end, the analysis of the relevant environmental, asylum and human rights body and case law will be thoroughly studied.

On the other hand, based on the aforementioned analysis, an attempt will be made to reflect on current protection prospects, specifically at the European and national levels. A comparative assessment of the relevant EU and national provisions will define the legal loopholes in protection and the best practices that could be implemented for grounds of protection to arise. Indeed, an inquiry into existing protection instruments reveals their potential, the functionality of a human rights-based approach and the need for individual, rather than collective, instruments. Feasible hypotheses for the creation of EU ad hoc and comprehensive new instruments will be overlooked and discussed.

In summary, this research will be organised as follows.

To frame the discussion, chapter I will outline the nexus between environmental changes and migration. It will highlight the difficulty of conceptualising and classifying this migration phenomenon and the coexistence of distinct orientations regarding the theoretical framework and the need for solutions. The complex and intersectional character of the phenomenon will be explained and the difficulty in determining its nature and understanding its many facets will be thoroughly analysed. Given the above, the use of different concepts and definitions and the absence of specific protection avenues will be demonstrated. The role of the EU in

the recognition of this category of migrants will be investigated to delimit the research object of study.

The second chapter dwells on the analysis of existing international and regional protection instruments and whether they can be considered suitable to offer protection to those on the move, even if they have not been designed to address this phenomenon. It elucidates which human rights might be at stake and where the legal loopholes in the refugee, environmental and human rights frameworks stand. In particular, the external competencies of the EU for what concerns the participation in or the creation of international agreements regarding climate migration are studied. The final section of the chapter will take a regional approach through the analysis of the European Convention on Human Rights (hereinafter, ECHR). The possible provisions under the ECHR that could be applied to the status of environmental migrants, the interpretation given by the European Court of Human Rights (hereinafter, ECtHR) and its impact on the Court of Justice of the European Union (hereinafter, CJEU) will be explored.

The third chapter will be dedicated to the assessment of the EU legal framework and case law on the matter of migration, and environmental and human rights policies. It will be underlined how the existing EU migratory instruments under the Qualification, the Temporary Protection, Return and Seasonal Workers Directives do not directly and effectively protect environmental migrants and that only an extensive interpretation that considers environmental conditions as affecting the enjoyment of fundamental rights might entail the grant of the protection. The possible use of ulterior options based on humanitarian grounds under EU law will be discussed. The last section will describe the environmental policies implemented over the years by the EU. In particular, the efforts of the EU in combatting climate change and financially supporting the development of adaptation measures in countries particularly vulnerable to natural hazards will be examined. In this regard, it will be argued how the measures enforced at the EU level can be deemed as pre-emptive measures to prevent, in the long term, migration to take place. Considering the aforementioned, the EU unarguably holds increasing regulatory powers over the environment as well as over migration and the human rights body attached to them.

This suggests that there is significant potential and substantial room for policy development around environmental migration.

Based on the aforementioned analysis and the fact that the EU has not yet developed a legal instrument that specifically addresses the needs of environmental migrants, chapter four will consider national responses on the matter. The study will be conducted on the Italian, French, Austrian, Cypriot, German, and Swedish complementary forms of protection that conclude and make up for the instances not covered under the Common European Asylum System. The legal frameworks and, in particular, the jurisprudence will be assessed to understand whether and which of the approaches is best suitable to address the claims of environmental migrants. This chapter aims to critically evaluate whether the solutions adopted at the national level effectively close the protection gap and might set an example for protection at the EU level. Central importance in the discussion of chapter IV will be assumed by the fil rouge that all national provisions share: a human rights-based approach in which the attainment and enjoyment of minimum human rights standards becomes relevant inasmuch the negative effects of environmental changes might significantly count as factors triggering the need for protection.

Chapter V will wrap up the overall findings and conclude the thesis. To resume the research aims, it will concentrate on the EU's legal and policy responses by providing general guidelines and recommendations for EU legislators and policymakers to open avenues for the recognition of status to environmentally displaced people. The discussion will also delve into the necessity of creating new EU ad hoc instruments or better implementing and enforcing the already existing ones.

CHAPTER I: THE INTERPLAY BETWEEN THE ENVIRONMENT AND MIGRATION

The impact of changes in environmental conditions on migration patterns is a fundamental aspect of human behaviour. The movement of populations in response to environmental changes has existed throughout history, but the scale of migration related to environmental factors has today become more significant. Despite the neglect of the impact of environmental or climate changes on migration at the international and European levels in the past, attention to this issue has grown in recent decades. Studies, reports, and research have stated the impact of environmental changes on human mobility and how its multicausal nature interacts with and exacerbates the scale of migration. The complexity of the interaction of these factors presents significant challenges in distinguishing people who are fleeing exclusively because of environmental factors from those who are fleeing due to a combination of them. This complexity leads to a gap in a fully recognized definition of migratory movements strictly and solely correlated to an environmental disaster at the international and European levels, which results in a gap in humanitarian protection.

In this chapter, the interlinkages between the environment and migration will be further analysed to understand the extent to which these phenomena have an impact on people's lives. Firstly, the institutional discourse around environmental migrants, specifically at the international and European levels, will be elucidated. Through this analysis, the underlying and foundational issue of this research will be explained: although international and regional actors have recognized the problem of climate-change-related migrations and the necessity to find an adequate solution, the implementation of effective measures of protection is still not consolidated and, therefore, this category of migrants is yet to be granted protection. Later on, the specificity and interlinkages between climate change and migration will be thoroughly delineated. The research will highlight how climate change has been widely recognised as one of the major factors in shaping and affecting the livelihoods of human beings, and how the resulting mobility is a multicausal and disproportionate phenomenon driven by various causes that expose the population

in differentiated manners. This complexity is reflected in the lack of an internationally accepted definition of how human mobility related to the effects of environmental changes should be legally described. The multiple definitions prompted during the years will be explained and the overall term that the thesis will refer to will be indicated.

1.1 The institutional discourse and problem foundation around environmental migration

The issue of environmentally induced migration remains open and fraught with doubts about the concept and terms to be used. Consequently, international, European, and national responses so far have been limited, and protection for those affected remains inadequate. [9] Despite the growing awareness of the impact of environmental change on human mobility, the lack of consensus on the issue has produced different discourses and perspectives on the topic.

At the international level, the absence of a global governance system on migration has led to different addressing the topic of human mobility in diverse negotiations. For instance, in 2016, the New York Declaration for Refugees and Migrants [10] was adopted. The need for further global cooperation on migratory issues was envisaged and, therefore, the process that led to the negotiation for the Global Compact for Safe, Orderly and Regular Migration [11] and the Global Compact on Refugee [12] was initiated. The former, by setting objectives for safe, orderly, and regular migration, is the first global framework with a common approach to international migration in all its dimensions, including disaster and environmental change-related migration. It commits parties to "*minimize the adverse drivers and structural factors that compel people to leave their country of origin*", including *"natural disasters, the*

[9] European Parliamentary Research Service, '*The concept of 'climate refugee'* Towards a possible definition', PE 621.893 – February 2019

[10] UNGA, Resolution adopted by the General Assembly on 19 September 2016 71/1, '*New York Declaration for Refugees and Migrants'* A/RES/71/1 (October 2016)

[11] UNGA, Resolution adopted by the General Assembly on 19 December 2018, *'Global Compact for Safe, Orderly and Regular Migration'* A/RES/73/195 (January 2019)

[12] UNGA, Resolution A/RES/73/195 '*Global Compact for Safe, Orderly and Regular Migration'* adopted by the General Assembly on 19 December 2018

adverse effects of climate change, and environmental degradation". [13] Objective five commits the parties to the creation of regular migration pathways by providing humanitarian visas or temporary work permits to migrants crossing borders *"while adaptation in or return to their country of origin is not possible"*. [14] The Refugee Compact acknowledges the interaction between environmental degradation and drivers of migration and provides guidelines considering appropriate national provisions and practices such as temporary protection and humanitarian arrangements. [15]

On the other hand, the EU, a human rights-oriented actor, has for decades been addressing issues related to climate change and environmental degradation but its policymaking has, to a great extent, not directly tackled the issue of environmental migration, and has yet to develop a framework or instrument to recognise and protect climate-displaced people. At the international level, the EU has supported the adoption of global cooperation instruments and acknowledged climate change and natural disasters as drivers of irregular migration.[16] Nevertheless, the topic of environmentally driven migration has only entered the EU discourse at the dawn of the new millennium as a security issue rather than a human rights one. [17]

In 2007, the Commission Green Paper [18] first mentioned the connection between climate change and migration. The Paper outlines the necessity for the EU to implement adaptation and mitigation actions to cope with the effects of natural disasters caused by climate change. Interestingly, the Paper pinpoints the responsibility of developed countries in the current climate crisis and how it is their responsibility to sustain adaptation actions in developing countries. The Joint Paper

[13] UNGA, '*New York Declaration for Refugees and Migrants'*, *supra* note 10, at 9-10
[14] *Ibid*, paragraph 21 g
[15] *Ibid,* paragraphs 8 and 63
[16] European Parliament Resolution, '*Progress on the UN Global Compacts for Safe, Orderly and Regular Migration and on Refugees'* (2018/2642(RSP)), paragraphs 16-35
[17] L. Wirthova, '*Addressing Environmental Migration in the European Union Discourse'* UCL Open UCL Press (2023), at 1-2
[18] Commission of the European Communities, '*Green Paper from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: adapting to climate change in Europe – options for European Union action*' COM 354 final (2007)

on Climate Change and International Security [19] described climate change as a threat multiplier and, consequently, a security risk. The same line of reasoning was adopted in the Stockholm Programme in which climate change was described as a "*driver of security-relevant migratory flows"*. [20]

In 2008, by framing the issue as a security threat, at the European level, the Council of Europe Parliamentary Assembly's Committee on Migration, Refugees and Population admitted that Europe is not immune to the consequences of climate change and environmentally induced migration. [21]

From this moment on, because of the growing importance of the topic, much of the European policy framework has addressed the topic and underlined the necessity to pay more attention to displacement and migration related to disasters, climate change and environmental degradation, and studies have been issued across all policy areas. [22]

Recently, in 2017, the European Commission's European Political Strategy Centre published the paper "10 Trends Shaping Migration*"* and, among those, climate change is described as a trend which "*dwarfs ... all other drivers of migration"*. [23]

In 2020, the European Parliament [24] recalled that climate change is one of the drivers of migration and acknowledged the lack of protection for environmental migrants. It called for consolidated clarity on the terminology of what environmental migration entails and for the development of a coherent external policy on the nexus of climate change and mobility and a strategy to assess the asylum demand of environmental migrants. In its 2021 Resolution [25] on human

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[19] European Commission and High Representative, '*Climate change and international security: paper from the High Representative and the European Commission to the European Council'* S113/08 (2008)

[20] European Parliamentary Research Service, '*The concept of 'climate refugee' supra* note 9, at 8

[21] Council of Europe Parliamentary Assembly, Committee on Migration, Refugees and Population, '*Environmentally Induced Migration and Displacement: A 21st Century Challenge'* CoE Doc 11785

[22] See A. Kraler, T. Cernei, M. Noack, M. Hofman, M. Wagner, A. Pohnitzer, '*Climate refugees – Legal and policy responses to environmentally induced migration'* Study Commissioned by the Policy Department C: Citizens' Rights and Constitutional Affairs Civil Liberties, Justice and Home Affairs PE 462.422 (2011)

[23] European Commission Political Strategy Centre, *'10 trends shaping migration'* (2017), at 6

[24] European Parliament's Committee on Civil Liberties, Justice and Home Affairs, '*Climate Change and Migration Legal and policy challenges and responses to environmentally induced migration'* PE 655.591 (2020), at 88-93

[25] European Parliament Resolution, *'Human rights protection and the EU external migration policy'* European Parliament Resolution of 19 May 2021 on human rights protection and the EU external migration policy (2020/2116(INI)) (2021)

rights protection and the EU external migration policy, the European Parliament called, inter alia, for funding for sustainable responses to climate change at the regional level.

The 2021 EU Strategy on Adaptation to Climate Change [26] outlined increased support for international climate resilience and preparedness, scaling up international finance to build climate resilience, and strengthening global engagement and exchanges on adaptation. It considered that "*adaptation strategies, programmes and projects should be designed in a conflict-sensitive way to avoid aggravating tensions. This is important to reduce the risks of climate-related displacement and better understand and manage the interconnections between climate change, security, and mobility"*.[27]

The New Pact on Migration and Asylum [28] identifies climate change as a societal challenge but it seems to lack the inclusion of the category of environmental migrants in the legal framework. Moreover, the Pact refers to the EU's external dimension by requesting to implement cooperation systems with the migrant's countries of origin in different policy areas. Among those, combating climate change within the countries most affected by environmental disasters is mentioned as an active engagement between both parties. [29]

It is noteworthy also the position of European NGOs such as the European Environmental Bureau, Climate Action Network Europe or Friends of the Earth which, although they do not directly deal with environmentally displaced people, focus on wider themes such as adaptation and resilience building in the face of natural catastrophes and environmental deterioration. [30]

Considering what has been analysed so far, it is possible to depict how, at the international and, specifically, at the European level, there are no comprehensive and solid policies for environmental migrants yet. Current policies focus on long-

[26] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *'Forging a climate-resilient Europe - the new EU Strategy on Adaptation to Climate Change'* COM 82 final (2021)

[27] *Ibid*, at 20

[28] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a *New Pact on Migration and Asylum*, COM 609 final (2020)

[29] *Ibid*, paragraph 6 at 17

[30] C. Weber, *'Climate Refugees and Climate Migration'*, Green European Foundation (2019), at 21

term solutions to tackle the climate change issue and on creating adaptation measures and funding for the territories most affected but, they do not address the challenges of protecting persons displaced or trapped by disasters. Indeed, the effects of environmental changes might lead to major impacts on the lives of affected people in terms of the possibility of enjoyment of fundamental rights. The risk that the increasing severity of these effects will mostly have a stake on vulnerable populations, those unable to counteract, highlights the possible exacerbation of human rights violations and climate injustice. For this reason, protection statuses are essential to ensure that this category of people is not discriminated against when moving across borders.

In this context, the role of the EU, being a global actor, is becoming the leader in shedding light on these issues. As indicated in the Treaties, the EU is built on respect for human rights in its internal policies and its external relations. Respect for human rights is a fundamental part of all EU relations with non-EU countries and international institutions and, therefore, all treaties and agreements signed by the EU need to comply with human rights. Additionally, the promotion of human rights is also a priority. [31] Articles 2 and 21 (1) [32] of the TEU states that the EU is built on the values of the respect of human rights and that its international action should be guided by that principle universally and indivisibly. Article 3(5) [33] of the TEU also declares the EU as responsible for protecting human rights worldwide. Therefore, the EU must ensure the enjoyment and protection of human rights to migrants, as

[31] Council Conclusions *on the EU Action Plan on Human Rights and Democracy* 2020-2024 12848/20 (2020)

[32] Article 2 TEU reads as follows: *The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.* Article 21 paragraph 1 TEU states that: *1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.*

[33] Article 3 paragraph 5 TEU entails: *In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.*

well as environmental ones. On this matter, the EU competencies which are relevant to the legal position of environmental migrants are the migration and environmental ones. In the next chapters, the thesis will dwell on the degree to which these competencies give the EU power to implement measures to protect environmental migrants.

All in all, to abide by its human rights policies and follow the responsibilities imposed by the Treaties, the EU should lead cooperation in influencing global governance to provide effective solutions for the protection of environmental migrants. For this reason, this thesis will mostly focus on the position of the European policies on the matter, to what extent they provide safeguards to this category of migrants and how the legal loopholes and voids in protection might be overcome.

1.2. Climate change and its effect on the environment

As mentioned previously, climate change is directly contributing to humanitarian emergencies. It is important to acknowledge which are the risks for the environment and, consequently, be aware of the impacts on people living in areas vulnerable to the effects of climate change and understand when those impacts reach a certain degree that they result in migratory movements. This analysis is crucial not only to identify the negative effects that climate change and environmental disruptions have on the environment but also to recognize the root causes that force people to leave their country.

The Intergovernmental Panel on Climate Change [34] (hereinafter, IPCC) is the UN body whose aim is the assessment of climate change science and whose main activities revolve around the implementation of comprehensive assessment reports on climate change, its causes, impacts and response options for reducing the rate at which climate change is taking place. In 2007, one of its assessment reports defined climate change as any identifiable change in climate over time, *"whether due to*

[34] The Intergovernmental Panel on Climate Change available at https://www.ipcc.ch accessed 28 October 2023

natural variability or as a result of human activity." [35] Multiple reports have now widely demonstrated how human activities have been the main driver of climate change, primarily due to the burning of fossil fuels like coal, oil, and gas. [36] Those factors contribute to global climate change by accounting for over 75% of global greenhouse gas emissions and approximately 90% of all carbon dioxide emissions. [37] Greenhouse gas emissions blanket the Earth, trapping the sun's heat. As a result, global warming and climate change occur. The earth is currently warming faster than at any other time in recorded history.

The consequences of climate change include among others, intense droughts, water scarcity, severe fires, rising sea levels, flooding, melting polar ice, catastrophic storms, and declining biodiversity.

Those effects do not only directly influence the environment itself, but also human beings. For instance, by affecting the ability to grow food, climate change is among the causes of a global increase in hunger and malnutrition. These consequences increase the factors that put and keep people in poverty, especially in the poorest regions of the world. The more vulnerable people are, the less adaptive capacity they have, and in some cases, they will therefore have no other option but to migrate outside their country of origin.

The integration of all these concerns has led to the description of climate change as a threat multiplier. This concept refers to the capacity of climate change to multiply existing threats to security that, as the 2007 CNA Report [38] delineated, potentially result *" in multiple chronic conditions* that *in already fragile areas will further erode as food production declines, diseases increase, clean water becomes*

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[35] IPCC, '*Climate Change 2007: Synthesis Report'* Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (2007), at 30

[36] IPCC, *'Climate Change 2023: Synthesis Report'* Summary for Policy Makers Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change or IPCC, '*Climate Change widespread, rapid, and intensifying'* (2021) available at https://www.ipcc.ch/2021/08/09/ar6-wg1-20210809-pr/ accessed 01 October 2023

[37] UN Climate Action, *'Causes and Effects of Climate Change'* available at https://www.un.org/en/climatechange/science/causes-effects-climate-change accessed 01 October 2023

[38] CNA Corporation, *'National Security and the Threat of Climate Change'* Military Security Board (2007) available at https://www.cna.org/reports/2007/national%20security%20and%20the%20threat%20of%20climate%20change%20%281%29.pdf accessed 01 October 2023

increasingly scarce, and large populations move in search of resources". [39] This term has also been adopted by the EU which depicted climate change as a " *threat multiplier which exacerbates existing trends, tensions and instability".* [40] With this background in mind, it is easy to establish the links between human activities and climate change and the consequential serious global risks in threatening the basic elements of life, such as access to water, food production, health, and use of land and the environment.

1.3. Understanding the environmental change – migration nexus

In addition to establishing links between human activities and climate change, the chapter needs to establish another link - whether and how such events or consequences cause, compel, or at least contribute to people's movement. The relationship between climate change and human mobility is complex and varied, and the movement resulting from it is not new. For ages, people such as nomads and pastoralists have periodically moved in reaction to changes in their environment. However, it has only been in the last decades that the international community has noticed the broader ramifications and its implications. The IPCC cautioned in 1990 that "*the greatest single impact of climate change could be on human migration".* [41]

Certainly, climate change does not, per se, directly displace or induce people to relocate. As noted during the 2011 Nansen Conference, it "*is not necessarily the temperature increase itself that poses the largest challenge in terms of human mobility, but the associated changes in, and combined effects of, precipitation patterns (drought and flooding), storms, and sea level rise; loss of biodiversity, and*

[39] Sherri Goodman, Pauline Baudu, *'Climate Change as a "Threat Multiplier": History, Use and Future of the Concept'* Center for Climate and Security Council on Strategic Risks BRIEFER No. 38 (2023), at 5

[40] European Commission and High Representative, *'Climate change and international security: paper from the High Representative and the European Commission to the European Council' supra* note 19

[41] IPCC, *'Climate Change: the 1990 and 1992 IPCC Scientific Assessment'* IPCC First Assessment Report Overview and Policymaker Summaries and 1992 IPCC Supplement (1992), at 103

ecosystem services; and resulting health risk, food and livelihood insecurity".[42] In other words, the combined effects of climate change and, more crucially, their interplay with pre-existing stresses will decide if and when people relocate.
Changes in the environment could affect the movement of people in at least four different ways: [43]

1. the intensification of natural disasters;
2. increased warming and drought that affects agricultural production and access to clean water;
3. rising sea levels make coastal areas uninhabitable and increase the number of sinking island states;
4. competition over natural resources may lead to conflict and in turn displacement.

Environmental change events can essentially be divided into two macro-categories. [44] The first concerns fast-onset events - such as floods, cyclones, and tropical storms. These types of events affect human migration in different ways: people might be forced to "*leave their homes and move to other areas to avoid physical harm or loss of life"* [45] or, in cases in which these events do not directly affect people's lives, local economies might be undermined and thus contribute to precarious living conditions.
The other macro-category is composed of slow-onset events. These phenomena include sea-level rise, desertification, and drought. Sea-level rise is the event that can most affect the movement of entire populations by causing extreme flooding,

[42] Chairperson's Summary, '*The Nansen Conference on Climate Change and Displacement in the 21st Century'* (Oslo, 6–7 June 2011), para 4 available at https://www.icvanetwork.org/resource/chairpersons-summary-nansen-conference-on-climate-change-and-displacement-in-the-21st-century/ accessed 24 January 2024
[43] IOM, *'Migration, Environment and Climate Change: Assessing the Evidence'* (2009), at 15
[44] In the literature, climate events are classified also in different ways, as an example the IOM classifies them in climate processes and climate events. Nevertheless, in almost all publications and studies, climate events are often categorised as slow and rapid.
[45] European Parliament's Committee on Civil Liberties, Justice and Home Affairs, '*Climate Change and Migration Legal and policy challenges and responses to environmentally induced migration' supra* note 24, at 20-22

[46] but increasing droughts can cause water shortages to such an extent that it is essential to move where financial resources are sufficient to make up for the lack of water. [47]

1.4. Vulnerability and population exposure: the disproportion of the phenomenon

The social impact of climate change is characterised by a major paradox: the populations most affected by the effects of climate change are those that have contributed the least to producing the phenomenon. This paradox is then reflected in the migratory movements associated with it; the populations mostly involved are those living in the least developed countries.

The fact that some parts of the world and some social groups are more affected than others does not depend solely on chance but on factors of a different nature, including geographical, technological, and social.

Firstly, the geographical impact of climate change is not proportional. The temperature increase itself will have an unequal distribution, as stated by the IPCC as early as 1990. [48] While a greater temperature increase is projected in areas at higher latitudes, on the other hand, the countries with the greatest exposure to the effects of climate change are predominantly developing countries in South and East Asia, Sub-Saharan Africa and the Pacific Islands. South and Southeast Asia are most affected by sudden-onset extreme disasters such as cyclones, hurricanes, or floods - particularly in states such as Bangladesh, the Philippines, and countries dependent on monsoon cycles. Sub-Saharan Africa is most exposed to slow-onset climatic phenomena, such as extreme heat, drought, and desertification, with a tremendous impact on water and food shortages, and the resulting conflicts over resources. Small island states in the Pacific are particularly vulnerable to sea-level rise and extreme coastal events such as cyclones. [49]

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[46] E. Piguet, A. Pécoud, P. De Guchteneire, *'Introduction: migration and climate change'* in E. Piguet, A. Pécoud, P. De Guchteneire *Migration and Climate Change* 1st Edition Cambridge University Press (2011), at 24

[47] *Ibid*

[48] IPCC, '*Climate Change: the 1990 and 1992 IPCC Scientific Assessment' supra* note 41, at 91

[49] IOM, *'Migration and Climate Change No.31'* prepared by Oli Brown (2008), at 31

The uneven impact of the phenomenon, if it produces devastating effects in certain areas, tends to improve climatic conditions in other areas by making some places better able to sustain larger populations. [50]

On top of that, developing countries are the most affected because of their close dependence on natural resources. This concerns countries where the rural population makes up an important percentage, or where the agricultural sector is the predominant one for the population's subsistence and the country's economic wealth, as in much of Africa and Asia.

Another factor that must be considered is the level of development of the affected country. In the face of the same environmental disaster, the impact on the population will be greater where the response to the disaster is weaker, while where risk reduction strategies, relief and rehabilitation are put into practice, the population will have less need to move. [51]

Countries with the least capacity to manage the crisis will face a major increase in international migration, as it is often the only alternative for survival.

1.5. Is migration the only solution?

It is necessary to point out, however, that migration is not always the only solution for those affected by climate change, as *"the inhabitants of affected areas can implement adaptation and mitigation strategies that allow them to significantly reduce the pressure due to climate change.* " [52] The resilience of populations and, above all, the adaptation and assistance responses of countries can decrease the likelihood of migration flows. In this regard, adaptive capacity is described as the ability to cope with and adapt to environmental changes, on an ongoing basis. [53] The adaptive capacity of a given individual, family or community can be determined by different factors: family configuration and accessible livelihoods,

[50] *Ibid*, at 19-20

[51] J. McAdam, '*Climate change, forced migration and international law'* 1st Edition Oxford University Press (2012), at 21-22

[52] C. Weber, *'Climate Refugees and Climate Migration' supra* note 30, at 15

[53] R. Mcleam, *'Climate-related migration and its linkages to vulnerability, adaptation, and socioeconomic inequality: evidence from recent examples'*, in B. Mayer, F. Crepeau, *Research Handbook on Climate Change, Migration and the Law* 1st Edition Edward Elgar Publishing (2017), at 31

membership in each social network and other factors not influenced by individuals, such as market prices and national governance structures. Moreover, characteristics diminishing adaptive capacity, such as poverty, gender, age, indigenous or minority status and disability are crucial. [54]

In other words, this capacity is configured as *"a function of complex and dynamic interactions of social, economic, political, technological, and cultural processes interacting across multiple scales* ". [55] This consideration leads, again, to an inevitable paradox. Those who feel most of the negative effects of climate change and suffer its repercussions are those populations living in poor countries that have often a low adaptive capacity and do not have the necessary means to move, people sometimes referred to as trapped populations. Evidence [56] indicates that a considerable number of individuals will lack the financial, social, political, or even physical assets to move out from ecologically hazardous places. Consequently, marginalized groups will face double jeopardy: on the one hand, higher chances of becoming trapped or immobile because of a lack of assets and, on the other hand, they will have the necessity to bear climate change impacts while being the most vulnerable to it. [57]

1.6. The multi-causal nature of the phenomenon

Migration is a complex, multi-casual and based on a compound interaction of push and pull factors phenomenon. The same applies to environmental migration, in which climate change and environmental pressures are only one of the triggering factors. IOM states that people migrate when they are: "*(i) exposed or expect to be*

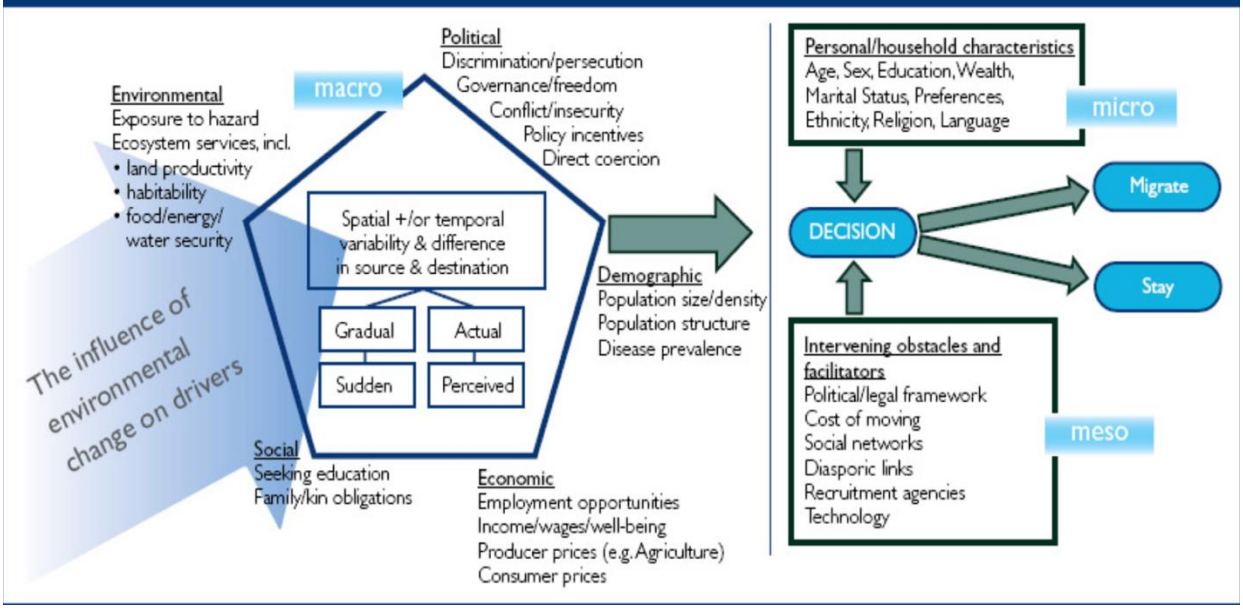
[54] UN Human Rights Council, '*Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights'* A/HRC/10/61 (2009)
[55] Sherri Goodman, Pauline Baudu, *'Climate Change as a "Threat Multiplier": History, Use and Future of the Concept' supra* note 39, at 32-33
[56] Foresight, *'Migration and Global Environmental Change Future Challenges and Opportunities'* Final Project Report The Government Office for Science (2011) at 29
[57] IOM, *'People on the Move in a Changing Climate – Linking Policy, Evidence and Action'* (2022), at 9

exposed to (ii) a sudden-onset natural hazard or slow-onset environmental change and (iii) lack the resilience to withstand impacts". [58]

When natural catastrophes cause displacement, they are sometimes compounded by socioeconomic and political reasons such as political instability, a lack of security, and social marginalization. Climate change will have an "*incremental impact, add[ing] to existing problems' and 'compound[ing] existing threats"*. [59]

The figure below [60] envisages the multi-causality of the migratory movement and demonstrates how political, demographic, economic, social, and personal characteristics all together influence a possible international movement.

Figure 1.3: Foresight's conceptual framework for the 'drivers' of migration



Additionally, extreme weather events can become the indirect cause of displacement. Their consequences range from scarcity of water availability, food insecurity, depletion of natural resources, and prevalence of disease. In these circumstances, conflicts will likely arise and, therefore, people will massively

[58] M. McAuliffe, M. Klein Solomon, '*Ideas to inform International Cooperation on Safe, Orderly and Regular Migration'* IOM Geneva (2017), at 3

[59] J. McAdam, '*Climate Change Displacement and International Law: Complementary Protection Standard*s', Legal and Protection Policy Research Series PPLA/2011/03 (2001), at 27

[60] IOM, *'Migration and the Environment and Climate Change: Assessing the Evidence' supra* note 43, at 33

migrate. In this case, it is possible to depict how environmental causes are indirectly causing migration by triggering environmentally- generated conflicts.

Such a scenario explicates the difficulty in isolating the role of natural hazards and environmental disruptions alone in the decision to migrate. Undoubtedly, whether such circumstances are sufficiently disruptive to affect people's lives or living situations to force them to leave their homes depends on a variety of human and natural considerations.

Although demonstrating the direct nexus between environmental changes and migration is extremely challenging, the IOM has reiterated that people are and will, soon, cross international borders due to environmental disasters and that *"many [internally displaced persons] fail to find safety and security in their own country, leading to significant numbers of cross-border movements within and beyond the region".* [61]

1.7. Terminology and definitions

The previous sections highlighted the complexity and variety of origins and types of migratory movements related to environmental factors. This exact peculiarity is reflected in the number of expressions used to describe it: "environmental refugees", "climate change migrants", "climate refugees", "forced environmental migrants", "environmentally displaced persons", "disaster refugees", and "environmentally motivated migrants". At the moment of writing, there is no internationally and universally agreed definition describing persons moving for environmental reasons. The literature on the topic describes this trait as a "*lack of conceptual clarity".* [62]

Before diving into the analysis of the various definitions that have been used over the years, it seems necessary to discuss whether the use of a definition is, first and

[61] Internal Displacement Monitoring Centre (IDMC), '*Global Report on Internal Displacement'* GRID 2019 (2019)

[62] F. Biermann, I. Boas, *'Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees, Global Governance'* Working Paper No. 33 The Global Governance Project (2007) available at: http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf accessed 02 October 2023, at 2

foremost, necessary, and to what extent a specific term would have an impact on the legal status of this category of migrants.
The debate over the need for a definition can be summarised as follows. On the one hand, authors in favour argue that climate change characterises migration in such a unique way that it is necessary to differentiate it from the other types of migration. It can therefore be said that the use of a definition is not a random terminological choice, but it has concrete repercussions on the further legal status. As Brown outlines "*Labels are important. One immediately contentious issue is whether people displaced by climate change should be defined as 'climate refugees' or as 'climate migrants'. This is not semantics – which definition becomes generally accepted will have real implications for the obligations of the international community under international law."* [63]
On the other hand, others assert that it is contradictory to refer to environmental migration as a separate type of migration because of the complexity of the phenomenon and the intertwining factors leading to it. [64] Moreover, the definition of a category, especially a legal one, inevitably leads to assessing its boundaries and limits. A legal category may exclude certain persons from exercising certain rights or from receiving certain protection, even though they are worthy of protection. Following this idea and considering the complexity of migrations induced by environmental changes, it could be possible that the use of a specific definition would not be useful and effective when it comes to implementing a protection instrument. Nevertheless, this argument seems to lack a foundational basis: this migratory phenomenon has been studied thoroughly over the years and the nexus between environmental changes and migrations, albeit complex, has been widely accepted by the scientific community. Additionally, the definition of the category provides a starting point to which States are agreeing to be bound, and from which subsequent solutions and developments may stem and certain rights and obligations may flow. There is a growing acknowledgement that existing gaps need to be

[63] O. Brown, *'Climate change and forced migration: Observations, projections and implications'* Human Development Paper 2007/2008 (2007/17), at 7
[64] B. Mayer, *'Who are "Climate Refugees"? Academic engagement in the post-truth* era' in S. Behrman, A. Kent *Climate Refugees': Beyond the Legal Impasse?* 1st Edition Routledge (2018), at 89-98

bridged and an agreed definition to be framed.
Likewise, the use of a specific terminology rather than another reflects the perspective we might have of the phenomenon. As an example, the term 'climate refugee', which is mostly referred to by the media, envisages an alarmistic view.[65] Not to mention that the lexical choice implies the legal framework to be applied for protection. Those advocating the use of the term 'refugee' are more inclined to investigate protective instruments and to consider those who move due to environmental and climatic phenomena as subjects in need of protection; those who use the term migrant rather identify the movement as an adaptation strategy that can be adopted to mitigate the effects of climate change.
All in all, different terms and definitions have proliferated over the years. What unites them is the fact that they all are descriptive terms: they have no legal basis and do not indicate a status that confers obligations on States. [66]
In the next section, an analysis of the debate discussed by the international community on the topic will be provided. Although there is still no agreement on the vocabulary to be used, there is a growing awareness of the importance of identifying the subjects to be regulated and protected.

1.7.1. Refugees, displaced persons or migrants?

In 1985, a report by Essam El Hinnawi suggested the use of the term "environmental refugee" describing *"those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life. By "environmental disruption" in this definition is meant any physical, chemical and/or biological changes in the ecosystem (or the resource base) that render it, temporarily or permanently, unsuitable to support human life."* [67]

[65] M. Voyer, *'Climate Refugees or Migrants? Contesting Media Frames on Climate Justice in the Pacific'* Environmental Communication A Journal of Nature and Culture 9 (2014)
[66] CNR and IRiSS, *'Migration and the Environment: some reflections on current legal issues and possible ways forward'* edited by Giovanni Carlo Bruno, Fulvio Maria Palombino, Valentina Rossi CNR Edizioni (2017), Preface VII
[67] E. El Hinnawi, '*Environmental Refugees'*, UNEP (1985), at 4

Myers used the same term in defining this category of refugees as *"people who can no longer gain a secure livelihood in the homelands because of drought, soil erosion, desertification and other environmental problems, together with associated problems of population pressures and profound poverty."* [68] Biermann and Boas advocated for the term climate refugee to describe people who *"have to leave their habitats, immediately or shortly, because of sudden or gradual alterations in their natural environment related to at least one of three impacts of climate change: sea-level rise, extreme weather events, and drought and water scarcity."* [69]

The adoption of the term refugee has been highly criticised by scholars and international organizations. McAdam [70], Behrman and Kent [71] believe it creates misunderstandings since the position of environmental migrants does not fit the definition of a refugee under the 1951 Geneva Convention, as it will be further explained in the next chapter. Furthermore, the UNHCR [72] and the IOM [73] have repeatedly stated that the use of the term environmental or climate refugees should be avoided as it is inaccurate and misleading.

Another term used to describe people moving due to environmental changes is "environmentally displaced persons ". Displaced persons, under international law, are defined as *"persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized border."* [74] In this sense, the term is a reinterpretation of the international definition of displaced persons. It considers

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[68] N. Myers, *'Environmental Refugees in a Globally Warmed World'* BioScience Vol. 43 No. 11, 752-761 (December 1993), at 752

[69] F. Biermann, I. Boas, *'Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees, Global Governance' supra* note 62, at 67

[70] J. McAdam, '*Climate change, forced migration and international law' supra* note 50, at 40

[71] S. Berhman, A. Kent, "*Overcoming the legal impasse: Setting the scene"* in S. Behrman, A. Kent '*Climate Refugees': Beyond the Legal Impasse?* 1st Edition Routledge (2018), at 10

[72] UNHCR, *'Summary of Deliberations on Climate Change and Displacement: Identifying Gaps and Responses: Experts Roundtable'* Bellagio Conference Center (2011), at 1

[73] IOM Policy Brief, *'Migration, Environment and Climate Change: Assessing the Evidence'* (2009), at 4-5

[74] UNHCR, '*Guiding Principles on Internal Displacement'* ADM 1.1, PRL 12.1, PR00/98/109 (1998)

internal and cross-border movements, and it has been employed by the IOM as a less ideological and "*controversial alternative to environmental refugees or climate refugees that have no legal basis or raison d'être in international law, to refer to a category of environmental migrants whose movement is of a forced nature."* [75] Rather, the IOM has preferred the use of the dichotomy "environmental migrants". Although there is no universal definition of migrant, the IOM defines a migrant as any person who, temporally or permanently, moves away from their usual place of residence internationally or within their country, regardless of their legal status. [76] Under this umbrella term, numerous specifically or not defined categories of people are included. The IOM proposed to define environmental migrants as "*persons or groups of persons who, predominantly for reasons of sudden or progressive change in the environment that adversely affects their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad".* [77] This definition is particularly broad, and it includes temporary and permanent movements, internal and international as well as forced and voluntary migration. [78] In this regard, it is also necessary to highlight the difference between environmental migration and climate migration. In the first case, the movement is caused by any sort of changes in the environment which cause natural disasters, whereas in the second, the movement is exclusively due to a change in the environment caused by climate change. Climate migration is, therefore, a subcategory of environmental migration. [79]

This definition has also been subject to criticism. Some scholars [80] argue that it minimises the phenomenon because it equates it to movements of a purely voluntary nature. In fact, the term migrant covers a broad spectrum of movements and does not emphasise the search for protection and refuge that characterises most

[75] IOM Glossary, *'Migration, Environment, and Climate Change: Evidence for Policy'* (2014), at 13
[76] IOM, *'Glossary on Migration'* IML series No.34 (2019), at 132
[77] IOM, '*Discussion Note: Migration and the Environment'* MC/INF/288 (2009), at 1-2
[78] D.C. Bates, *'Environmental Refugees? Classifying Human Migrations Caused by Environmental Change'* Population and Environment Vol. 23 No. 5 (2002), at 471
[79] IOM MECC Division, *'Warsaw International Mechanism, Executive Committee, Action Area 6: Migration, Displacement and Human Mobility, Submission from the International Organization for Migration'* (2016)
[80] J. McAdam, '*Climate Change Displacement and International Law: Complementary Protection Standard' supra* note 59, at 11-12

of those who move because of environmental changes. European institutions argue for a rather diplomatic approach to the issue: *"because the term 'environmental refugee' has been challenged both in the academic and political debate, we suggest using the more general term of 'environmentally induced migration' to denote the broader phenomenon and 'environmentally induced displacement' to denote forced forms of mobility primarily engendered by environmental change".* [81]

Notwithstanding the existence of punctual definitions, to this day, there is no international agreement on a term to be used to refer to a person or people who move for environment-related reasons. Consequently, this type of migrant faces legal uncertainty whenever they cross borders. In this thesis, it will be referred to 'environmental displacement' (or 'environmental migration') and 'environmentally displaced people' (or 'environmental migrants') as umbrella terms, also including 'climate migration' and 'climate migrants'. Therefore, 'environmental migration' includes all movements, which are mainly driven by an environmental factor, notwithstanding whether these movements are triggered by disasters related to climate change or not. Finally, the wrongfully yet commonly used term 'environmental refugees' will not be employed in this work, as it is erroneous as a matter of law.

1.8. Environmental migration: recognising the issue and exploring possible solutions

As stated in the previous sections, growing evidence shows that climate change-related occurrences will both affect underdeveloped countries and the EU Member States, and it will shortly challenge and overwhelm countries while putting fundamental human rights in jeopardy. Following its underlying values, the EU has a crucial role in reaching a consensus on finding a solution to the recognition and legal protection of environmental migrants. Furthermore, a growing number of international and regional actors have recognized the necessity to implement

[81] European Parliament's Committee on Civil Liberties, Justice and Home Affairs, '*Climate Change and Migration Legal and policy challenges and responses to environmentally induced migration' supra* note 24, at 4

safeguards for this category of migrants and that legal loopholes and voids in protection have to be overcome through a common effort. Consequently, this increasing interest of international and regional actors and the extent to which the EU has the power to suggest and implement effective policies in the international fora have to be thoroughly analysed. The next chapter will dwell on this topic to explore the possible branches of international law that might implement provisions under which the position of environmental migrants might fall and the role and potential of the EU in the adhesion and creation of ad hoc international legal instruments that could potentially protect environmental migrants.

CHAPTER II: THE INTERNATIONAL AND REGIONAL LEGAL MECHANISMS FOR ENVIRONMENTAL MIGRANT PROTECTION: THE ROLE OF THE EUROPEAN UNION

Although the international community has acknowledged the environmental migration phenomenon, no rule of international law offers a specific form of protection for international migration caused by climate change and environmental phenomena.[82]

As explained in the previous chapter, because the object of this research is the intersection of migration and the effects that environmental changes might have on it, its transversal nature makes environmental migration possibly fall within multiple of the traditional branches of law. Consequently, the underlying aim of this chapter is to give an overview of which branch of international law might be relevant when discussing this topic and which provisions of the international legal framework could be extensively interpreted to implement forms of protection for environmental migrants, albeit not dedicated specifically to the object of study. The issue of environment-induced population movement will be analysed through the lenses of the refugee, environmental and human rights international legal framework to understand whether and to what extent each branch of law would be able to provide a possible solution to the lack of protection of this category of migrants.

Moreover, the analysis will be conducted through a specific EU lens. Arguably, the international mechanisms studied are either part of the EU's legal framework or form principles based on which the EU deploys its activities. The further analysis will elucidate the EU's external action and its role at the international level in the implementation of effective and suitable protection mechanisms and which position the EU might take in the possible future creation of new protection mechanisms at the international level. For this reason, it is essential to first examine how the EU deploys its external competencies.

[82] J. McAdam, M. Limon, *'Human rights, climate change and cross-border displacement: the role of the international human rights community in contributing to effective and just solutions'*, Policy Report Universal Rights Group (2015), at 15

2.1. The EU in the international legal order: participation in international organisations and its treaty-making competence

The EU deploys countless activities on the global scene. As a global actor, it is engaged around the world to promote peace, security and prosperity and the interest of European citizens. In 1993, with the establishment of the EU, external competencies were enshrined in the new EU architecture within the Common Foreign Security Policy (hereinafter, CFSP), the second pillar in the 'three-pillar system'. [83] The organization of the CFSP was essentially designed as a distinct framework within the Union's structure and based on intergovernmental principles. [84] Subsequently, the 1997 Treaty of Amsterdam established a more efficient decision-making process in the CFSP, including constructive abstention and qualified majority voting. [85] The 2003 Treaty of Nice introduced further changes to streamline the decision-making process and mandated the Political and Security Committee to exercise political control and strategic direction of crisis management operations. [86] Nowadays, the provisions on the external action of the EU are laid down in Articles 21- 46 of Title V of the TEU. The EU foreign policy is implemented by the EU's foreign affairs chief, the EU High Representative, [87] and supported by the European External Action Service, [88] the EU's diplomatic service. Article 24 TEU states that the Union's competence in CFSP matters covers all areas of foreign policy and all questions relating to the Union's security.

Overall, these provisions provide the EU with the power to assist, cooperate with and develop relations and partnerships with non-EU countries and with international, regional or global organisations. This power can be exercised by the EU according to the objective of the EU's external actions as set out in Article 21 TEU. On this legal basis, the external action has to be guided by the principles that inspired its creation and development, and which it seeks to promote in the wider

[83] European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht , 7 February 1992, Official Journal of the European Communities C 325/5

[84] G. De Baere, '*Constitutional Principles of EU External Relations'* Oxford University Press OUP (2008), chapter 4

[85] H. De Waele, '*Legal Dynamics of EU External Relations - Dissenting a Layered Global Player'* 2nd Edition Springer (2017), at 21

[86] *Ibid*

[87] The role of the High Representative is envisaged in the TEU in Articles 18 and 27

[88] The role of the EEAS is envisaged in the TEU in Article 27 TEU

world, including democracy, the rule of law, the universality and indivisibility of human rights, fundamental freedoms and respect of human dignity.

To achieve the principles envisaged in Article 21 TEU, the EU has concluded many agreements with third countries and takes part in numerous international organizations. As article 21 TEU states, *"the Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations...It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations".*

2.1.1. The relationship between the EU and international organizations

In the international arena, the EU makes itself out to be distinct from other international organisations and claims to constitute an *'autonomous legal order'*. [89] Although the EU Treaties do not mention the 'autonomy' of the EU legal order as such, the CJEU started referring to it from Opinion 1/91 [90] and later claimed it as a constitutional principle. Over the years, the CJEU has clarified its meaning under EU law as a multifaceted concept that originates from the fact that the EU is a distinct or 'new' legal order and from its lex specialis character in relation to international law to which the Member States have agreed upon in the Treaties. [91] It is often described as having an internal and external dimension: the first, is directed against and establishes the autonomy of the EU legal order vis-à-vis the Member States; the latter is directed vis-à-vis international law and relates only to the special and non-negotiable, in the external context, characteristics of the EU legal order.

The main consequence of this autonomous position is that general international law has a restricted applicability to the EU legal order. If, on the one hand, the EU is

[89] CJEU Case 6/64, *Costa v ENEL*, EU:C:1964:66, [1964] ECR 585, 15 July 1964

[90] CJEU, Opinion 1/91 *delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty - Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area* ECLI:EU:C:1991:490, paras 30, 35, 47

[91] V. Moreno-Lax, K. S. Ziegler, '*Autonomy of the EU legal order – a general principle? On the risks of normative functionalism and selective constitutionalization* in *Research Handbook on General Principles in EU Law* Edited by Katja S. Ziegler, Päivi J. Neuvonen, Violeta Moreno-Lax 1st Edition Elgar Online (2022), at 228-232

bound by the Treaties it has concluded, on the other, the CJEU acts as a gatekeeper that exercises control over external norms and their capability of affecting the EU legal order. The EU must respect international law in the exercise of its powers to the extent that it has accepted these norms and that they do not clash with its internal legal systems. [92] In addition, Article 47 TEU explicitly recognises the legal personality of the European Union, making it an independent entity in its own right. This means that the EU has been conferred the powers to conclude and negotiate international agreements and sign treaties following its external commitments, become a member of international organisations and join international conventions. Consequently, its legal system is built on the principle of freedom of contract and liberal participation in international organizations which plays a fundamental role in the external action of the EU. The participation needs to be based on the specific organization's rules; therefore, it might be the case that some of them only admit states.[93] In this respect, the EU will not be able to be a member of the organization, but it might authorise Member States to act on its behalf and in its interests. [94] Participation can be based on a full membership or an observer status. For instance, the EU is a full member of the WTO and FAO, but only an observer in the ILO. [95] Article 220 TFEU affirms that the EU shall maintain appropriate forms of cooperation with international organisations, specifically *"with the organs of the United Nations and its specialised agencies, the Council of Europe, the Organisation for Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development."* For what concerns the participation of the EU in the work of the UN, the EU is a permanent observer and acquired, in 2011, the status of enhanced observer in the UN General Assembly. [96] This means that the EU is enabled to be inscribed on the list of speakers and have its communications circulated as UN General Assembly documents but, as some

[92] Examples of opinions and judgements in which the CJEU has extensively explained the relationship between the EU legal order and international law are: Opinion 1/76, Opinion 1/91, Opinion 1/00, Joined Cases C-402/05 & C-415/05 P, Opinion 2/13, Case C-741/19

[93] Examples of international organisations only admitting states are the UN, IMF and the World Bank

[94] H. De Waele, '*Legal Dynamics of EU External Relations - Dissenting a Layered Global Player' supra* note 85, at 21

[95] *Ibid*

[96] UNGA Resolution adopted by the General Assembly on 3 May 2011 65/276, '*Participation of the European Union in the work of the United Nations'* A/RES/65/276 (2011)

authors suggest, this has only a limited and symbolic value. [97] The EU is not a member of the UN Security Council, however, the Member States who are part of it must defend the interests of the Union. [98]

2.1.2. The EU Treaty-making power

As indicated above, another way the EU expresses its international presence is by concluding international agreements with third countries or international organizations.

As with any juridical construction, the EU possess a legal personality to be able to enter legal relations. [99] Article 47 TEU states that the "*Union shall have legal personality"* which, by only looking at the wording of the Article, seems to pertain to only internal matters. In reality, the interpretation given to Article 47 TEU explains that the EU's natural condition also retains an international legal personality, meaning the capability to act as an international actor. This matter was first addressed by the CJEU in the *Erta* case [100] under which the Court stated that, although in an obiter dictum fashion, [101] the long European Economic Community could conduct itself as an actor at the international level. Because of the extremely short phrasing of Article 47 TEU, the *Erta* ruling still pertains to its importance: the international legal personality of the EU is implied in the wording of the Article, and it is not limited to the internal sphere, but it should be regarded as covering external aspects as well. [102]

For international organisms seeking to engage in legal relations, holding an international legal personality is just one of the prerequisites. Additionally, if the Union seeks to express its legal personality with the implementation of international agreements, a proper and sufficient legal basis is necessary. Being the EU built on

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[97] H. De Waele, '*Legal Dynamics of EU External Relations - Dissenting a Layered Global Player' supra* note 85, at 167
[98] Article 34 TEU
[99] Article 47 TEU reads as follows: '*The Union shall have legal personality.'*
[100] CJEU Case 22/70, *Commission of the European Communities v Council of the European Communities, European Agreement on Road Transport*, ECLI:EU:C:1971:32
[101] H. De Waele, '*Legal Dynamics of EU External Relations - Dissenting a Layered Global Player' supra* note 85, at 5
[102] *Ibid*

the principle of conferral [103] and, therefore, being able to exercise powers only and to the extent to which the Treaties confer it, it means that whenever powers are not conferred to the EU, Member States still retain them, and the EU cannot act lawfully on the matter. At the beginning of the European integration, only a couple of external competencies were given to the EU. The possibilities were broadened with the implied powers doctrine which was first explained in the *Erta* ruling. The Court asserted that whenever the, at the time, Community was to implement common policies as referred to in the Treaties, the Member States had no right to take up international obligations and, consequently, the Community would enjoy external powers in all the fields in which it already enjoyed corresponding internal powers. Further rulings [104] interpreted this doctrine as attaching a necessity element in the implementation of these powers. Nowadays, the EU enjoys a wide variety of external competencies, but this doctrine has still a residual role whenever there is no express power or where there only exists an incomplete one. [105]

Article 216 TFEU provides the cases in which the EU can conclude an agreement with a third country or an international organization: " *The Union may agree with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope."* The first case indicates the instances in which the Treaties themselves provide the necessity to conclude an international agreement, whereas the second, envisages the implied powers doctrine. Lastly, the third scenario refers to the cases in which the EU has already exercised its powers and the legal act adopted has conferred the relative treaty-making power or, a subsequent act, affects the instrument earlier adopted.[106]

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[103] Article 5 TEU, para 1 reads as follows: *"The limits of Union competences are governed by the principle of conferral*."

[104] CJEU, Opinion 1/76, *Opinion given pursuant to Article 228 (1) of the EEC Treaty - 'Draft Agreement establishing a European laying-up fund for inland waterway vessels*, ECLI:EU:C:1977:63

[105] An example of these scenarios is on the topic of energy and transport in which the EU does not have a corresponding external competence.

[106] H. De Waele, '*Legal Dynamics of EU External Relations - Dissenting a Layered Global Player' supra* note 85, at 10

Moreover, for the agreement to be valid under EU law, it is necessary to comply with further procedural requirements laid down in the procedure enshrined in Article 218 TFEU. [107]

For what concerns the EU competencies on the topic of migration and the environment, those that are of interest to this thesis, it is necessary to analyse them distinctly.

The migrations policy is a shared one between the EU and its Member States. [108] The legal basis for action is Articles 67, 77, 78 and 78 TFEU. [109] The Articles do not envisage a broad competence to conclude international agreements on this topic but, because of the implied powers doctrine, the EU might conclude them based on the internal competencies given. For instance, the EU has concluded multiple

[107] The procedure indicated by the Treaty requires the participation of multiple actors, the Commission, the High Representative, the Council and the European Parliament and, in a later stage, the Court of Justice. The conclusion of the agreement itself is adopted by the Council which will take its decision by qualified majority voting or, for specific instances, unanimously. This peculiarity highlights how Member States play an essential role in the conclusion of international agreements.

[108] TFEU, Article 4: "...*2. Shared competence between the Union and the Member States applies in the following principal areas: [...] (j) area of freedom, security and justice*;"

[109]TFEU, Article 67: *"1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. 2. It [...] shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals..."*

TFEU, Article 77: *"..the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning: (a) the common policy on visas and other short-stay residence permits; (b) the checks to which persons crossing external borders are subject; (c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period; (d) any measure necessary for the gradual establishment of an integrated management system for external borders; (e) the absence of any controls on persons, whatever their nationality, when crossing internal borders. [...]*

4. This Article shall not affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law."

TFEU, Article 78: *"1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulment. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties..."*

TFEU, Article 79: *"1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in the Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings. [...]*

5. This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed."

arrangements with third countries, especially those defined as *transit countries* [110] by expressing its cooperative role in providing access to international protection and financial instruments and its containment approach. [111]

On the topic of migration, the objectives set out by the Treaties are the implementation of a common policy and the regulation of a fair policy on migration and asylum, with full respect to fundamental human rights and in compliance with the principle of solidarity between Member States. Moreover, Article 78 TFEU affirms that EU asylum legislation must comply with the 1951 Refugee Convention and its 1967 Protocol [112], although the EU cannot be part of it, [113] and that the EU shall adopt measures for the enforcement of the common asylum system, using the ordinary legislative procedure. In the EU migratory and asylum policy, the Geneva Convention plays a prominent role. As a fact, the implementation of the Common European and Asylum System is based on the full application of the Geneva Convention and *"the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community"*. [114]

On the other hand, the EU competencies on the environment are laid down in Articles 11 and 191, 192 and 193 of the TFEU, as a shared area of competencies with the Member States. [115] The EU is competent to act in all areas of

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[110] Examples of this type of international arrangement are the 2016 EU-Turkey Agreement, the 2015 Western Balkan Route Statement, the 2017 Migration Partnership Framework with Niger, the 2014 National Strategy on Migration with Tunisia.

[111] N. Feith Tan, J. Vedsted-Hansen, *'Inventory and Typology of EU Arrangements with Third Countries-Instruments and Actors'* ASILE Global Asylum Governance and the European Union's Role (2021), at 6-8

[112] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 Refugee Convention

[113] *Ibid*, Article 39 of the Refugee Convention. On the contrary, all Member States have signed and ratified the Convention and its Protocol.

[114] Charter of Fundamental Rights of the European Union, 2000, Article 18

[115] TFEU, Article 11: *Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.*

TFEU, Article 191: *1. Union policy on the environment shall contribute to pursuit of the following objectives:*

- preserving, protecting and improving the quality of the environment,

- protecting human health,

- prudent and rational utilisation of natural resources,

- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

environmental policy. Its scope for action is only limited by the principle of subsidiarity and its policy rests on the international principles of precaution, prevention and the polluters pay principles. On top of the EU's internal policies and programmes on the environment which will be further explained in the next chapters, the EU's external competencies also cover environmental and climate policies such as the External Environmental Policy (hereinafter EEP). It is a party to numerous global, regional, or sub-regional environmental agreements on a wide range of issues, such as nature protection and biodiversity, climate change, and transboundary air or water pollution. [116] Its approach is mostly for the implementation of common policies at a global level to create a bigger impact for instance, in taking part in the COP negotiations. [117] The EU helped shape several major international agreements adopted in 2015 at the UN level, such as the 2030 Agenda for Sustainable Development, the Paris Agreement on Climate Change, and the Sendai Framework for Disaster Risk Reduction. Moreover, the EU [118] is a party to the UNFCCC as a regional economic integration organisation and, according to article 22 of the UNFCCC, might be a Party to the Convention itself. Both the EU and its Member States have also ratified the Kyoto Protocol, which implemented and specified the objectives of the UNFCCC.

2.2. The 1951 Geneva Convention and the principle of non-refoulment

4. Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.

TFEU, Article 193: *The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission.*

[116] Examples of agreements to which the EU is a party: UNFCCC, adopted 9 May 1992, entered into force 21 Mar 1994, 1771, UNTS 107 Chapter XXVII and UN Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, Treaty Series , vol. 1760, p. 79 and Convention on international trade in endangered species of wild fauna and flora. March 3rd, 1973, 993 U.N.T.S. 243

[117] European Parliament Fact Sheet on the EU, '*Environment policy: general principles and basic framework'* available at https://www.europarl.europa.eu/factsheets/en/sheet/71/environment-policy-general-principles-and-basic-framework accessed 10 October 2023

[118] Kyoto Protocol to the UNFCCC, 11 December 1997

The cornerstone of the international legal framework on refugee protection is the 1951 Geneva Convention Relating to the Status of Refugees (hereinafter, the Refugee Convention or the Convention) and its subsequent 1967 Protocol. [119]

In the context of environmental migration, the Refugee Convention and its 1967 Protocol play a key role as instruments of possible protection for those who cross the borders of their own country. By translating the human rights principle of non-refoulement principle into concrete provisions, it legally binds country signees to recognize and protect people who flee their countries of nationality because of specific grounds. Furthermore, although the EU itself is not a party to it, its asylum system is built on the principles and the application of the Convention and all EU Member States are signatories to the Convention and, therefore, they have to implement it through their national legislation. [120]

Consequently, the analysis of this instrument is crucial to depict whether the legal position of environmental migrants might fall under the scope of application of the Geneva Convention and the subsequent national legislation.

The Convention provides a standard of protection for those who qualify as refugees. It includes provisions concerning the definition of those to be protected, the rights to be granted to them and the way states parties must comply with the implementation of the Convention. [121] However, it does not define the procedures for the acquisition of the status, leaving states free to implement its content at regional and national levels. Although the Convention did not provide for a supervisory body, UN Resolution 428 (V) of 14 December 1950, established the Office of the United Nations High Commissioner for Refugees (hereinafter, UNHCR) with the task, among others, of overseeing the proper implementation of the Convention. [122]

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[119] Geneva Convention *supra* note 112

[120] UNHCR, *States parties, including reservations and declarations, to the 1951 Refugee Convention* available at https://www.unhcr.org/media/states-parties-including-reservations-and-declarations-1951-refugee-convention accessed 18 November 2023

[121] A. Del Guercio, *'La protezione dei richiedenti asilo nel diritto internazionale ed europeo'* Editoriale Scientifica (2016), at 33

[122] UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* December 2011, HCR/1P/4/ENG/REV. 3, paragraphs 18-19

The Convention provides for a series of rights to be granted to refugees: some rights are those that apply to foreigners in general [123]; other types of rights, however, require the same treatment as that granted to nationals of the foreign state. [124]

Moreover, the Convention outlines the cornerstone principle of international refugee law: the principle of nonrefoulment. According to Article 33, refugees must not be removed or returned to situations where the enjoyment of human rights might be jeopardized. This principle translates into the obligation not to transfer a refugee or asylum seeker, directly or indirectly, to a country where he or she risks being persecuted, tortured, or subjected to other cruel or degrading treatment or punishment because of his or her status. [125] Reservations to Article 33 are not authorized [126] except in the cases provided for under Articles 32 and 33 of the Convention, which allow for the expulsion of a refugee on grounds of national security or public order and when there are substantial reasons to depict the individual as a risk or a threat to the security of the country. [127] This principle can be found in numerous legal instruments [128] and is part of customary law. [129] Consequently, states are bound to respect the principle even if they are not a party to any treaties or international legal documents containing the prohibition against refoulement.

Article 1. A(2) of the Geneva Convention, defines a refugee as a person " *who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it".* [130]

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[123] Geneva Convention *supra* note 112, Article 13
[124] Geneva Convention *supra* note 112, Article 4 and22
[125] Geneva Convention *supra* note 112, Article 33
[126] Geneva Convention *supra* note 112, Article 42
[127] Geneva Convention *supra* note 112, Articles 32 and 33
[128] For example, Article 3 ECHR, Article 7 ICCPR, Article 21 EU Qualification Directive, Articles 4 and 19(2) of the EU Charter
[129] UNHCR, '*Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol**' (2007), paragraph 15
[130] Geneva Convention *supra* note 112, Article 1.A.(2)

2.2.1. The application of the Geneva Convention to environmental migrants

In most cases, the elements of the refugee definition, will not be met by people displaced in the context of environmental change. Nevertheless, as it will be thoroughly explained later, since "*the impacts of a disaster may create conditions that reinforce or bolster claims for refugee status under the Refugee Convention"*, [131] the application of international refugee law should not directly be dismissed when climate change or disasters have a stake on the migratory movement.

The study shall depart from the definition of "refugee" as given in the text of the Convention.

First, the refugee definition only applies to people who have already crossed an international border. As discussed previously, much of the anticipated movement in response to environmental change will be internal, and thus will not meet this preliminary requirement.

Moreover, the Convention does not define the term persecution. McAdam defines persecution as violations of human rights that are particularly serious, either because of their inherent nature or because of their repetition [132] and, consequently, the question of whether something amounts to persecution remains a question of degree and proportion. She argues that a claim based only on climate change will not succeed because it is not possible to prove a differential impact on the single individual compared to the rest of society. Moreover, in this context, it is challenging to depict who is the persecutor because no government, per se, is responsible alone for environmental changes. On the other hand, it could be argued that the international community and industrialized countries can be held liable, but those are also the countries where refuge is usually sought.

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[131] W. Kälin and N. Schrepfer, '*Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*', UNHCR Legal and Protection Policy Research Series, PPLA/2012/01 (2012) at 10

[132] J. McAdam, *'Climate Change, Forced Migration, and International Law'* Oxford University Press (2012), at 44

A leading international refugee law expert, Hathaway, gives a much wider interpretation of what persecution entails. [133] He claims that persecution is the sustained or systemic violation of basic human rights demonstrative of a failure of state protection. [134] In this view, if we consider that environmental disasters may result in basic human rights violations because of the disaster itself or because the State fails to protect affected people and to implement preventive measures, then environmental migrants may, to some extent, fall into the category of persecuted people.

Nevertheless, persecution necessitates more than a direct link between wrongdoing and harm. It implies a clear goal on the part of a persecution agent to cause harm to another individual or group of people. [135] In the context of climate change, it seems difficult to believe that environmental disruptions caused by human activities are carried out with the explicit aim of harming other communities.

Even if the requirement of persecution was met, the Convention lists the grounds under which a person is entitled to the status of refugee, namely race, religion, nationality, membership of a particular social group or political opinion. These grounds restrict the scope of the Convention and make its application to environmental and climate disruptions particularly difficult because the impact of the latter is largely indiscriminate, rather than tied to specific characteristics. Moreover, an argument that those migrants might constitute a "particular social group" would be difficult to envisage, since they should be connected by a fundamental and immutable characteristic other than the risk of persecution itself. [136] Einarsen highlights the groups that might be left out of the scope of the Convention, (i) internally displaced refugees – namely people who have not crossed an international border – ; (ii) migrants of economic or personal convenience; (iii) stateless persons who are not also liable to persecution; and (iv) accidental victims of natural disasters, environmental problems, or a violent society without an

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[133] J.C. Hathaway, *'The Law of Refugee Status'*, Cambridge University Press 2nd Edition (1991), at 104-105

[134] *Ibid*

[135] UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees supra* note 122, at 100

[136] J. McAdam, '*Climate Change-Related Displacement of Persons'* in Oxford Handbook of International Climate Change Law 1st Edition Oxford University Press (2016)

element of discrimination or differential treatment that expose any given group or individual to a higher risk of harm than others. [137]

Because the Convention retains a political conception and a restrictive view of persecution, infringements on living conditions due to environmental causes were not included in the text and refugees were conceived as directly affected by their political and civil rights rather than their economic or social. [138] Situations of widespread violence do not meet the criteria of persecution, and, for the same reasons, victims of natural disasters are excluded from the scope of the Convention. [139] All in all, superior Courts around the world have stated that the Convention does not apply in the cases of environmental migrants searching for better living conditions across borders. [140]

Nevertheless, it is to highlight a peculiar interpretation of the term persecution that might be of use in the case of environmental migration. Even if environmental migrants do not, per se, fall under the scope of application of the definition of persecution, environmental disasters not only interact with other drivers of displacement but may also provide an overarching context for displacement and therefore, it might be possible to extensively interpret the Convention and grant environmental migrants protection. The UNHCR stresses the necessity to address the *"social and political characteristics of the effects of climate change or the impacts of disaster"* and the possible *"significant adverse effects on state and societal structures and individual well-being and the enjoyment of human rights"* when protection claims are held. [141] As indicated in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention

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[137] A. Zimmerman, F. Machts, J. Dorschner (eds*), 'Drafting History of the 1951 Convention and the 1967 Protocol. From: The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary'* Oxford Commentaries on International Law (2011), at 52

[138] C. Cournil, '*The inadequacy of international refugee law in response to environmental migration'* Research Handbook on Climate Change, Migration and the Law Edited by Benoît Mayer and François Crépeau, Elgar Publishing (2017), at 91

[139] UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees supra* note 122, paragraph 39

[140] Examples: Canada (Attorney General) v Ward [1993] 2 SCR 689, 732 or Horvath v Secretary of State for the Home Department [2001]1AC489,499–500

[141] UNHCR, *'Legal Considerations regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters'* (2020) paragraph 5 available at https://www.refworld.org/docid/5f75f2734.html accessed 18 November 2023

and the 1967 Protocol relating to the Status of Refugees, an applicant for protection might have been subject to multiple measures that in themselves do not amount to persecution, but, if taken all together, they might justify a claim to a well-founded fear of persecution on cumulative grounds. [142] Moreover, there might be exceptions in which environmental degradation might amount to persecution for the scope of application of the Convention, namely [143]:

- victims of natural disasters flee because their government has consciously withheld or obstructed assistance to punish or marginalize them on one of the five Convention grounds;
- government policies target particular groups reliant on agriculture for survival, in circumstances where climate change is already hampering their subsistence;
- a government induces famine by destroying crops or poisoning water, or contributes to environmental destruction by polluting the land and/or water;
- a government refuses to accept aid from other States when it is in need, such as in the aftermath of a disaster;
- a government does not establish appropriate measures for the prevention of disasters.

It is possible to note how, in these instances, the fear of persecution arises not from the environmental disaster itself, but from the actions or inaction of the government or non-state actor. Consequently, the well-founded fear of persecution would be linked to the act or omission of the state and therefore, to one of the Convention's reasons.

2.2.2. Proposed modifications to the Geneva Convention

More generally, it is to highlight that the Refugee Convention's direct applicability is limited in disaster displacement instances. Although one could argue that the international community, especially industrialized States, might be considered

[142] UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees supra* note 122, paragraph 53
[143] J. McAdam, *'Climate Change, Forced Migration, and International Law' supra* note 132

persecutors, individuals are likely to seek protection in these very countries. On top of that, in the case in which the negative effects of climate change and disaster obtained the constitutive status of persecution, it would be challenging to link it with one of the persecution's grounds, given that such effects are largely indiscriminate.

Nevertheless, the Convention enshrines conceptual constructs that could be usefully transposed to the climate change-related displacement context. The UNHCR has argued that the absence of a definition was a choice deliberately made to allow the term to encompass different forms of persecution depending on the context. [144] This peculiarity could fit the purpose of expanding the protection granted by the Convention to different groups of people seeking protection, however, it has never been used. A resolution by the UN General Assembly might be effective for the purpose: any contracting state might request the revision of the Convention. Nonetheless, this possibility seems quite inconceivable, it is doubtful that the States Parties would accept to modify the Convention to integrate such a bigger group of refugees and the possible political tensions that could arise make this option quite difficult.

Some scholars, argue that the definition given by the Convention must be expanded because it *"embodies an outdated understanding of the worldwide refugee situation"*.[145] Therefore, they propose to modify the current refugee definition to include environmental degradation and natural disasters.

At the EU level, the Green/EFA party in the European Parliament has proposed the addition of an ulterior Protocol to the Convention by making a clear distinction between the traditional definition of refugee and environmental migrants worthy of international protection. [146]

The position of the Council of Europe on the possible expansion of the Convention is quite negative: although it has acknowledged the necessity to implement measures that protect people who are forced to move as a consequence of climate

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[144] UNHCR, *'An Introduction to International Protection. Protecting persons of concern to UNHCR'* (2005) available at https://www.unhcr.org/3ae6bd5a0.pdf accessed 20 October 2023, at 56

[145] B. Harvard, *'Seeking protection: recognition of environmentally displaced persons under international Human Rights Law'* Villanova Environmental Law Journal volume 18(1) (2007)

[146] H.Flautre, J. Lambert, S.Keller, B. Lochbihle, '*Climate Change, Refugees and Migration'* The Greens/EFA in the European Parliament (2013)

change, it has refrained from proposing to extend the level of protection guaranteed by the Convention to environmental migrants. Rather, according to the Assembly, it would be more useful to reflect on the opportunity to strengthen resilience and capacity to adapt to climate-related hazards and natural disasters in the native countries according to a human rights-based approach. [147]

2.3. Addressing environmental migration in the broader context of climate change and disaster policies

International environmental law is a vigorously evolving branch of international law whose aim is to deal with environmental issues affecting more states or countries than one. [148] The question arises whether international environmental law is the appropriate legal framework to address environment-induced migration.

At the Rio Earth Summit in 1992, the problem of environmental-induced migration and displacement was not recognized as a major concern. Only the Convention to Combat Desertification (hereinafter, UNCCD [149]), one of three new venues established in Rio to address environmental and development concerns, offered a passing mention of environment-induced migration. [150] However, the UN Framework Convention on Climate Change (hereinafter, UNFCCC [151]) did not mention the environment-induced human mobility phenomenon. However, since the Intergovernmental Panel on Climate Change identified migration and displacement as consequences of global warming in 1990, governmental and non-governmental organizations and academics have advocated for climate-induced migration to be covered by international environmental law, specifically international climate law. It was only in 2010, during COP16 that environmental migration was included in an official COP decision under the UNFCC regime.

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[147] Parliamentary Assembly of the Council of Europe, Resolution 2307 (2019), adopted on 3 October 2019 (34th Sitting)

[148] V.P. Nanda, G.R.Pring, G. W. Pring, *'International Environmental Law and Policy for the 21st Century'* International Environmental Law Volume 9 Martinus Nijhoff Publishers (2013), at 5

[149] United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD), adopted on 17 June 1994, entered into force on 26 December 1996, 1954 UNTS 3

[150] *Ibid,* Prologue Articles 10 and 17

[151] United Nations Framework Convention on Climate Change (UNFCCC), adopted on 9 May 1992 in New York, entered into force on 21 March 1994, 1771 UNTS 107

2.3.1. Climate change and international environmental law

The UNFCC has consolidated the international's community awareness of climate change: it has, in fact, allowed climate change to acquire its own regulatory space within an instrument susceptible to adaptation and transformation in the light of the changing international context and the growing awareness of the climate phenomenon. The UNFCC, being a framework Convention, sets out basic principles for cooperation between the contracting parties, leaving space for possible further agreements implementing its scope. Its main aim is to achieve the "*stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system"*. [152]
The Convention is based on international environmental law principles such as the principle of prevention, the principle of equity and sustainability of development, the principle of precaution and, especially, the principle of state responsibility which is envisaged as common but differentiated to developed and developing states.[153] Furthermore, it provides solidarity mechanisms for developing countries and it establishes special bodies for the effective implementation of the objectives set therein, among which the Conference of the Parties (COP) stands out. The latter, in addition to examining the status of the implementation and progress of the objectives, meets annually to adopt decisions necessary for the advancement of the fight against climate change.
The EU and its Member States are both parties to the UNFCCC. [154] Nevertheless, the EU does not have a separate vote from its Member States, that, during sessions

[152] *Ibid*, Article 2
[153] *Ibid*, Articles 3 and 4
[154] UN Climate Change, *Parties to the United Nations Framework Convention on Climate Change Annex 1* available at https://unfccc.int/process/parties-non-party-stakeholders/parties-convention-and-observer-states?field_national_communications_target_id%5B515%5D=515&field_parties_date_of_ratifi_value=All&field_parties_date_of_signature_value=All&field_parties_date_of_ratifi_value_1=All&field_parties_date_of_signature_value_1=All&combine= accessed 12 February 2024

and negotiations, meet privately to agree to a common negotiating position that is exposed by the Member State holding the Presidency of the Council of the EU. [155] Another major step in the fight against climate change was the adoption of the Kyoto Protocol during COP3. [156] It operationalises the UNFCC by committing industrialised countries and economies in transition to limit and reduce greenhouse gases through national measures. It delineates binding objectives and a sanction mechanism in the event of non-compliance with these obligations.

At the 1997 Conference, the EU tried to lead by example and committed itself and the Member States to reduce greenhouse gas emissions to 8% by 2012. Moreover, the follow-up of the Kyoto Protocol at the EU level was the adoption of the EU Climate Change Package.

Afterwards, the Paris Agreement [157] was adopted. Its overarching goal is to hold *"the increase in the global average temperature to well below 2°C above pre-industrial levels"* and pursue efforts *"to limit the temperature increase to 1.5°C above pre-industrial levels".* [158] At the discussion, the EU position was crucial for the speedy ratification of the Agreement. Not only the EU has an important role in building the coalition and consensus, but it also deposited its act of approval and enabled the Agreement to enter into force by crossing the needed threshold. [159] Both the EU and its Member States are signatories of the Paris Agreement, and their position is coordinated in common and shared goals at the EU level. [160]

Over the years, the EU has participated and committed to climate negotiations. In 2019, the EP by declaring a climate and environmental emergency, called for the EU to set climate neutrality by 2050 as its long-term climate goal under the Paris Agreement by implementing a socially balanced and fair transition. [161] Furthermore, it committed to increasing the emission reduction target to 55% by

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[155] UNFCC, '*A guide to the Climate Change Convention Process'* Preliminary 2nd edition Issued for informational purposes only Climate Change Secretariat (2002), at 29-30

[156] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162

[157] UN Doc. FCCC/CP/2015/10/Add.1 Adoption of the *Paris Agreement* Decision 1/CP.21 (2015)

[158] *Ibid*, Article 2

[159] H. De Waele, '*Legal Dynamics of EU External Relations - Dissenting a Layered Global Player' supra* note 85, at 107

[160] European Parliament, '*EU and the Paris Agreement: towards climate neutrality'* Article Directorate General for Communication (2023)

[161] EP, Resolution of 28 November 2019 *on the climate and environment emergency* (2019/2930(RSP)), point C.1.

2030. [162] In December 2019, the European Commission presented the roadmap for a climate-neutral Europe - the Green Deal [163] and, in 2020, the EP approved its Climate Law [164] proposing a 2030 emissions reduction target of at least 55%. During COP27, the EU stated its commitment to net zero greenhouse gas emissions and that its climate action should scale up its international climate finance towards the developed countries' goal of mobilising at least USD 100 billion per year. [165]
Recently, the EU has agreed to their COP28 position. It has reiterated its commitment to cutting its net GHG emissions [166] and agreed on a global phaseout of fossil fuels from the energy sector while providing technical and financial support to developing countries to secure the benefits of this transition. [167] Part of these commitments were later endorsed in the final negotiations of the first global stocktake: a call to a complete transition away from fossil fuels through the use of renewable energy and transitional fuels [168] and an agreement on the operationalisation of the Loss and Damage Fund to be hosted by the World Bank.[169]

2.3.2. Environmental migrants within the framework of international environmental law

The phenomenon of migration induced by environmental phenomena and climate change did not appear in the early stages of the regulation of climate effects at the international level.
The first explicit reference to environmental migrations was during COP16 in the Cancun Agreements. Decision 1/CP.16 *"invites all Parties to enhance action on*

[162] *Ibid*, point A
[163] European Commission *The European Green Deal supra* note 4
[164] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 *establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 'European Climate Law'*, PE/27/2021/REV/1
[165] European Council, '*Council sets out EU position for UN Climate summit in Sharm El-Sheikh* (COP27) (2022) available at https://www.consilium.europa.eu/en/press/press-releases/2022/10/24/council-sets-out-eu-position-for-un-climate-summit-in-sharm-el-sheikh-cop27/ accessed 19 November 2023
[166] Council Conclusions, ' *Preparations for the 28th Conference of the Parties (COP28) of the UNFCC supra* note 5, paragraph 17
[167] *Ibid*, paragraphs 30, 37-40
[168] UNFCC, '*Conference of the Parties serving as the meeting of the Parties to the Paris Agreement Fifth session United Arab Emirates, 30 November to 12 December 2023 Agenda item 4 First global stocktake*' FCCC/PA/CMA/2023/L.17 (2023), paragraph 28
[169] *Ibid*, subsection C "Means of Implementation and Support"

adaptation under the Cancun Adaptation Framework, taking into account their common but differentiated responsibilities and respective capabilities, and specific national and regional development priorities, objectives and circumstances, by undertaking, inter alia, the following: [..] Measures to enhance understanding, coordination and cooperation about climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels." [170] While this was an important step in the UNFCCC's engagement with migration, displacement, and relocation, it did not prescribe any obligation and, consequently, it did not bind states to protect displaced people. Later, the Doha Decision included Paragraph 7(a)(vi) encouraging *"further work to advance the understanding of and expertise on loss and damage, which includes [. . .] enhancing the understanding of [...] how impacts of climate change are affecting patterns of migration, displacement and human mobility"*. [171] Moreover, it called for understanding the relationship between non-economic loss and damage and human mobility and, consequently, formed the Warsaw International Mechanism on Loss and Damages. [172] The latter is a mechanism dealing with the loss and damage resulting from the impacts of climate change when it is not possible to mitigate the effects of climate change anymore. Its functions include, among others, strengthening cooperation, and collaboration with regional and global institutions on loss and damage associated with climate change. During COP21, the establishment of a task force was demanded to elaborate: *"recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change"*. [173] This Task Force on Displacement was established by the Executive Committee of the Warsaw International Mechanism for Loss and Damage and comprised, among others, representatives of civil society,

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[170] UNFCCC, Decision 1/CP.16: *The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention* (2010) FCCC/CP/2010/7/Add.1, paragraph 14 f

[171] COP to the UNFCCC, Dec. 3/CP.18, *Doha Amendment*, 18th Sess., 26 November–8 December 2012, UN Doc. FCCC/CP/2012/8/Add.1, paragraph 7(a)(2)(vi)

[172] UNFCC, Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013. Addendum. Part two: Action taken by the Conference of the Parties at its nineteenth session *Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts* (WIM) FCCC/CP/2013/10/Add.1

[173] *Paris Agreement* Decision 1/CP.21 (2015) *supra* note 157

the IOM, the UNHCR, the ILO, the UNPD and the European Commission. The Task Force recommends parties to *"consider the formulation of national and subnational legislation, policies, and strategies, as appropriate, that recognize the importance of integrated approaches to avert, minimize, and address displacement related to adverse impacts of climate change and issues around human mobility, taking into consideration human rights obligations and other relevant international standards and legal considerations, and with inter-ministerial and cross-sectoral inputs, with the participation of relevant stakeholders;*

[..] Integrate human mobility challenges and opportunities into national planning processes, including inter alia the process to formulate and implement national adaptation plans, as appropriate, by drawing upon available tools, guidance, and good practices;

[..] Facilitate orderly, safe, regular and responsible migration and mobility of people, as appropriate and following national laws and policies by considering the needs of migrants and displaced persons, communities of origin, transit and destination, and by enhancing opportunities for regular migration pathways, including through labour mobility, in consistent with international labour standards, in the context of climate change". [174]

Moreover, it also delineated recommendations to UN agencies and relevant organizations in relation to averting, minimizing, and addressing displacement related to the adverse impacts of climate change. [175] These recommendations were later implemented during COP24 in Decision 10/CP.24. [176]

The Task Force's mission was extended until 2021 with a new plan of action. In particular, the expected results envisage an enhanced understanding of the scale of displacement in the context of climate change and increased knowledge of how to

[174] The Task Force Report can be found at https://unfccc.int/sites/default/files/resource/2018_TFD_report_17_Sep.pdf , para 33

[175] *Ibid*, para 34

[176] UNFCCC, Decision 10/CP.24, *Annex Recommendations from the report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts on integrated approaches to averting, minimizing and addressing displacement related to the adverse impacts of climate change*, FCCC/CP/2018/10/Add.1.

minimize the possible negative effects of climate change in the context of migration. [177]

Although the content of the analysed instruments is commendable from the point of view of focusing on the phenomenon and the need to find appropriate responses, they seem to remain on an abstract level, without leading the international community to solutions or proposing a model for action. As a fact, these instruments do not specifically regulate environmental migration, nor do they bind States Parties to adopt solutions to cover the international protection gap.

2.3.3. States' liability towards environmental migrants under international environmental law

A topic highly discussed in the literature is whether States, especially the most developed ones, might incur responsibility for climate change under international environmental law. Under treaty law, States have obligations to implement programmes for mitigating greenhouse gas emissions, [178] to prevent, reduce, and control pollution of the atmosphere and the marine environment, [179] and to conserve biodiversity, [180] among many others. These obligations are all relevant where displacement is caused by a loss of livelihood or resources resulting from climate change and, therefore, from the non-compliance of states with the obligations under international environmental law. The question arises of whether states bear legal responsibility for indirectly causing such migration and have duties to remedy it. This doctrine, although discussed, carries on the importance that customary law

[177] Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts available at https://unfccc.int/sites/default/files/resource/sb2019_05_add1.pdf accessed 25 November 2023

[178] For example, Stockholm Declaration, Principle 21; Convention on Long-Range Transboundary Air Pollution (adopted 13 November 1979, entered into force 16 March 1983) 1302 UNTS 217; Vienna Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 293; UN Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1993) 1771 UNTS 107 ('UNFCCC'); Kyoto Protocol to the Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 148 ('Kyoto Protocol')

[179] For example, Stockholm Declaration, Principle 21; Rio Declaration, Principle 2; UNFCCC; Kyoto Protocol; United Nations Law of the Sea Convention (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396, Arts 192–95

[180] For example,Conventionon Biological Diversity (adopted 5 June 1992,entered into force 29 December 1993) 1760 UNTS 79

plays in the context of environmental protection. Some authors have argued that environmental and climate change law obligations - stemming from the relevant international provisions - can provide the basis for states' responsibility towards environmental migrants, notwithstanding the absence of explicit regulation of the phenomenon of climate change-induced displacement. [181] By examining the role of state responsibility in the context of climate change and, therefore, the possible infringement of international norms, the doctrine has claimed that, because this infringement is deemed to be one of the major causes of climate change, it would constitute the basis for a duty of care [182] of states held responsible. In other words, States that fail in their attempts to reduce climate-changing emissions, when they would be obliged to meet certain targets on the basis of their obligations under the relevant international environmental law provisions, [183] could be held responsible for the repercussions of climate effects, and thus also for the displacements caused by them. Although this line of reasoning seems accurate, addressing climate-related displacement from an international environmental law perspective and its provisions on state responsibility has several limitations. State responsibility under international law is understood as any internationally wrongful act breaching an international obligation that is attributable to a State. [184] If multiple States are responsible for the same internationally wrongful act, then the responsibility of each state might be invoked. [185] On the other hand, the rule of individual responsibility applies when more than one State carries out separate wrongful conduct that contributes to the same damage.
With this background in mind, it seems quite difficult to depict state responsibility under international law in the context of a breach of climate change provision. Firstly, for the responsibility to arise, it is necessary to establish a specific internationally wrongful act and, the relevant international documents, such as the Paris Agreement and the Kyoto Protocol contain an obligation of result that needs

[181] J. McAdam, '*Climate Change, Forced Migration, and International Law*' *supra* note 132, at 92
[182] *Ibid,* at 93
[183] B. Mayer, '*Climate Change, migration and the law of state responsibility'*, in B. Mayer, F. Crepeau, *Research Handbook on climate change, migration, and the law*, Edward Elgar Publishing (2017), at 242.
[184] UNGA Resolution, *Responsibility for Internationally Wrongful Acts ARSIWA*, Doc. A/RES/56/83 (2001), 53 UN GAOR Supp. (No. 10) at 43, Supp. (No. 10) A/56/10 (IV.E.1), Articles 1 and 2
[185] *Ibid*, Article 47

further interpretation and clarification. Moreover, climate change is the result of all State's emissions, and the related environmental degradation cannot be attributable to a single and specific state but rather to all states, even if to different degrees. This situation calls attention to whether a State Party's emission of GHG in breach of the Paris Agreement may give rise to its responsibility even if damages caused by climate change (including human displacement) are not entirely attributable to the former. [186] As shown above, Article 47 of ARSIWA only admits this possibility when the action of multiple States can be identified as a single internationally wrongful act. However, GHG emissions are framed as separate acts that generate the same damage. Against this background, it is necessary to consider the UNFCC framework and the common but differentiated responsibility regime envisaged. Under the latter, States are divided into developed country Parties and other Parties and, only for the first, the Convention foresees an obligation to adopt national policies and measures aimed at limiting their GHG emissions and thus mitigating climate change. [187] This same principle is also permeated in the Kyoto Protocol and the Paris Agreement. This concept has been discussed as to whether it could be possible to develop a form of state responsibility for those with the highest levels of GHG emissions towards those states who, on the other hand, are most affected by phenomena linked to climate change, including human displacement. This possibility seems to be appealing but, it has to be highlighted that *"although it is tempting to allocate responsibility based on the UNFCCC principle of 'common but differentiated responsibilities'"*, that principle was developed to "*clarify who needed to reduce emissions causing the overall problem*" and that *"using that principle to assign responsibility to one country for the effects experienced by specific individuals strains traditional notions of causation".* [188] Consequently, the principle of common but differentiated responsibilities, then, does not provide a sufficiently legal basis to construe a common state responsibility

[186] F. Staiano, '*State responsibility for climate change under the UNFCC regime: challenges and opportunities for prevention and redress'* Migration and the Environment Some Reflections on Current Legal Issues and Possible Ways Forward CNR Edizioni (2017), at 31-32
[187] UNFCC, *supra* note 152, Article 4(2)
[188]S.C. McAnaney, *"Sinking Islands? Formulating a Realistic Solution to Climate Change Displacement"* New York University Law Review Volume 87, Number 4 (2012), at 1193

or liability for climate-change-related damage.

2.3.4. Adding a new Protocol on environmental migrants to the UNFCC?

Among the proposals indicated to tackle the issue of environmental migration, is the creation of an independent legal regime under a new Protocol to the UNFCC. Under Article 17 of the UNFCC, *"the Conference of the Parties may, at any ordinary session, adopt protocols to the Convention. The text of any proposed protocol shall be communicated to the Parties by the secretariat at least six months before such a session. The requirements for the entry into force of any protocol shall be established by that instrument."*

For instance, Biermann and Boas argue for a UNFCCC Protocol on the Recognition, Protection and Resettlement of Climate Refugees. [189] This instrument would be adapted to the needs of climate refugees and based on the principles of common but differentiated responsibilities and the polluter pays principle. The scholars have come up with a governance mechanism functioning under the authority of an Executive Committee, composed of an equal number of affected countries and donor countries, determining the types of support measures for affected areas. This governance mechanism would be based on five main principles. Firstly, the objective would be the planned and voluntary resettlement and reintegration of affected populations (principle of planned relocation and resettlement) with international assistance and funding (principle of international assistance for domestic measures). Environmental migrants would be treated as permanent immigrants (principle of resettlement instead of temporary asylum) whose rights are tailored to the needs of entire groups of people, instead of individuals, (principle of collective rights for local populations). Finally, protection would be regarded as a matter of global responsibility since climate change is mainly caused by the industrialised world (principle of international burden-sharing).[190] To provide this resettlement regime with the necessary financial means,

[189] F. Biermann and I. Boas, '*Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees' supra* note 62
[190] *Ibid*, at 75-76

Biermann and Boas propose to integrate a separate fund into the protocol, called the 'climate refugee protection and resettlement fund'. [191]

On the other hand, Gogarty recommends creating a new framework on migration and displacement adjusting the existing Framework Convention, either through a series of regionally based protocols to the UNFCCC or by an additional multi-state protocol. [192] He argues that, since the Cancun Agreements already recognise migration and displacement as part of adaptation strategies under the UNFCC, the latter has the legal base and potential to support more concrete provisions.

If, on the one hand, the UNFCC is an already existing regime with extensive support [193] and, therefore, it might be more likely that states will accept migration provisions in the UNFCCC regime than in a new international convention, on the other, the UNFCCC regime can only address climate change-induced migration, leaving other environmental push factors for migration aside, and it cannot impose obligations on states in the matter of migration because this matter retains, mostly, to national sovereign matters. [194]

2.4. Addressing environmental migration in the broader context of international human rights standards

The UN General Assembly has acknowledged that climate change and environmental disasters directly and indirectly affect the enjoyment of a set of human rights. Among those, we can recall the right to life, safe drinking water and sanitation, food, health, housing, self-determination, culture, work, and development. [195] Nevertheless, human rights law does not currently contain direct protection for persons made vulnerable by climate change. The Human Rights

[191] *Ibid*, at 5

[192] B. Gogarty, '*Climate-Change Displacement: Current Legal Solutions to Future Global Problems'* Journal of Law Information and Science Volume 21 No. 1 (2011)

[193] M. Gromilova, '*The Issue of Climate-Induced Displacement from the Perspective of International Environmental Law'*, Thesis submitted to the Tilburg University in partial fulfilment of the requirements for the degree Research Masters in Law, under supervision of Prof. J.M. Verschuuren, 28 June 2012, available at: http://arno.uvt.nl/show.cgi?fid=122940, at 27 accessed 25 October 2023

[194] B. Docherty and T. Giannini, '*Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees'*, Harvard Environmental Law Review Volume 33 No.2 (2009), at 350, 358-359, 394-397

[195] UNGA Resolution, 41/21. *Human Rights and Climate Change* adopted by the Human Rights Council on 12 July 2019 A/HRC/RES/41/21

Council has stressed that the issue of environmental migrations shall be tackled with a human-rights-based approach by implementing policies and programmes whose main objectives and principles derive from international human rights law. It argues that international human rights offer the most comprehensive and people-centred framework for the protection of migrants.

As McInerney-Lankford suggests [196] the legal regime implemented by the human rights framework entails rights and correlative duties and accountability. Human rights law is triggered whenever a right is affected and, for this research, *"human rights obligations provide important protection to the individuals whose rights are affected by climate change".* [197]

The specific obligations owed to environmental migrants under human rights law, according to the UN ESCR Committee, [198] can also be framed under the analysis of obligations to protect, respect, and fulfil. The obligation to respect necessitates that a state's activities do not exacerbate climate change, undermining existing access to rights or creating situations that drive people to migrate. In the context of environmental migrants, a more tangible application of the obligation to respect emerges in adaptation policies: governments should consider climate migration in the full range of policies they adopt to manage the social impacts of climate change, and safeguards should be implemented to prevent and reduce population displacement. Therefore, this obligation requires that any environmental change-led migration must prevent migrants from enjoying their human rights to a lesser extent. On the other hand, the obligation to protect in the context of environmental degradation harming human rights has been confirmed by human rights bodies. [199] It suggests that States adopt proactive measures to halt or avert external causes of climate change that drive people or groups to migrate. Second, it features a corrective component that calls for States to act when migration happens. Therefore, it entails both the elaboration of a coherent and comprehensive legal

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[196] S. McInerney-Lankford, '*Climate change, human rights and migration: a legal analysis of challenges and opportunities'* in Research Handbook on Climate Change, Migration and the Law Edited by Benoît Mayer and François Crépeau Elgar Publisher (2017), at 140

[197] Report of the Office of the United Nations High Commissioner for Human Rights *on the relationship between climate change and human rights* A/HRC/10/61 15 January 2009, para 71

[198] *Ibid,* at 9

[199] Human Rights Committee General Comment 31 '*The Nature of the General Legal Obligations Imposed on States Parties to the Covenant'* CCPR/C/21/Rev.1/add.13 (2004), paragraph 8

framework to effectively tackle climate change and the provision for environmental migrants of safeguards. The obligation to fulfil requires States to create enabling conditions for individuals to fully enjoy their rights. In terms of the conditions required for the achievement of rights, the obligation to fulfil could be understood as supporting action in connection to both climate reduction and adaptation. Moreover, it would entail the inclusion of both procedural and substantive rights such as socioeconomic rights.

2.4.1. Human rights and complementary protection

Due to the narrowness of the 1951 Geneva Convention - determined by the circumscribed definition of refugee in Article 1A(2) - the need has arisen to implement international protection to the extent of encompassing situations that would not strictly fall within the aforementioned definition. There has been a growing awareness of the need to protect those who need protection but do not necessarily come within the ambit of the refugee definition to avoid *"differential treatment, uncertainty, and unequal burden-sharing"*.[200]

To make up for these gaps, human rights law has expanded States' protection obligations beyond the refugee category, to include (at least) people at risk of arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment.

This has led to the creation of complementary protection systems which grant human rights-based protection that is complementary to that provided by the 1951 Refugee Convention. No international instrument defines what complementary protection entails [201] but, as a general term, it can be described as forms of protection guaranteed by states that go beyond the requirements imposed by the 1951 Geneva Convention and that are grounded in human rights treaties or humanitarian general principles. [202] What all these forms of protection commonly

[200] G.S. Goodwin-Gill, J. McAdam, '*The Refugee in International Law* ' Oxford Public International Law 4th edition, at 294

[201] UNHCR, ' *Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")'* Legal and Protection Policy research Series PPLA/2005/02, at 2

[202] J. McAdam, *'Complementary Protection in International Refugee Law'* Oxford Monographs in International Law Oxford University Press (2007), at 21

share is their complementary relationship with the refugee protection regime and the ground under which States can grant protection in alternative to refugee recognition. [203] The protection enshrined includes the protection from the risk of gross violations of human rights, namely the right to life and the right not to be subjected to torture or cruel, inhuman, or degrading treatment.

In the international sphere, complementary forms of protection are essentially based on the principle of non-refoulement which has absolute force. The principle of non-refoulment is explicitly enshrined in Article 3 of the UN Convention against Torture and implicitly in other instruments of international human rights law, such as the 1966 International Covenant on Civil and Political Rights (hereinafter, ICCPR) and the European Convention on Human Rights (hereinafter, ECHR). In particular, the obligations arising from the International Covenant of 1966, as interpreted by the United Nations Human Rights Committee (hereafter the UN Committee), include the prohibition against extraditing, expelling, or otherwise transferring a person from its territory if there is a risk of irreparable harm, such as those covered by Article 6 (the right to life) and Article 7 (the right not to be subjected to torture or inhuman and degrading punishment or treatment). Under the ECHR, the relevant provisions are Articles 2 and 3 which imply the prohibition of refoulment to countries where there might be a risk of torture, inhuman and degrading punishment, or treatment. [204]

The principle of nonrefoulment plays an important role in the context of environmental migrations. Because of the serious violations of human rights caused by the effects of climate change, it can be argued that they give rise, in some cases, to additional and complementary forms of protection that might fall under the scope of application of the prohibition of refoulment. [205]

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[203] *Ibid*, at 3

[204] EASO, "*Un'analisi giuridica. Procedure di asilo e principio di non- refoulement"* Pubblicazioni EASO per lo sviluppo professionale dei membri degli organi giudiziari, a cura di IARLJ – EUROPE in base a un contratto con l'EASO (2018) at 28

[205] G. Sciaccalunga, *International Law and the Protection of "Climate Refugees"* Palgrave Macmillan (2020), at 159

2.4.2. The UN framework and Article 6 of the 1966 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights [206] is a binding treaty which entered into force in 1976. Articles 6 and 7 recognize the right to life and the prohibition of torture, cruel, inhuman, or degrading treatment. Although not expressly recognizing the prohibition of refoulment, the Human Rights Committee [207] has stated that Articles 6 and 7 entail it and that all State Parties must respect and ensure that all rights enshrined in the Covenant are enjoyed by all persons in their territory. In the 1990s, the connection between environmental protection and human rights was found to be expressed in the right to the enjoyment of one's culture under Article 27 of the ICCPR. The Human Rights Committee contemplated that specific minority groups had such strong ties with the natural environment that they deserved protection. [208]

Because of the correlation between the right to life and the enjoyment of all other human rights, it comes to the fore in the context of climate change not only with regard to disastrous natural events that directly threaten people's lives. On the contrary, it is also relevant because it is connected to other human rights threatened by the effects of climate change such as the right not to be deprived of one's livelihood and the right to an adequate standard of living, which includes adequate food, clothing, and shelter and the continuous improvement of one's living conditions.

Today, the link between environmental degradation and the right to life is enshrined in General Comment No. 36 (hereinafter, GC No.36). [209] Paragraph 62 notes that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and

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[206] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

[207] UN Human Rights Committee (HRC), *General comment no. 31* [80], *The nature of the general legal obligation imposed on States Parties to the Covenant* CCPR/C/21/Rev.1/Add.13 (2004), paragraph 12

[208] Human Rights Committee, *General Comment No. 23: Protection of Minorities* (Art. 27), 4 August 1994, CCPR/C/21/Rev.1/Add.5, paragraph 3.2

[209] Human Rights Committee, *General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life* (30 October 2018) CCPR/C/GC/36

future generations to enjoy the right to life, [210] whereas paragraph 26 sets positive obligations for States to implement appropriate measures to address… and preserve the environment [211] in situations that might prevent the enjoyment of the right to life. GC No.36, therefore, recognizes that environmental degradation enables, and it is itself, a direct and serious obstacle to the benefit of the right to life. Consequently, environmental degradation and the effect of climate change fall within the scope of Article 6 of the ICCPR. This peculiarity has been further explained in a remarkable case of the UN Human Rights Committee: the Teitiota case.

2.4.3. The Teitiota ruling and its possible impact on the EU legal framework

The 2020 decision of the Human Rights Committee Teitiota v. New Zealand [212] foresees the difficulties in granting legal protection for environmental disruption-induced migrations, as well as the ambiguities to be faced when identifying the link between environmental change, migration, and human rights. Additionally, it sets a significant precedent for the notion of environmental protection as a component of the right to life [213] and reaffirms the possibility that the climatic effects may result in a violation of both the right to life and the prohibition against inhuman and degrading treatment that would open the prohibition of refoulement. [214]

In brief, the case originates from Ioane Teitiota, a citizen of the Republic of Kiribati, to whom New Zealand had denied recognition of refugee status under the Geneva Convention and who, for that reason, had been returned to his country. Teitiota applied for asylum in New Zealand claiming that Kiribati had become an untenable and violent environment because of the effects that climate change had on the

[210] *Ibid*, paragraph 62
[211] *Ibid,* paragraph 26
[212] *Ioane Teitiota v. New Zealand* (advance unedited version), CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 7 January 2020
[213] G. Le Moli, '*The Human Rights Committee, environmental protection and the right to life'* International Law Quarterly 69(3), 735–752 (2020), at 736
[214] OHCHR, *Historic UN Human Rights case opens the door to climate change asylum claims*, 21 January 2020 available at https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25482&LangID=E accessed 28 October 2023

ecosystem. Before the Human Rights Committee, Teitiota argued that his deportation to Kiribati had violated the right to life under Article 6 ICCPR. The grounds under which the claim was held were a shortage in habitable space caused by erosion, flooding generating housing crises land disputes and environmental degradation. [215]

The Committee referred to General Comment No.13, General Comment No. 26 and the right to life laid down in Article 6 of the ICCPR. Firstly, it noted how, under paragraph 12 of GC No. 13, [216] State Parties have an obligation not to deport individuals in places where there would be substantial grounds to believe that they would risk irreparable harm in violation of Articles 6 and 7 of the ICCPR. The test to undergo to prove the risk entails a high threshold that must consider the individual circumstances and the human rights conditions in the country of origin.[217]

After that, the Committee underwent the analysis of the right to life. The opinion was that the right to life includes a life lived in dignity and that States have positive obligations to implement protective measures against reasonably foreseeable threats and life-threatening situations that can result in loss of life. [218] Moreover, it is stressed how climate change and environmental degradation are one of the greatest threats to the enjoyment of the right to life of current and future generations.[219]

In the decision, the Committee stated that environmental degradation can be brought within the scope of a violation of the right to life under Article 6 of the ICCPR and foresaw that the situation in Kiribati fell under environmental harm. Nevertheless, the bar was set too high for reaching the necessary conditions to engage protection under the ICCPR. The urgency of his conditions was not yet serious enough to actively threaten his life, his family's position was not any different from every other inhabitant of Kiribati, and Kiribati's government took sufficient actions to address the rising threat of climate change. As a result, the

[215] UNHRC, *Ioane Teitiota v. New Zealand supra* note 212, paragraph 3
[216] UNHRC, *Ioane Teitiota v. New Zealand supra* note 212, paragraph 9.3
[217] UNHRC, *Ioane Teitiota v. New Zealand supra* note 212, paragraph 9.3
[218] UNHRC, *Ioane Teitiota v. New Zealand supra* note 212, paragraph 9.4
[219] UNHRC, *Ioane Teitiota v. New Zealand supra* note 212, paragraph 9.4

Committee found that there is still enough time before the territory is fully unfit for human existence, giving opportunity for intervening acts by Kiribati and, therefore, that the right to life was not violated. [220]

Although the outcome of the case did not grant protection to the claimant, it sets a global precedent [221] in amplifying the nexus between human rights and climate change. Above all, it recognizes a deeper and wider body of jurisprudence and practice on the existence of an undeniable relationship between environmental protection and the right to live in dignity. [222] The ruling opens the door for recognising climate change refugees under the principle of non-refoulment and the ICCPR, and to using human rights treaty bodies in environmental disruption and migration issues. [223]

On the contrary, what the Committee failed to do is to establish at what point the imminency of harm caused by climate change triggers the violation of the right to life and how directly affected individuals must be for international obligations to protect arise. [224] Indeed, most criticisms point out how difficult it is for potential claimants to prove to be directly and individually affected by climate change as that is precisely a phenomenon that affects the general community and not only specific individuals. [225]

All in all, what is especially relevant is the integrated human rights-based approach enshrined in the UN Committee's decision: the effects of climate change may impair the right to life - also interpreted as the right to a dignified life - or constitute inhuman or degrading treatment. Based on this assumption, the right of refoulement may arise in the third state in favour of those who have left their country of origin due to climate change and requested protection.

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[220] UNHRC*, Ioane Teitiota v. New Zealand supra* note 212, paragraphs 9.6-10

[221] Amnesty International UK, '*UN landmark climate refugee ruling sets global precedent'* (2020) available at www.amnesty.org.uk/press-releases/un-landmark- climate-refugee-ruling-sets-global-precedent accessed 30th October 2023

[222] G. Le Moli, *'The Human Rights Committee, environmental protection and the right to life' supra* note 213, at 736

[223] *Ibid*

[224] M. Foster and J. McAdam, *'Analysis of 'imminence' in international protection claims: Teitiota v New Zealand and beyond'* International and Comparative Law Quarterly Vol 71 Issue 4 (2022), at 976

[225] S. Behrman, A. Kent, '*The Teitiota case and the limitations of the human rights framework'* Questions of International Law Zoom-in 75 (2020), at 35

On this matter, the interpretation given by the Committee might serve as an inspiration for the European legal framework, specifically the ECtHR and CJEU. Although both Courts have never dealt with cases concerning the protection against refoulement to be granted to climate-induced migrants, they may adopt similar reasoning to the UN Human Rights Committee, based on its extensive interpretation of the ECHR and the EU Charter of Fundamental Rights.

It could be that the ECtHR adopts a reasoning similar to the one of the UN Human Rights Committee in the present decision in a future case, and engages European States' non-refoulment obligation under Articles 2 or 3 ECHR when individuals face removal to their home countries where they risk life-threatening conditions due to climate change. On the other hand, by referring to the EU Charter, which protects human dignity, life, and integrity, the CJEU might uphold this human rights-based approach and protect environmental migrants when environmental factors render living conditions unbearable and, therefore, trigger nonrefoulment obligations.

2.4.4. The Council of Europe framework

The Council of Europe is a leading international organization whose main aim is the promotion of human rights, the rule of law and democracy. [226] In 1950, it adopted the European Convention on Human Rights, [227] a Convention that establishes a set of fundamental freedoms and the obligation for the Parties to secure them, and the European Court of Human Rights (hereinafter, ECtHR or Strasbourg Court), the judicial body ensuring that the contracting States observe their obligations under the Convention. [228] In this context, the Parliamentary Assembly of the Council is a deliberative body that sets its debate on the founding statutory aims of the Council and whose Resolutions or Recommendations are, nevertheless, not binding. If we consider the issue of environmental migrants, the Council of Europe and its Parliamentary Assembly have been particularly involved in the issue

[226] European Union Agency for Fundamental Rights and Council of Europe, '*Handbook on European law relating to asylum, borders and immigration'* (2020), at 19

[227] European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) (ECHR)

[228] *Ibid*

since 2009. In Recommendation 1655, the Assembly acknowledged the link between migration and environmental disruptions and the multi-causal and multi-factorial relationship between the two phenomena. [229] In Resolution 1862, the Assembly demands a legal study on the gaps in the human rights legislative framework to elaborate a European framework convention for the recognition of the status of environmental migrants. [230] The underlying idea was also to add a protocol to the ECHR concerning the right to a healthy environment. [231] This preparatory work led to the adoption, in 2021, of a Resolution [232] recognising the fundamental right to a healthy environment and calling for the adoption of an additional protocol to the ECHR and ECSR including the right to a healthy environment. Recently, Resolution 2401 [233] underscores the importance of strengthening human rights protection for environmental migrants by acting on three pillars, ensuring human rights protection for people who are forced to migrate because of climate change-induced, disasters or hardship; using science and technology to serve people and save lives; improving development co-operation and emergency support in migrants' countries of origin; and preventing environmental degradation that multiplies the effects of climate change. [234]

The ECHR together with the related jurisprudence of the ECtHR are the fundamental instruments for the protection of human rights within the Council of Europe states. Although there is no express recognition of the right to asylum, this does not imply that some protection cannot be derived from other visions of the Convention. Over the years, the Strasbourg Court has extended the safeguards granted to foreigners, if not expressly recognised by the Convention. It has broadened the scope of the principle of non-refoulment by granting protection to foreigners if the refusal of entry adversely affected the exercise of the rights

[229] Council of Europe: Parliamentary Assembly, '*Resolution 1655(2009) Environmentally induced migration and displacement: a 21st- century challenge'* (2009), paragraphs 2-5
[230] Council of Europe: Parliamentary Assembly, '*Recommendation 1862(2009). Environmentally induced migration and displacement: a 21st-century challenge'* (2009), paragraphs 4-6
[231] *Ibid*
[232] Council of Europe: Parliamentary Assembly, *'Combating inequalities in the right to a safe, healthy and clean environment'*, Report Committee on Equality and Non-Discrimination, Doc. 15349 23 (2021), at 7
[233] Council of Europe: Parliamentary Assembly, '*Resolution 2401 Climate and migration'*, 2021
[234] *Ibid*, para 6

enshrined in the Convention, in particular the right to life [235], the right not to be subjected to torture or inhuman and degrading treatment [236] and respect for private and family life. [237]

2.4.5. The interplay between the ECHR and the EU: implications of ECtHR case law on the EU legal framework

The EU is not yet a member of the ECHR [238] even though the Lisbon Treaty recognized such a possibility in Article 6 (2) TUE. Nevertheless, the Convention and the jurisprudence of the Strasbourg Court extremely influence the EU. It is to recall Article 6(2) TEU which allows the EU to *"accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms"* and Article 59(2) ECHR which affirms that *"the European Union may accede to this Convention"*. On this legal basis, a first draft of an agreement on the accession of the EU to the ECHR was drafted and presented. The first provisional agreement on the accession was then rejected by the CJEU because of concerns about the autonomy of EU law, its exclusive competence and the possible detriment of the principle of mutual trust between Member States. [239] Nowadays, there has been major progress in the path to EU accession. Negotiations have been concluded at the technical level in the "46+1 Group", gathering all Council of Europe Member States and the European Union. [240] The Group has reached a provisional agreement on the resulting package of revised draft accession instruments. Nevertheless, the accession process still requires several steps, including a positive opinion from the CJEU and ratifications by the European Parliament and national parliaments.

As the situation stands today, all Member States are signatory parties to the Convention and, therefore, are bound to it. [241] The ECHR and the jurisprudence of

[235] ECHR, *supra* note 227, Article 2
[236] ECHR, *supra* note 227, Article 3
[237] ECHR, *supra* note 227, Article 8
[238] CJEU, *Opinion 2/13 pursuant to Article 218(11) TFEU* ECLI:EU:C:2014:2454 (2014)
[239] *Ibid*
[240] Delegation of the EU to the Council of Europe, '*Major progress on the path to EU accession to the ECHR: Negotiations concluded at technical level in Strasbourg'* available at https://www.eeas.europa.eu/delegations/council-europe/major-progress-path-eu-accession-echr-negotiations-concluded-technical_en?s=51 accessed 31 October 2023
[241] ECHR, *supra* note 227, Article 1

the ECtHR are general principles of EU law, as judged upon by the CJEU [242] and as laid down in Article 6 TEU: *"Fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law"*.

Based on this, EU fundamental rights law has largely developed following the Convention. Respect for human rights is a condition for the legality of EU law and, therefore, in implementing new policies and measures, the EU must respect them. Moreover, under Article 52 of the EU Charter, the meaning and scope of the rights enshrined in the latter shall be the same as the corresponding rights laid down by the ECHR. For instance, Article 4 of the Charter of Fundamental Rights of the EU, having the exact wording of Article 3 ECHR, shall have the same meaning as the latter, as interpreted by the ECtHR. In this regard, the Luxembourg Court has stated that Article 4 of the Charter imposes the same level of protection as Article 3 of ECHR.[243] For what concerns the relationship between the ECtHR and the CJEU, both courts have so far interpreted the Convention consistently and have referred to each other's case law.

Based on this intrinsic relationship between the ECHR, the EU legal order and the CJEU, it seems necessary to analyse the jurisprudence of the ECtHR to depict the relevant human rights provisions that could protect the legal position of environmental migrants and to understand how this interpretation might serve as an inspiration for further legislation at the EU level and guide the CJEU.

2.4.6. Article 2 and 3 ECHR and the principle of non-refoulment

The main relevant provisions in the ECHR for the protection of asylum seekers that might as well cover environmental migrants are Articles 2 and 3. Article 2 entails the right to life, while Article 3 prohibition of torture and inhuman or degrading treatment or punishment. Article 3 is an absolute right but, to fall within its scope, the conduct must attain a minimum level of severity. [244] Articles 2 and 3 prohibit

[242] See for example, Case C-540/03, Parliament v Council [2006] ECR I-5769, para. 35 and Sotirios Kouvelas [1991] ECR I-2925, paragraph 41

[243] CJEU C-411/10, *N.S. and others v. Home Department* (2011)

[244] ECHR, *Soering v. the United Kingdom* 14038/88 (7 July 1989), paragraph 100

any return of an individual who would face a real risk of treatment contrary to any of these provisions. [245]

The ECtHR has not yet expressly linked the prohibition of non-refoulment to the effects of climate change might have on migration patterns. [246] However, it can be analysed how the negative effects of climate change might be included in the spectrum of violations of Article 2 and 3 ECHR. It is to highlight how the Strasbourg Court has dealt with cases of naturally occurring harm, even if not directly linked to environmental events. The doctrine [247] considers these cases as potential role model cases, as they open a window for the protection of environmental migrants, who may flee from their country precisely to escape naturally occurring harms.

Concerning the right to life under Article 2 of the Convention, the ECHR recognised that *"a violation of the right to life can be envisaged in relation to environmental issues relating [...] also to other areas liable to give rise to a serious risk for life or various aspects of the right to life".* [248] States Parties must protect individuals from all situations that endanger the exercise of their right to life [249] by implementing preventive measures when it comes to natural disasters. If such measures are not effectively implemented by the State in question, therefore, there may be a risk of injury to the right to life. Such an argument has not been made regarding cases of environmental migration but, this line of reasoning could be applied. In such cases, environmental migrants could claim the risk of violation of the right to life, based on the inability of the country of origin to take the necessary measures to mitigate the effects of climate change and counteract the increase of natural disasters. However, it is emphasised that to constitute a real violation of the right to life, the ECHR has outlined the states' conduct in the context of natural disasters, making them more or less stringent depending on *"[of] the origin of the threat and the extent*

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[245] European Union Agency for Fundamental Rights and Council of Europe, '*Handbook on European law relating to asylum, borders and immigration' supra* note 226, at 106

[246] The European Court of Human Rights has, in fact, had to pronounce on environmental cases, but has not, until now, on repatriation cases related to climate change.

[247] M. Scott, *'Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?'*International Journal of Refugee Law Vol. 26 No. 3 404–432 (2014)

[248] ECHR, *case Öneryildiz v. Turchia* 48939/99 (30 November 2004), paragraph 64

[249] EHCR, *Guide on Article 2 of the European Convention on Human Rights* – Right to life, updated on 31 August 2020, paragraph 11

to which one or the other risk is susceptible to mitigation" and *"[of] the imminence of a natural hazard that had been clearly identifiable, especially where it concerned a recurring calamity affecting a distinct area developed for human habitation or use".* [250] In doing so, it has effectively limited the scope of these obligations in the context of the effects of climate change, which are often not imminent and are difficult to identify.

On the other hand, the case law on Article 3 ECHR appears to be evolving in relation to the applicability of the latter in circumstances where the expulsion of an individual would expose them to some type of inhumane or degrading treatment or punishment. It is possible to identify three different categories [251] in the ECtHR jurisprudence: the direct and intentional infliction of harm cases, the purely naturally occurring harm cases and the predominant cause cases. The threshold that must be reached before the engagement of the host state's Convention obligations will rise along a spectrum, with a lower (albeit already very high) threshold required for direct and intentional infliction of harm, a slightly higher threshold for acts seen as the primary cause of a humanitarian crisis, and a still higher very exceptional threshold where conditions on return are seen as entirely natural. In the direct and intentional infliction of harm cases [252], the ECtHR associated Article 3 of the Convention with the principle of non-refoulment and, consequently, state responsibility will rise whenever an expulsion return is mandated even if there are substantial grounds to believe that the person concerned faces a real risk of being subject to torture or inhuman or degrading treatment. [253] The provision does not define the kind of harm and ill-treatment under which the principle of non-refoulment applies and, hence, a case-by-case analysis must be assessed.

On the other hand, a less comprehensive prohibition on refoulment was indicated in purely naturally occurring harm cases. [254] In the latter, the receiving state is not considered to be responsible for harm that results from "purely" naturally occurring

[250] ECHR, *Budayeva and others v. Russia* 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (20 March 2008), paragraph 137

[251] European Union Agency for Fundamental Rights and Council of Europe, '*Handbook on European law relating to asylum, borders and immigration' supra* note 226, at 413

[252] Example of these cases: ECHR, *Soering v. the United Kingdom*

[253] European Union Agency for Fundamental Rights and Council of Europe, '*Handbook on European law relating to asylum, borders and immigration' supra* note 226, at 107

[254] Example of these cases: ECHR, *D. v. United Kingdom* and *N. v. The United Kingdom*

phenomena such as an illness, unless in the presence of exceptional circumstances. The Strasbourg Court recalled that the exceptional circumstances and compelling humanitarian considerations were grounds that would amount to inhuman treatment in violation of Article 3 and, therefore, expelling a non-citizen would engage Article 3 obligations. Therefore, the Court set very high standards for triggering Article 3 ECHR as the case must be very exceptional and the humanitarian reasons compelling.

In a later judgement, the ECtHR decided to define the other very exceptional cases as *"situations involving removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness".*[255] In the last case scenario, [256] the predominant cause has been described as situations in which actors in the receiving state are seen as being the predominant cause of a humanitarian crisis. In this case, the indirect actions of state and non-state actors should be regarded as the predominant cause. Factors that should be considered are the applicant's ability to take care of themselves, the vulnerability to ill-treatment and the possible improvement of personal conditions. A breach of Article 3 ECHR will be envisaged whenever there are indirect actions of state and/or non-state actors which are seen as being the predominant cause of a humanitarian crisis.

Climate change-related displacement might, in the future, be a topic that the Court will be asked to address and *"given the fundamental importance of article 3 in the Convention system, the Court has reserved for itself sufficient flexibility to address the application of that article in other contexts which might arise".* [257] Even if, in principle, a person affected by climate change could argue that the effects of the

[255] ECHR, *Paposhvili v. Belgium* 41738/10 (13 December 2016)
[256] ECHR, *Sufi & Elmi v United Kingdom* 8319/07 and 11449/07 (2011)
[257] ECHR, *D v United Kingdom* 30240/96 (2 May 1997), paragraph 49

latter can amount to inhuman or degrading treatment and, therefore, to a violation of Article 3 ECHR, it is highly difficult for the claim to hold.[258] If we take into consideration the direct and intentional infliction of harm cases, the ECtHR has indicated a very high threshold needed for inhuman treatment to amount to a violation of Article 3 which, if applied to climate and environmental change effects, would assist a person only when conditions are already particularly extreme. The same goes for purely naturally occurring harm scenarios: although natural disasters are purely naturally occurring and emanate from a lack of sufficient resources to deal with them, the circumstances would have to be very exceptional for obligations to arise.[259]

Some scholars [260] argue that the predominant cause cases approach might be justified. In the context of climate change-related risk on return, the responsibility of states for causing climate change must arise. The claimant would have to demonstrate that climate change is a result of greenhouse gas emissions by certain actors and that this climate change was the primary cause of the harm feared upon return to the receiving state. Drawing parallels between the approaches and environmental migration is debatable and any claim trying to rely on the impact of climate change or environmental disruption as a way of resisting expulsion will have to overcome substantial challenges, in particular, the challenge of establishing a connection between the natural disaster and the deprivation of socio-economic rights.

2.5. Concluding reflections on the participation of the EU in the international mechanisms to protect environmental migrants

The international community has not given a unique response to the issue of environmental migrants. On the one hand, the intersectional nature of the issue

[258] J. McAdam, '*Climate Change Displacement and International Law: Complementary Protection Standard*s' *supra* note 59, at 24

[259] M. Scott, *'Refuge from climate change-related harm: Evaluating the scope of international protection following New Zealand's Teitiota Judgment'* Refugee Law Initiative University of London Doctoral Affiliates Network Second Postgraduate Workshop on Refugee Law (2014)

[260] M. Scott, *"Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?*" *supra* note 247

makes the migratory movement possibly fall within different and independent branches of international law and, on the other, the international community has not implemented a univocal and clear path to grant protection to this category of migrants. Multiple international legal instruments, either binding or non-binding, are relevant when discussing migratory movements related to environmental disruptions and climate change but none of them is directly effective and capable of fulfilling the needs of protection of environmental migrants. In this context, the EU's external action powers have a stake in the position of the EU in the international fora. Its competencies on migration, the protection of the environment and the capability to act as an international actor and conclude international agreements with other States or international organizations make the EU an important leading supranational organization in the possible implementation of protection instruments for environmental migrants.

The analysis of the relevant international branches of law has led to the conclusion that a regulatory vacuum to protect those who move for climate change reasons exists. Seeking to analyse whether, under certain circumstances and based on the due premises, the fundamental rights of the individual threatened by environmental and natural phenomena, can find protection within these mechanisms, an overall picture that does not offer wide margins for extensive interpretation emerged.

Moreover, the EU, although having internally acknowledged the issue and having the capability to ask for the implementation of protective measures at the international level, seems not to focus its external action on promoting or reformulating measures of protection for those fleeing conflict and persecution. On the other hand, at the European level, the evolutive interpretation given by ECtHR for the application of the principle of non-refoulment to situations in which the deprivation of socio-economic rights in the country of origin of the applicant amounts to inhuman or degrading treatment seems promising. This interpretation could lead to the recognition of the prohibition to reject environmental migrants and, given the fact that the rulings of the ECtHR must be taken into consideration by the CJEU, this line of reasoning could be used by the Luxembourg Court to protect this category of people. Based on these findings, in the next chapter, the research will dwell on the EU internal policies relevant to the topic. The specific

position of the EU in each branch of law and the extent to which protection might be granted to environmental migrants under EU law will be analysed.

CHAPTER III: THE PATH TOWARDS AN EU LEGAL FRAMEWORK FOR THE PROTECTION OF ENVIRONMENTAL MIGRANTS

Further to an analysis of the overall international and regional legal framework that could apply to environmental migrants and the position of the EU as an international actor vis-à-vis such area of international cooperation, it is necessary to examine the solutions implemented in the EU and the relevant actions carried out by the EU institutions face this phenomenon. First and foremost, it is to highlight that environmental-induced displacement is not directly regulated within the European legal framework. The position of the environmental migrants is not considered in the European Union's system of competencies; therefore, the latter do not enjoy specific protection or status.

Nevertheless, in the context of the regional systems that can be analysed and from which it could be possible to seek protection for environmental migrants, the European system needs to be analysed specifically for multiple reasons. First, the EU is an international organization with specific features and, therefore, a regional system that is unparalleled in the current international system. To the EU, Member States have attributed powers for their surrogate exercise about certain matters, to achieve common goals.[261] The European Union thus does not have its objectives but rather exercises its functions following the goals shared by (and established with) the Member States. The peculiarity of the European legal system, in this context, is highlighted not only by the primary status of European law over the domestic law of the Member States but especially by the extensive scope of powers that States have delegated to the EU and that allows the latter to come into direct contact with individuals, who are also subject to EU rules. [262] Secondly, the EU and its Member States have an active role in promoting environmental protection in the international agenda. To make progress in the advancement of environmental protection consistent cooperation and a concomitant progressive increase in promotion are essential. In this sense, Article 191 of the TFEU sets as an EU objective the "*promotion at the international level of measures designed to solve*

[261] U. Draetta, F. Bestagno, A. Santini, '*Elementi di diritto dell'Unione Europea: Parte istituzionale Ordinamento e struttura dell'Unione europea*' 6th Edition Giuffrè Francis Lefebvre (2018), at 42-45

[262] *Ibid*

regional or worldwide environmental problems and, in particular, to combat climate change". [263] The latter emphasizes the concrete need for cooperation when dealing with environmental problems and the fight against climate change. As a fact, the effects of climate change, as pointed out earlier, know no boundaries, affect territories and populations indiscriminately, and require targeted, harmonious, and participatory actions by all (if not all, most) of the actors involved.

Arguably, the European order is relevant because the gradual increase in migration flows caused by climate effects could bring into question, within the European Union, the ability to respond to current needs concerning inward migration. Moreover, the European legal system is, without a doubt, a favourable environment for raising awareness of the phenomenon - given the increasing attention to environmental and climate issues and the related importance implemented within the Treaties - and for seeking adequate protection for those who move due to climate change – given the relevance of the protection system developed by the European Union in the field of asylum, namely the Common European Asylum System, establishing common standards in the field of international protection and complementary protection.

Based on these reasons, this chapter will thoroughly analyse the EU's position on the matter of environmental migration. The purpose of this part of the research is, first, to provide an overview of the evolution of the political and legal view within the Union on the topic, also highlighting some of the most significant initiatives taken in this context. Second, the European legal framework of reference will be described to assess whether current legislative instruments can offer protection to those fleeing the effects of environmental events. The relevant EU legal framework on migration and environmental law will be described and the EU's external dimension addressing environmental migration will be assessed. Finally, conclusions will be drawn on whether the current European and international systems are adequate to tackle the issue of environmental migration.

[263] G. Van Calster, L. Reins, '*EU Environmental Law'* Elgar European Law (2017), at 1-40

3.1. Environmental migrants within the EU policy debate

The European Union has addressed issues related to climate change and environmental degradation within as well as beyond EU borders as a self-proclaimed pro-environmental and human rights-oriented actor for decades.[264] Indeed, there is an awareness shown by the EU Institutions that environmental events, both man-made and natural, depending on their magnitude and recurrence, are one of the major causes of possible migration movements.[265] Furthermore, many situations of environmental degradation and/or disasters, influenced by or directly attributable to climate change, are described as threat multipliers exacerbating tensions and instability. [266] Despite this rising awareness, the EU still lacks a coherent and ad hoc policy on environmentally induced displacement, which means that there is currently no legal framework that systematically addresses the issue of legal protection for different forms of climate and environment-related migration. This lack of clarity at the EU level has not prevented the progressive creation of a policy framework, albeit fragmented and in some ways insufficient, aimed at finding solutions to what appears to be an important challenge the EU will face in our century. Indeed, there has been a growing interest in these issues for years through initiatives, studies, official documents, and participation in international panels. The EU is involved, also financially, in the Nansen Initiative, [267] an intergovernmental process created to build an international consensus on the creation of a global agenda to identify effective protection and assistance measures for those people who have crossed national borders due to disasters or the effects of climate change. In addition, the EU became an active member of the steering

[264] L. Wirthova, '*Addressing Environmental Migration in the European Union Discourse'* UCL Open: Environment Preprint UCL Press (2023)
[265] European Parliament Resolution, '*Addressing refugee and migrant movements: the role of EU external action'*
P8_TA(2017)0124 (2017), paragraph 5
[266] European Commission and High Representative, '*Climate change and international security: paper from the High Representative and the European Commission to the European Council' supra* note 19
[267] IOM, *The Nansen Initiative Disaster-Induced Cross-Border Displacement Agenda for the Protection of Cross-Border Displaced Persons in the context of Disasters and Climate Change Volume I* (2015)

group of the Platform on Disaster Displacement, [268] launched in May 2016 to follow up on the work of the Nansen Initiative and its Protection Agenda. The EU also ratified the Paris Agreement [269] which, albeit minimally, addresses in its loss and damage provision issues related to human mobility.

For what concerns European institutions, specifically the European Parliament (hereinafter, the EP) and the European Commission (hereinafter, the Commission), have devoted particular attention to this issue for years. [270] The latter started to engage with environmental-related migration in the late 1990s by gathering information, commissioning research projects, and organizing events to discuss the topic with different stakeholders. The EP was the initial EU body to lay some foundational work in this area. In its 1999 resolution, *The Environment, Security and Foreign Policy*, [271] it included the issue of 'climate refugees'. It stressed and described environmental migrations as increased *"security problems for the EU in the form of regional instability in other parts of the world"*. [272] Even though the issue was regarded through the lens of a security approach, the resolution has the merit of recognizing the link between the environment, scarcity of natural resources and conflicts over the hoarding of natural resources such as water, food, and fuels [273] and also recognizing a direct cause-effect link between human activities aimed at exploiting resources and the increased occurrence of natural and environmental disasters [274] and damage to health. [275] The resolution highlights the potentially cross-border nature of the phenomenon, which, by mostly affecting the world's poorest and most vulnerable populations, will increasingly provoke the occurrence of migratory movements, including international ones, with consequent direct pressure on EU immigration and justice policies, development assistance and

[268] UNOPS, *Platform on Disaster Displacement* available at https://disasterdisplacement.org accessed 10 January 2024
[269] UNFCC, *Paris Agreement supra* note 157
[270] M. Ammer, et al., '*Time to act, how the EU can lead on climate change and migration*' Brugger Edition Heinrich-Böll-Stiftung (2014), at 24.
[271] European Parliament Resolution, '*Resolution on Environment, security and foreign policy* 'A4-0005/1999 (1999)
[272] *Ibid*, at 4
[273] *Ibid*, letter G
[274] *Ibid*, letter F
[275] *Ibid*, paragraph 8

humanitarian aid. [276] In 2010, the EP launched a resolution [277] on the Commission White Paper *Adapting to Climate Change: Towards a European Framework for Action* [278] under which it indicates the possible large-scale migration caused by climate change from the regions of Africa, the Middle East and South, Southeast Asia to Europe. In this case, the resolution overcomes the security approach and foresees political measures on development assistance and humanitarian aid in the countries of origin. [279] After that, in 2011, the EP commissioned study research to the Centre for Migration Policy Development whose main aim was the production of a study on legal and policy responses to environmentally induced migration. [280] It is also to note a parliamentary inquiry, *Climate refugee status*, [281] which by referring to the Teitiota case, questioned the Commission's position on the recognition of refugee status and whether it would support, in principle, a European legislative proposal for the recognition of adequate protection. Later, with the parliamentary inquiry *Legal vacuum affecting climate refugees,* [282] the Commission was asked whether it intended to launch a debate on granting legal recognition at the European level, given the scale of environmentally induced movements. In both instances, the Commission recognized the interplay between climate change and migration, but it only highlighted the financial commitments already made within the Nansen initiative and those arising from the Paris Agreement on climate change. For what concerns the initiatives launched by political parties, the Greens/European Free Alliance group adopted the position paper *Climate Change, Refugees and Migration* [283] in 2013. The paper presents an overall analysis of environmental

[276] *Ibid*, letter I
[277] European Parliament Resolution on the Commission White Paper, '*Adapting to climate change: Towards a European framework for action'* P7_TA(2010)0154 (2009/2152(INI)) (2010)
[278] European Commission White Paper, '*Adapting to climate change: Towards a European framework for action*' COM(2009)147 (2009)
[279] *Ibid*, para 80
[280] European Parliament Directorate General for Internal Policies, Policy Department Citizen's Rights and Constitutional Affairs C, '*Climate refugees: legal and policy responses to environmentally-induced migration*' PE 462.422 (2011)
[281] Parliamentary questions, Question for written answer to the Commission E-006419-14 *Subject: Climate refugee status* Rule 30 Marc Tarabella (S&D) (2014)
[282] Parliamentary questions, Question for written answer to the Commission P-006280-16 *Return decisions and removal measures: to be registered in SIS or Eurodac?* Rule 130 Louis Michel (ALDE) (2016)
[283] The Greens/EFA in the European Parliament, '*Position paper climate change, refugees and migration'* drafted by Hélène Flautre, Jean lambert, Ska Keller and Barbara Lochbihler (2013)

migration and discusses terminology, adaptation and development, and legal options. It foresees the options the EU could implement with climate change and migration and makes recommendations for further policy developments in this field. Lately, in 2020, the European Parliament [284] recalled that climate change is one of the drivers of migration and acknowledged the lack of protection for environmental migrants. It calls for consolidated clarity on the terminology of what environmental migration entails and for the development of a coherent external policy on the nexus of climate change and mobility and a strategy to assess the asylum demand of environmental migrants. In its 2021 Resolution [285] on human rights protection and the EU external migration policy, the EP calls, inter alia, for funding for sustainable responses to climate change at the regional level. All in all, the European Parliament has, over the years, demanded the legal recognition of victims of natural and environmental phenomena. It has recognized and stressed how climate change and environmental disruptions can have major consequences on possible violations of human rights. [286] Moreover, it has drawn attention to the lack of an internationally recognized legal status for environmental migrants and engaged in multiple debates on the need for legal recognition within binding international agreements. [287]

It is noteworthy to add the position of the European Council and the Council of the European Union. The first has expressed his commitment to the Stockholm Program [288] which underlined the need to explore the connection between climate change, migration, and development, and invited the European Commission to

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[284] European Parliament's Committee on Civil Liberties, Justice and Home Affairs, '*Climate Change and Migration Legal and policy challenges and responses to environmentally induced migration' supra* note 24, at 88-93

[285] European Parliament Resolution on human rights and the EU external migration policy, '*Human rights protection and the EU external migration policy'*(2020/2116(INI)) (2021)

[286] European Parliament Resolution *on the Annual Report on Human Rights and Democracy in the World 2013 and the European Union's policy on the matter* (2014/2216(INI)) P8_TA(2015)0076, letter Y and European Parliament Resolution on the *Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter* (2015/2229(INI)) P8_TA(2015)0470, paragraph 17 A.B

[287] European Parliament Resolution on *Towards a new international climate agreement in Paris* (2015/2112(INI) (2015), paragraph 66, 77 and European Parliament Resolution on *addressing refugee and migrant movements: the role of EU External Action* (2017), paragraph 31 and European Parliament Recommendation to the Council of 7 July 2016 on the 71st session of the United Nations General Assembly (2016/2020(INI)), letter AN

[288] Council of the European Union, '*The Stockholm Programme – An open and secure Europe serving and protecting the citizens*' Document 17024/09 (2009)

present an analysis of the effects of climate change on international migration, including potential effects on migration in the EU. [289]

The Council of the European Union has referred to climate and environmental degradation as factors capable of increasing migration and mobility patterns, but it has limited the EU's action in the context of development cooperation, foreign policy, and humanitarian assistance by deepening knowledge and further developing policies on the matter. [290] In particular, the *Conclusions on the 2013 UN High-Level Dialogue on Migration and Development and on broadening the development-migration nexus* affirms that "*climate and environmental degradation are already exerting an increasing influence on migration and mobility and therefore considers that the linkages between climate change, environmental degradation and migration should be further explored and addressed as appropriate, in particular in the context of development cooperation, foreign policy and humanitarian assistance"*. [291]

On another note, the position of the European Commission is also remarkable. The first steps undertaken by the Commission and the High Representative date back to 2008 when a document on climate change and international security was published. [292] In the latter, environmental migration is described as a threat with the capability of intensifying causes of conflicts in transit and destination countries. The paper argues that the EU would have to face a possible form of mass migration from neighbouring countries already affected by difficult health conditions, unemployment, and social exclusion that would be exacerbated by the negative effects of environmental disruptions and trigger international migration. For this reason, it is argued that Europe would bear the consequences of global warming and that it should "*expect substantially increased migratory pressure"*.[293] The document recommends the promotion of global climate security through the

[289] *Ibid*, paragraph 6.1.2.
[290] Council of the European Union, '*Conclusions of the Council and of the Representatives of Governments of the Member States meeting within the Council on the 2013 Un High-level dialogue on migration and development and on broadening the development-migration nexus'* 12415/13 (2013)
[291] *Ibid*, paragraph 6
[292] European Commission and High Representative, '*Climate change and international security: paper from the High Representative and the European Commission to the European Council' supra* note 19
[293] *Ibid*, paragraph 5

implementation of "*a comprehensive European migration policy, in liaison with all relevant international bodies"* and the creation of monitoring and early warning systems. [294] The Commission, over the years, has described climate change and environmental disruptions as direct and indirect push factors for migration because they squeeze a wide range of rights and affect the most vulnerable people. In line with what the Stockholm Programme delineated, the Commission organised consultation processes and round tables, such as the one among experts on Climate Change and Migration on 6 May 2011. [295] Furthermore, it funded the FP7 project CLICLO [296] a two-year project (2010-2012) focusing research on the relationship between climate change, conflicts caused by water hoarding and human security in the Mediterranean, the Middle East and the Sahel. The culmination of these consultations and research ended in the 2013 Commission Staff Working Document (hereinafter, CSWD). [297] The CSWD's aim is the launch of an overall discussion on the inter-linkages between migration, environmental degradation and climate change, and an overview of the research and data available in this area. The CSWD aims to present a compilation "*of the many initiatives of relevance for the topic which are already being taken by the EU in various policy fields and analyses ongoing debates on policy responses at the EU and international levels".* [298] Such measures include, for instance, the support of research on the issue, as well as measures to increase resilience and improve emergency responses to reduce displacement risks. [299] Moreover, the CSWD focuses on the external dimension of the EU policies on environmental migration because the latter will primarily occur "*in the developing world, with migrants moving either internally or to countries in the same region".* [300] It envisages a human rights approach by stating that *"human*

[294] *Ibid*, paragraphs 6-7
[295] European Commission Staff Working Document, '*Climate change, environmental degradation, and migration, Accompanying the document communication from the Commission to the European Parliament, the Council, the European economic and social committee and the Committee of the regions, An EU Strategy on adaptation to climate change'* SWD(2013)138 (2013), at 7
[296] CLICLO, '*Climate Change Hydro-conflicts and Human Security funded under the Socio-Economic Sciences and Humanities'* (2016) available at https://www.clico.org accessed 14 November 2023
[297] European Commission Staff Working Document '*Climate change, environmental degradation, and migration' supra* note 295
[298] *Ibid*, at 3
[299] *Ibid*, at 35-36
[300] *Ibid*, at 34

rights law applies to environmentally induced migrations, as to all other persons". [301] To promote and facilitate migration as an adaptation strategy, it suggests the use of the model laid down in the EU-funded Temporary and Circular Labour Migration (hereinafter, TCLM), an agreement between Spain and Colombia which will be further explained in the further sections. [302] Although the CSWD has furthered the debate on environmental migration at the EU level, it did not provide concrete policy recommendations on how to address the environmental drivers of international population movements in the EU's migration law and policy.

The 2015 European Agenda on Migration [303] described climate change as a direct and immediate cause of migration phenomena. [304] Furthermore, in the subsequent 2016 Communication and its Commission Staff Working Document, environmental migration is conceptualised as a form of forced migration. [305] The accompanying Staff Working Document foresees the need for future provisions to be implemented by the EU and notes that "*greater attention is needed for addressing displacement in work on disaster risk reduction, resilience and climate change adaptation".* [306]

The New Pact on Migration and Asylum [307] identifies climate change as a societal challenge but it seems to lack the inclusion of the category of environmental migrants in the legal framework. It seems to refer to the international refugee definition which, as explained in the previous chapter, does not include environmental migrants and it does not seem to give the possibility of recognising other categories other than the one already existing at the international level. This would risk possible ex-ante discrimination [308] because environmental migrants would not fit in the definition of refugee but of the general migrant one and,

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[301] *Ibid*, at 16
[302] *Ibid*, at 28
[303] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions '*A European Agenda on Migration'* COM(2015) 240 (2015)
[304] *Ibid*, at 9
[305] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Lives in dignity: from aid-dependence to self-reliance forced displacement and development* COM(2016)234 (2016), at 2-3
[306] *Ibid*
[307] European Commission, *a New Pact on Migration and Asylum supra* note 28
[308] F. Gaudiosi, '*Environmental migrants: UN recent and "soft" sensitivity v. EU deafening silence in the New European Pact on Migration and Asylum'* Freedom, Security & Justice: European Legal Studies Rivista giuridica di classe A 150-167 n. 2 (2020), at 159

therefore, would not benefit from the same protection that the Pact provides to recognised refugees. Moreover, the Pact refers to the EU's external dimension by requesting to implement cooperation systems with the migrant's countries of origin in different policy areas. Among those, combating climate change within the countries most affected by environmental disasters is mentioned as an active engagement between both parties. [309] Consequently, as it looks today, the Pact, which should represent a turning point in European migration affairs, does not entail a possible specific provision for extending the scope of environmental migrants' protection in Europe.

Altogether, the EU, while acknowledging that climate change is one of the factors that will increase migration flows to Europe, limits the legal and moral obligation to provide protection only to those fleeing war and persecution. [310] On the other hand, the policies proposed and implemented are focused on measures of development, cooperation, and humanitarian aid. [311] It can be said that the EU has addressed the challenges of disaster, climate, and environmental-related displacement through a comprehensive approach that, in the absence of a specifically addressed legal framework for environmental migration, has implemented measures in various and different normative regimes stemming from the asylum, human rights and environmental ones. Indeed, its response is rooted in commitments to addressing climate-related challenges in its external actions and development partnerships and in active engagements in supporting and contributing to relevant international policy processes and instruments, emphasizing a commitment to multilateralism. [312] It rather focuses on long-term solutions to tackle the issue of climate change and on the creation of adaptation measures and funding for the territories that are most affected by climate change than on the implementation of a protection system for migration already in place.

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[309] European Commission, *a New Pact on Migration and Asylum supra* note 28, paragraph 6

[310] Communication from the Commission to the European Parliament and the Council, '*Towards a Reform of the Common European Asylum System and enhancing legal avenues to Europe'* COM(2016)197 (2016), at 2

[311] Communication from the Commission to the European Parliament, '*Linking relief, rehabilitation and development (LRRD)'* COM(2001)153 (2001)

[312] European Commission Staff Working Document, '*Addressing displacement and migration related to disasters, climate change and environmental degradation*' SWD(2022) 201 final, at 15

3.2. The EU migration and asylum system

The discipline offered by the protective regime of the 1951 Geneva Convention and its 1967 Additional Protocol has been harmonised and supplemented by the EU with the Qualification Directive 2011/95/EU, [313] the Asylum Procedures Directive 2013/32/EU[314] and the Reception Conditions Directive 2013/33/EU. [315]

At the same time, the EU, for cases where people are forced to migrate forcibly from their state of origin for reasons other than those set out by the Geneva Convention, has set up two complementary protection schemes, the temporary protection, governed by Directive 2001/55/EC613, [316] and the subsidiary protection, currently governed by Directive 2011/95/EU. [317]

It is worth analysing whether the Common European Asylum System (hereinafter, CEAS), thus formed by the aforementioned provisions, can offer protection, at least in certain cases, to individuals or groups of people who have been forced to migrate for reasons mainly due to environmental events.

3.2.1. The Common European Asylum System

The CEAS stems from the recognition that, in an area without internal borders, asylum requires harmonised regulation at the level of the European Union. [318] The

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[313] Council of the European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 European Commission Staff Working Document, '*Addressing displacement and migration related to disasters, climate change and environmental degradation for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted* (recast), 20 December 2011, OJ L. 337/9-337/26

[314] Council of the European Union, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 *on common procedures for granting and withdrawing international protection* (recast), 29 June 2013, OJ L. 180/60 -180/95

[315] Council of the European Union, Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 *laying down standards for the reception of applicants for international protection* (recast), 29 June 2013, OJ L. 180/96 -105/32

[316] Council of the European Union, Council Directive 20 01/55/EC of 20 July 2001 *on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof*, 7 August 2001, OJ L.212/12-212/23; 7.8.2001, 2001/55/EC

[317] *Qualification Directive supra* note 313

[318] EASO, '*Un'analisi giuridica. Un'introduzione al Sistema europeo comune di asilo per i giudici*' *supra* note 204, at 13

1997 Treaty of Amsterdam introduced a Community-shared competence in the field of asylum [319] based on "*the full and inclusive application of the Geneva Convention"*. [320]

Under the Treaty of Lisbon, Articles 67(2), 78 and 80 TFEU, are, still to these days, the legal basis for the EU Common Asylum System which under Article 78(1) TFEU aims at developing "*a common policy on asylum, subsidiary protection and temporary protection to offer appropriate status to any third-country national requiring international protection and ensure compliance with the principle of nonrefoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties".*

The European Parliament and the Council, through deliberation under the ordinary legislative procedure, are competent to adopt new legislation in the field of asylum [321] to regulate a fair policy on migration, with full respect to fundamental human rights and in compliance with the principle of solidarity between Member States. [322]

Overall, the current CEAS therefore contemplates three forms of protection. First, two forms of international protection governed by Directive 2011/95/EU, namely

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[319] Before the Amsterdam Treaty, to meet the need for harmonisation, in the absence of a Community asylum policy, there was the use of intergovernmental cooperation, based on the Treaty of Maastricht Treaty and outlined on the basis of the Schengen agreements.

[320] European Council, '*Presidency Conclusions*' Tampere European Council 15 and 16 October 1999, SN 200/99, Bruxelles, paragraph 13

[321] TFEU, Article 78 paragraph 2 reads as follows: *2. For the purposes of paragraph 1, the European Parliament and the Council, acting by the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:*
(a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
(b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
(c) a common system of temporary protection for displaced persons in the event of a massive inflow;
(d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;
(e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
(f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;
(g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

[322] The principle of solidarity between Member States is also laid down in Article 80 TFEU: *The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States.*

refugee status and subsidiary protection. As a result of the Directive, these forms of protection have been placed on an equal footing in terms of the status accorded to refugees and beneficiaries of subsidiary protection. Alongside these, temporary protection in the event of a mass influx of displaced persons is regulated by Directive 2001/55/EC, which has not been recast.

For this research, it is considered necessary to analyse the three forms of protection in detail, to:

1. highlight that the scope of application of these forms of protection does not entail an explicit reference to environmental and climatic factors;
2. analyse the possibility that one of the forms of protection may nevertheless protect types of climate change-induced displacement (through a link to existing categories);
3. underline if and how such instruments could, in any case, represent models for developments in the protection of this category of migrants.

3.2.2. Directive 2011/95/EU, the Qualification Directive

The Qualification Directive's [323] (hereinafter, QD) main scope is to set criteria, implemented equally in all Member States, for applicants to qualify for one of the forms of protection envisaged, namely refugee status or subsidiary protection status, and the rights that those persons are entitled to. [324]

The QD establishes *standards* concerning the qualification, status, and content of the beneficiary of international protection and compares the content of international protection to be granted to refugees and beneficiaries of subsidiary protection.[325]

[323] *Qualification Directive supra* note 313

[324] European Commission, '*Who qualifies for international protection'*, Migration and Home Affairs Policies, available at https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/who-qualifies-international-protection_en accessed 25 November 2023

[325] G. Morgese, '*La direttiva 2001/95/UE sull'attribuzione e il contenuto della protezione internazionale'* La Comunità Internazionale n. 2 (2012), at 259

3.2.3. The refugee status under the Qualification Directive

Under Article 2 letter d) of the QD, the refugee status is described as *"a national of a third country who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of which he is a national and cannot, or, owing to such fear, does not wish to avail himself of the protection of that country. does not wish to avail himself/herself of the protection of that country, or a stateless person who is outside the country of former habitual residence for the same reasons as mentioned above and cannot or, owing to such fear, does not wish to avail himself/herself of the protection of that country. does not wish to return there, and to whom Article 12 does not apply."*

The definition given by the QD recalls the one contained in Article 1A(2) of the Refugee Convention, in line with what is stated in Article 78 TFEU on the conformity of the common asylum policy with the Convention and its Protocol.

The requirements for granting refugee status are, therefore, a well-founded fear of persecution for one of the five reasons mentioned in the article; distance from the country of origin (and in the condition of not wishing to return); the lack of protection from that State.

The main and relevant differences between what the QD entails, and the Refugee Convention are the clarifications concerning the nature of the persecutory acts and the five reasons for persecution (Articles 9 and 10 of the Directive).

Article 9(1) describes an act of persecution as "*(a) sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular, the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).*"

Furthermore, paragraph 2 lists a non-comprehensive series of acts that can concretely be considered as persecution. [326] In the case of environmental migrants,

[326] *Qualification Directive supra* note 313, Article 9 paragraph 2

the analysis and subsequent conclusions are the same as those made regarding the Geneva Convention. Although the QD specifies the cases in which an act can be deemed as persecution, there is no express reference to environmental and/or climatic factors. The explicit reference to the grave violation of fundamental human rights is certainly a plus in comparison to what is stated in the Geneva Convention, but it cannot overstep its bounds in the context of climate change: the necessary link with one of the five grounds for persecution.

3.2.4. Subsidiary protection under the Qualification Directive

Under EU migration law, subsidiary protection has its legal base in Article 78(2) TFEU on points (a) and (b). [327] Article 2, para f, describes a person eligible for subsidiary protection as "*a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country".* [328]
This type of protection can be described as a complementary one. The latter, even if not defined in any international instruments, is a "*protection granted to individuals based on a legal obligation other than the principle refugee treaty".* [329]
Therefore, it is an alternative basis for protection eligibility other than the Refugee Convention and a conditional one: the examination of the application for international protection focuses first on whether the requirements for refugee status are met, and only when these are not met, an assessment is made as to whether the

[327] TFEU Article 78 paragraph 2 points (a) and (b) reads as follow: *"For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:*
(a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
(b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection".
[328] *Ibid*
[329] J. McAdam, '*Complementary Protection in International Refugee Law' supra* note 202, at 2-3

asylum seeker can benefit from subsidiary protection. Moreover, subsidiary protection does not need to be established within a specific ground of harm because it is based on an extended principle of non-refoulment under international law to which some sort of legal status should attach. [330] It is to note that, although one of the scopes of the Directive is the harmonisation of standards set in various Member States, each Member State retains the possibility to grant more favourable standards for determining who qualifies as a person eligible for complementary protection.[331] The rights to which a person eligible for subsidiary protection is entitled are a residence permit, social assistance, education, and healthcare as provided to nationals of that Member State. They shall be authorised to in any employed or self-employed activity and educational opportunities, vocational training, and workplace experiences. As explained before, a person eligible for subsidiary protection is defined as a third-country national or a stateless person who does not meet the requirements for being considered a refugee but risks, if returned to his or her country of origin or former habitual residence, suffering serious harm. The threshold and definition of serious harm are crucial to understanding whether environmental migrants could fall under this category. Article 15 describes what serious harm should entail: *"(a) the death penalty or execution; or*

(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person because of indiscriminate violence in situations of international or internal armed conflict". [332]

Although the scope of application of the Directive is broader than the Refugee Convention, the EU legislation, nevertheless, links the grant of protection to a specific list of serious grounds under which environmental migrants cannot easily fall. Among the three situations described in Article 15, paragraph (a) is the least

[330] M. Ammer, L. Boltzmann, '*Research project on climate change: "Climate change and Human Rights: The Status of Climate Refugees in Europe"*', Swiss Initiative to Commemorate the 60th Anniversary of the UDHR Protecting Dignity: An Agenda for Human Rights (2009), at 57

[331] Directorate General for Internal Policies Policy Department C Citizens' Rights and Constitutional Affairs Civil Liberties, Justice and Home Affairs, '"*Climate Refugees" - Legal and policy responses to environmentally induced migration*' PE 462.422 (December 2011), at 51

[332] *Qualification Directive supra* note 313, Article 15

compatible with environmental migrants, because the death penalty and or executions are not applicable. For what concerns paragraph (c), the CJEU has clarified that the presence of an armed conflict is necessary to assess the existence of a serious and individual threat.[333]

The international or internal armed conflict requisite did not exist in the European Commission's initial proposal, which referred more generally to the "*systemic and generalised violation of human rights"*, which widened the scope of application of the system of protection and made it possible to protect a variety of different situations. [334] The reference to human rights could have implied the protection of those who, due to environmental disasters or the effects of climate change, see their human rights threatened in their country of origin. On the contrary, the QD refers to cases of international or internal conflict that prevent the provision from being easily and directly applied in the context of climate change. Some authors have argued that only in cases in which negative environmental effects have been or are the cause of internal conflicts, for instance, because of resource scarcity, then subparagraph (c) could be applicable in that context. [335]

On the other hand, the CJEU stated that Article 15(b) - relating to torture, inhuman or degrading treatment or punishment – "*corresponds, in essence"* to Article 3 ECHR. [336] Moreover, the Commission has highlighted that Member States shall not apply a higher threshold than the one applied by the ECHR when granting protection based on paragraph (b). [337] If we take a closer look at the jurisprudence of the ECtHR on the violation of Article 3 ECHR, the latter is developing in the sense of a possible grant of protection in the case of deprivation of socio-economic rights, that may happen in the occasion of environmental hazards. Among the case

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[333] CJEU, C-465/07, *Meki Elgafaji Noor Elgafaji v Staatssecretaris van Justitie*, ECLI:EU:C:2009:94, 2009

[334] UNHCR, *Nota dell'UNHCR: La protezione sussidiaria secondo la 'Direttiva Qualifiche' nel caso di persone minacciate da violenza indiscriminata' (*2008)

[335] Examples of authors agreeing with this position are: W. Kalin, '*Conceptualising Climate-Induced Displacement*' in J. McAdam, '*Climate Change and Displacement: Multidisciplinary Perspectives'*, Hart Publishing (2010), at 81

[336] CJEU, *Meki Elgafaji Noor Elgafaji v Staatssecretaris van Justitie supra* note 333, paragraph 28

[337] Commission of the European Communities, '*Proposal for a Council directive on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection',* COM/2001/0510 final - CNS 2001/0207 OJ C 51E (2001), at 26

law, it is to note *N. v. the United Kingdom.* [338] The case relates to the specific medical conditions of the applicant that, if returned to his state of origin, would drastically be impaired. In the case, the Court stated how socioeconomic rights violations in the country of origin might amount to inhuman or degrading treatment and, hence, a violation of Article 3 ECHR if the complainant would be returned to his country of origin. Nonetheless, the threshold set is still deemed too high for protection to be granted because the Court highlighted the extremely exceptional circumstances of the case. [339] This threshold was later lowered in subsequent cases [340] of medical conditions and lack of adequate care in the state of origin. The Court held that a "*significant reduction of life expectancy or intense suffering"* [341] could amount to inhuman and degrading treatment and, therefore, a violation of Article 3 ECHR. Based on these judgements, a lack of socio-economic rights such as access to medical treatment could result in inhuman or degrading treatment if removed. Thus, climate and environmental change's adverse effects on socio-economic rights such as the right to food, water, and housing, could give rise to inhuman or degrading treatment. Considering the need to uniformly interpret Article 3 ECHR, it is possible that the CJEU, when dealing with an environmental migration matter, may consult the ECtHR jurisprudence on Article 3 ECHR.

It is possible to note how Article 15 of the QD cannot offer an all-inclusive and secure system of protection against climate change-induced displacement. The hypotheses indicated in paragraphs (a), (b) and (c) are not directly linked to the case of environmental migrants. Indeed, in the study "*Climate Refugees". Legal and policy responses to environmentally induced migration*, the International Center for Migration and Policy Development (ICMPD) stated that:

"The EU should consider further developing complementary forms of protection. This may initially be limited to an ad hoc mechanism and made dependent on the further evolution of the situation in the country of origin. Current national approaches regarding non-harmonised protection statuses can be used as a model

[338] ECHR, *N. v. the United Kingdom* Application No. 26565/05 (27 May 2008), paragraph 12
[339] J. McAdam, '*Climate Change Displacement and International Law: Complementary Protection Standard*s' *supra* note 59, at 26
[340] ECHR, *Paposhvili v. Belgium supra* note 255
[341] *Ibid,* paragraph 183

for the European legislator in amending the content of the Qualification Directive. As long as the reasons listed in Article 15 shall be applicable to qualify for subsidiary protection, an amendment to its paragraph (c) might include, in addition to armed conflict, also environmental disasters". [342]

On top of this, the study *Migration and Climate Change: Legal and Policy Challenges and Responses to Environmentally Induced Migration* highlights the possible effects that "*the negotiation for a qualification regulation* might have as an *opportunity to broaden the scope of subsidiary protection".*[343] The study, therefore, suggests that it is not certain that a future modification of subsidiary protection, in the light of studies promoted within the Union, might add to the hypothesis concerning environmental factors and, therefore, climate change.

3.3. The case law of the Court of Justice of the EU on the meaning of inhumane and degrading treatment

The previous paragraphs explained the relevant EU Qualification Directive and outlined whether and to what extent it can be applied to environmental migrants. To analyse whether this results in obligations for the EU to protect these, the case law of the CJEU will be studied, with a specific focus on the scope of Articles 3 ECHR and Article 15 (b) QD. It is necessary to examine how the CJEU has interpreted the meaning of inhuman or degrading treatment or punishment under Article 15(b) and whether it has followed the case law of the ECtHR to clarify the legal obligations of Member States under Article 3 ECHR, in cases of return to situations where people risk violations of their human rights due to environmental hazards. This will eventually contribute to concluding whether the judgements broaden the scope of application of the principle of non-refoulment to the extent that environmentally induced migrants might fall under the scope of application and might be offered the protection envisaged in the QD under Article 15 (b). As there is no existing legal precedent concerning the principle of non-refoulment

[342] ICMPD, "*Climate Refugees". Legal and policy responses to environmentally induced migration",* PE 462.422 (2011), at 53

[343] European Parliament Policy Department for Citizen's Rights and Constitutional Affairs Directorate General for Internal Policies, '*Climate Change and Migration Legal and policy challenges and responses to environmentally induced migration' supra* note 24, at 72

for environmental migrants, the analysed cases primarily specify what inhuman and degrading treatment entails or involve ill individuals who face deprivation of access to medical treatment upon return to their country of origin. These individuals share similar characteristics with migrants displaced due to environmental hazards, as the harm does not derive from immediate physical violence but rather from socio-economic vulnerabilities.

3.3.1. CJEU *M'Bodj v. Belgium* and the scope of Article 15 (b) QD [344]

The CJEU ruled on the scope of protection available under EU law to third-country nationals suffering from a serious illness whose removal would amount to inhuman or degrading treatment.
Mr M'Bodj, who was suffering from a grave disability, was granted a residence permit in Belgium for medical reasons and argued that he could not be sent back to his country of origin because he would face the risk of inhuman or degrading treatment and, hence, fall under the scope of Article 3 ECHR. [345] In its assessment, the Court stated that a third-country national with a deteriorating status of health does not, per se, entail the grant of subsidiary protection under Article 15(b) of the Directive, but only under the principle of non-refoulment. [346] Following this reasoning, the CJEU ruled that the danger of injury due to a lack of proper health care in the country of origin is insufficient, and therefore Article 15 (b) QD applies only if the nation of origin actively denied the individual health care and cannot be the result of general shortcomings in the health system of the country of origin. [347]
By making this decision, the CJEU separated Article 15 (b) QD from ECtHR case law: even though the case law of the ECtHR interprets Article 3 ECHR to mean that people in the same situation as the claimant could not be sent back to their country of origin, this does not mean that they should be granted subsidiary protection under EU law.

[344] CJEU, C-542/13, *Mohamed M'Bodj v. Belgium*, 2014 ECLI:EU:C:2014:2452
[345] As explained by ECHR in *N. v. the United Kingdom supra* note 338
[346] CJEU, *M'Bodj v. Belgium supra* note 344, paragraph 45
[347] *Ibid*, paragraph 36

3.3.2. CJEU *Abdida* [348] and the Returns Directive

Mr. Abdida, a Nigerian national diagnosed with AIDS, applied to the Belgian state requesting leave to remain due to medical reasons. The application was rejected and hence an appeal was submitted during which the claimant was denied social assistance. The Court based his reason on the Returns Directive since his asylum application was rejected and it was stated an obligation to return. The Directive establishes standards for returning third-country nationals who are illegally staying in one of the Member States. [349] Article 5 of the Directive states the principle of non-refoulment [350] that must be interpreted considering Article 19(2) EU Charter. [351] The findings of the Court confirmed what was already stated in M'Bodj but, the Court added that the exceptional cases where the removal of a person suffering from serious illness to a country in which he risks the exposition to ill-treatment and where there is no remedy enabling the suspension of a return decision would violate Article 5 of the Returns Directive and, therefore, the principle of non-refoulment. Based on this judgement, individuals who do not qualify for subsidiary protection under Article 15 (b) Qualification Directive may be awarded some sort of alternative protection by the Returns Directive.

3.3.3. CJEU *MP v. Secretary of State for the Home Department* [352]

In the judgement, the CJEU considered the interpretation of the subsidiary protection as defined in the Qualification Directive. The applicant, MP, a Sri Lankan national, was given a leave to remain as a student in the UK and later applied for asylum because he had been tortured in Sri Lanka and claimed that, if he were to

[348] Case C-562/13 *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v. Moussa Abdida*, 2014 ECLI:EU:C:2014:2453
[349] Council Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 *on common standards and procedures in Member States for returning illegally staying third-country nationals*, 16 December 2008, OJ L. 348/98-348/107; 16.12.2008, 2008/115/, Article 1
[350] *Ibid*, article 5 (c)
[351] CJEU, *Abdida supra* note 348, paragraph 63
[352] Case C-353/16 *MP v. Secretary of State for the Home Department*, ECLI:EU:C:2018:276 2018

return to his country of origin, he would face a risk of ill-treatment. His request for asylum was rejected and, hence an appeal was submitted. [353]

In the CJEU's ruling, the Court emphasizes how Article 15 (b) of the Qualification Directive must be interpreted in the light of Article 4 ECHR, and, hence, as Article 3 ECHR because Article 52(3) of the EU Charter recalls how the rights enshrined in Article 4 ECHR, which corresponds to those under Article 3 ECHR, have the same meaning and scope. [354] The CJEU ruled that the EU Member States are precluded from expelling the applicant if *such expulsion would, in essence, result in significant and permanent deterioration of that person's mental health disorders,* particularly where such deterioration would endanger his life. [355] However, the substantial aggravation of the mental health disorders due to a return to his country of origin would not amount to inhuman or degrading treatment as Article 15 (b) of the Qualification Directive entails and, hence, subsidiary protection shall not be granted under EU law. [356] To grant subsidiary protection, the deprivation of health care shall be intentional. [357]

3.3.4. CJEU *Abubacarr Jawo v Bundesrepublik Deutschland* [358]

Mr Jawo, a Gambian national, had applied for asylum, firstly in Italy and then Germany. Consequently, Germany rejected his application and ordered the applicant's transfer to Italy based on the Dublin Regulation. Mr Jawo appealed this decision arguing that he could not be transferred to Italy due to the systemic deficiencies and living conditions beneficiaries of international protection are facing there. The CJEU, in this case, ruled on the grounds under which a transfer could not be carried on when it would be contrary to Article 4 of the EU Charter. The Court held that applicants for international protection can resist their transfer when it would violate the prohibition of torture and inhuman treatment laid down

[353] *Ibid*, paragraphs 16-18
[354] *Ibid*, paragraphs 36-37
[355] *Ibid*, paragraph 43
[356] *Ibid*, paragraphs 40 and 49
[357] *Ibid*, paragraph 51
[358] CJEU C-163/17 *Abubacarr Jawo v Bundesrepublik Deutschland* ECLI:EU:C:2019 (2018)

in Article 4 of the Charter. [359] For what concerns the relevant criteria to assess when there is such risk, the CJEU stated that the threshold would be met when such deficiency attains a particularly high level of severity resulting in a situation of extreme material poverty that does not allow the person to meet his or her most basic needs such as food, hygiene and a place to live and it is incompatible with human dignity. [360] The applicant must prove individual and specific circumstances that lead him into a situation of extreme material poverty irrespective of his wishes and personal choices. [361]

If we apply this line of reasoning to the circumstances of environmental migration, the CJEU has, once again, instituted a connection between the prohibition of torture or inhuman, degrading treatment or punishment and human dignity but envisaged an extremely high threshold to give rise to such a violation. Based on this interpretation, some argue that nonrefoulement cases involving return in extreme material deprivation deriving from intolerable environmental conditions caused by the State's inertia or actions, might constitute a breach of human dignity and meet the threshold of serious harm under Article 15(b) of the Directive and, therefore, protection might be granted. [362]

3.3.5. CJEU *X,Y, their six minor children v Staatssecretaris van Justitie en Veiligheid* (Notion d'atteintes graves) [363]

On 28 January 2018, X and Y, two spouses of Libyan nationality, lodged, also on behalf of their six minor children, applications for international protection in the Netherlands, claiming that upon return to their country of origin, they would face a real risk of serious harm within the meaning of Article 15(b) of the QD. The applicants relied on facts relating both to their circumstances and the general

[359] *Ibid*, paragraphs 81-87
[360] *Ibid*, paragraph 92
[361] *Ibid*, paragraph 95
[362] C. Scissa, '*The Principle of Non-Refoulment and Environmental Migration: a legal analysis of regional protection instruments'* Diritto, Immigrazione e Cittadinanza Fascicolo n. 3/2022, at 25
[363] CJEU Case C-125/22 *X,Y, their six minor children v Staatssecretaris van Justitie en Veiligheid* ECLI:EU:C:2023:843 (2023)

circumstances of their country of origin, in particular the general level of violence in Libya and the resulting humanitarian situation.

The question raised before the CJEU was related to the criteria to be used for the assessment of what inhuman and degrading treatment would entail and if both the individual and general situation of the country of origin had to be considered in the analysis for the grant of subsidiary protection. The Court ruled that the risk of torture or inhuman or degrading treatment or punishment entails situations in which the applicant is specifically and individually exposed to the risk. Consequently, the grant of subsidiary protection is contemplated when there are substantial grounds for believing that the applicant if returned to his or her country of origin or his or her country of origin, would be exposed specifically and individually to a real risk of, torture or inhuman or degrading treatment or punishment. That being said, the factors related to the general situation of the country of origin must be examined in the overall assessment of the risk the applicant is exposed but the latter circumstances cannot weaken the necessary specific and individual risks for granting protection. [364]

Moreover, in this judgement, the CJEU reiterates that the interpretation of Directive 2011/95 must consider the case law of the ECtHR on Article 3 of the Convention as the minimum threshold for protection. [365] This interpretation given by the CJEU expresses an emerging jurisprudence that an individual and specific deprivation of social and economic rights when returning to the country of origin might reach the threshold of severity to be defined as inhuman and degrading treatment. An extensive interpretation of the latter may consider the indirect effects that environmental events may produce in terms of the enjoyment of social and economic rights and, therefore, the possibility of granting protection under Article 15 of Directive 2011/95.

3.3.6. How the Court of Justice of the European Union's case law could apply to environmental migrants

[364] *Ibid*, paragraphs 39 and 73
[365] *Ibid*, paragraphs 59-60

This jurisprudence research focused on the potential of Article 15 (b) QD to protect environmental migrants from being sent back to their country of origin where they could face inhuman or degrading treatment due to a violation of socio-economic rights. Since the CJEU has not yet ruled on the specific situations of environmental migrants, situations in which the applicants had the same characteristics were researched.

In the M'Bodj v. Belgium case, the Court ruled that seriously ill migrants, although protected by the principle of non-refoulment, they do not fall under the scope of application of subsidiary protection. The risk of ill-treatment caused by the absence of appropriate health care in the country of origin is not sufficient to fall under the protection of Article 15 (b) because it is necessary for intentional deprivation of health care. From the reasoning of the CJEU, it can be concluded that non-medical cases will be treated the same. It could be argued that the environmental change effects come from a third party but, it is difficult to oversee a possible grant of protection. [366]

In the Abdida case, the Court granted alternative protection under the Returns Directive to an individual facing a risk of ill-treatment in his country of origin. The CJEU ruled that Article 5 of the Return Directive should be interpreted in the light of Article 19 (2) EU Charter and that the removal procedure may not be continued if this would infringe the principle of non-refoulement. In fact, the Court outlines that a removal procedure should cease if it infringes the non-refoulment principle under Article 5 of the Returns Directive. It is possible to believe that also environmental migrants could fall under the alternative protection granted. [367]

MP v. SSHD confirmed the line of reasoning of M'Bodj. The applicant could only be granted subsidiary protection if the risk of ill-treatment was intentional. It is unlikely that environmental migrants would be willfully denied their right to health, water, and food in environmental issues.

In Jawo, the Court inferred that a transfer to another Member State can be prevented only in cases in which there is a substantial risk of suffering inhuman or degrading

[366] S. Peers, '*Could EU law save Paddington Bear? The CJEU develops a new type of protection'* EU Law Analysis (2014) available at <http://eulawanalysis.blogspot.com/2014/12/could-eu-law-save-paddington-bear-cjeu.html> accessed 29 November 2023

[367] *Ibid*

treatment within the meaning of Article 4 of the EU, on account of the possible living conditions that could be found in that Member State. Based on this reasoning, subsidiary protection claims based on environmental grounds could only exceptionally be accepted when extreme material deprivation directly derives from negative environmental conditions.

In the Staatssecretaris van Justitie en Veiligheid case, the Court renewed that the conditions for granting subsidiary protection are fully compatible with the Strasbourg jurisprudence and that the individual and specific risks of facing inhuman and degrading treatment must be present to grant protection under Article 15(b) of Directive 2011/95.

Despite the cautious approach found in the CJEU's approach, recourse to its case law can be seen as a possible safeguard clause which tries to bring in new instances of protection. It could be considered possible to grant, at the very least, the guarantee of respect for the principle of non-refoulment at least in those exceptional cases in which an anthropic cause can be recognised as having contributed to the environmental event, if there is a real risk of suffering serious damage as a result. Although no express reference is made to the issue of environmental migration, through an evolutionary interpretation of the EU Charter based on a human rights approach, it could be possible to allow for indirect reflections of protection for those persons who, fleeing from adverse environmental events intend to resist deportation or seek international protection on the assumption that the situations they risk suffering in their countries of origin violate those rights enshrined in the EU legal system. Nevertheless, it is highlighted that the threshold reiterated in the judgements is quite high and, therefore, it is quite challenging to envisage the grant of protection for environmental migrants based on an extensive interpretation of Article 15 (b) QD.

In conclusion, the analysis of the case law offers no appreciable scope for delineating non-refoulement protection in the context of environmental and natural phenomena, except in very exceptional cases.

3.4. Temporary Protection Directive

The Temporary Protection Directive [368] is an EU legislative instrument which exceptionally provides immediate and temporary protection in the event of a mass influx or imminent mass influx of displaced persons from third countries unable to return to their country of origin. The legal basis of the Directive is Article 63(2) TEC, points (a) and (b). [369]

The Directive was adopted in the 1990s [370] but was only formerly activated once in March 2022 in response to the Russian invasion of Ukraine. [371]

The purpose of the Directive is to create a one-year lengthy protection mechanism as an "*exceptional device providing immediate and transitional protection"* to displaced persons in the event of a mass influx, through adopting minimum standards for the establishment of such a mechanism "*and measures to ensure a balance of effort between Member States receiving such persons and bearing the consequences of receiving them"*. [372] The procedure to be followed to trigger the temporary protection mechanism entails a complex procedure involving the attainment of a high political threshold. [373]

Under Article 2 of the Directive, the concept of mass influx is generally described as "*the arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area"*. The UNHCR defines it more specifically as a situation with "*(i) considerable numbers of people arriving over an international border; (ii) a rapid rate of arrival; (iii) inadequate absorption or response capacity in host States, particularly during the emergency; (iv) individual asylum procedures, where they exist, which are unable to deal with the assessment*

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[368] *Temporary Protection Directive supra* note 316

[369] Treaty Establishing the European Community, 1957; article 63: *"The Council [...] shall [...] adopt: measures on refugees and displaced persons within the following areas:*
(a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection,
(b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons;"

[370] European Commission, '*Temporary Protection'* Migration and Home Affairs available at https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/temporary-protection_en accessed 29 November 2023

[371] Decision of the Council of the European Union, No.2022/382 of 4 March 2022 *establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection* (2022)

[372] *Temporary Protection Directive supra* note 316, Preamble

[373] *Ibid*, Article 5

of such large numbers". [374] Article 2 of the Directive defines the meaning of displaced persons as "*third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular:*
(i) persons who have fled areas of armed conflict or endemic violence;
(ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights".

Compared to the Qualification Directive, the Temporary Protection Directive does not provide an exhaustive list of grounds that define a displaced person. No explicit reference is made to environmentally displaced persons. This reflects what the Opinion of the Economic and Social Committee pointed out: the legislative proposal limited the scope of action to those displaced by political situations and that, therefore, it was appropriate to study a directive capable of providing "*temporary protection and reception mechanisms also for persons displaced by natural disasters".*[375]

Nevertheless, some argue that the Directive might be applied in cases of environmental displacement because generalised violations of human rights could be triggered by climate change or environmental hazards. [376] Furthermore, the European Parliament, [377] relying on a broad interpretation, mentions the possibility of granting protection to environmental migrants thanks to the open definition of mass influx under which this category of migrants could fall. Letter (c) of Article 2 entails an open definition, listing two situations - flights from

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[374] UNHCR Executive Committee of the High Commissioner's Programme, '*Conclusion on International Cooperation and Burden and Responsibility Sharing in mass influx situations'* International Journal of Refugee Law Volume 17(1) (2004), at 278

[375] Parere del Comitato Economico e Sociale in merito alla "*Proposta di direttiva del Consiglio sulle norme minime per la concessione della protezione temporanea in caso di afflusso massiccio di sfollati e sulla promozione dell'equilibrio degli sforzi tra gli Stati membri che ricevono i rifugiati e gli sfollati e subiscono le conseguenze dell'accoglienza degli stessi*" Gazzetta Ufficiale n. C 155 (2001), at 21-25.

[376] V. Kolmannskog, F. Myrstad, '*Environmental Displacement in European Asylum Law'* European Journal of Migration and Law Volume 11 (2009), at 316-317

[377] European Parliamentary Research Service, *'The concept of 'climate refugee' supra* note 9, at 9

areas of armed conflict or endemic violence and systemic and generalised human rights violations or the risk of such violations – which are not the only cases in which temporary protection may be applied. [378] This peculiarity may allow the scope of the Directive to be extended to include the category of environmentally and climatically displaced persons based on the violation or risk of violation of human rights. On the other hand, it is essential to consider that the Directive can be applied only in cases of mass influx and, hence, it does not apply to individual cases, and that it is an exceptional measure that requires a high political threshold to be activated. [379] Furthermore, it is to note that the temporary nature of the protection and the massive nature of the flows only offer a prospect of protection regarding rapid-onset events and do not consider slow-onset processes. The gradual effects of slow-onset events make the resulting displacements in need of a more lasting protection instrument capable of responding to needs in the long term. Consequently, this instrument is not adequate to grant the needed protection. Moreover, it is to highlight that, if such a mechanism is used in environmentally induced movements, temporary protection does not offer the same guarantees as international protection. Directive 2001/55/EC provides minimum standards, obligations, and rights when it comes to granting protection, leaving a wide margin of manoeuvre to the Member States. Therefore, the status granted to the beneficiaries of temporary protection might be susceptible to the will of the Member States. For these reasons, it is questionable whether this instrument might be effective in tackling the issue of environmental migrants.

3.5. Humanitarian grounds for protection within EU asylum law

Due to challenges in utilizing the aforementioned provisions for safeguarding environmental migrants, it is essential to consider additional provisions within EU asylum law. Specifically, those about the admission, residence, and prevention of

[378] J. McAdam, '*Climate Change Displacement and International Law: Complementary Protection Standard*s' *supra* note 59, at 38

[379] DG for Internal Policies Policy Department C Citizens' Rights and Constitutional Affairs Civil Liberties, Justice and Home Affairs, '*"Climate Refugees" - Legal and policy responses to environmentally induced migration' supra* note 331, at 55

expulsion of third-country nationals from the Member States' territory on humanitarian grounds.

Recital 15 of the QD states that "*t]hose third-country nationals or stateless persons who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds fall outside the scope"* and, that humanitarian provisions are discretional, leaving the Member States the chance to deal with different national humanitarian practices. [380]

First, it is important to note that, under Regulation No. 539/2001, [381] individuals whose country of origin is listed in Annex 1 are obligated to obtain a visa before entering the EU territory. Short-stay visas are governed by Regulation No. 810/2009 [382] (hereinafter, Visa Code or VC), while long-stay visas are issued by Member States following their domestic immigration laws. Typically, short-stay visas may be issued by Member State consulates or representations in third countries under specific conditions outlined in the VC and do not permit third-country nationals to enter and stay indefinitely on the Member State's territory.

The Visa Code does not contain specific provisions addressing the entry and stay of environmental migrants. Nevertheless, certain key articles dealing with humanitarian situations [383] could be interpreted to address their need for protection. Article 19(4) VC, for instance, allows for the consideration of a visa application as admissible on humanitarian grounds if it does not meet the prescribed admissibility criteria. Additionally, Article 25(1)(a) VC permits a Member State to issue a visa with limited territorial validity on humanitarian grounds, even if another Member State objects to the third-country national's visa application. Furthermore, a short-stay visa may be extended if the competent authority of a Member State

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[380] G. Morgese, '*Environmental migrants and the EU immigration and asylum law: is there any chance for protection?*' in Migration and the Environment Some reflections on current legal issues and possible ways forward edited by Giovanni Carlo Bruno, Fulvio Maria Palombino ,Valentina Rossi CNR edizioni 2017, at 56

[381] Regulation (EC) No 539/2001, of 15 March 2001, *listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement*, in OJ L 81, 21 March 2001, at 1-7.

[382] EC Regulation 810/2009 of 13 July 2009, *establishing a Community Code on Visas*, OJ L 243 (15 September 2009), at 1-58

[383] *Ibid*, at 57

acknowledges humanitarian reasons preventing the visa holder from leaving before the expiry of the authorized duration of stay.

Beyond these provisions facilitating protected entry, commonly used by Member States on an exceptional basis, it's crucial to recognize that Regulation 2016/399 [384] (hereinafter, the Schengen Borders Code or SBC) aligns with the Visa Code. Article 6(5)(c) of the SBC allows a Member State to permit entry to third-country nationals who do not meet all entry conditions on humanitarian grounds, national interest, or international obligations and, therefore, on a discretionary basis, Member States might be willing to permit environmental migrants a right to entry their territory.

Under the Return Directive, [385] "*Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory"* and therefore, humanitarian reasons might be ground against the removal of illegally staying third-country nationals.

The question arises of whether the humanitarian grounds outlined in existing regulations are sufficient and clear enough to address environmental disasters and enable environmental migrants to enter, remain in, and avoid expulsion from the EU. Regrettably, all these provisions do not provide further clarification on such humanitarian grounds.

In the case of *X and X v. Belgium*, [386] which involved a humanitarian visa, Advocate General Mengozzi held that humanitarian grounds, as mentioned in Article 25(1) VC, should be a concept of EU law and not exclusive to a specific Member State. However, the CJEU asserted the contrary, entailing that visa applications fall solely under national law. Consequently, it would suggest that the precise scope of application of humanitarian grounds, potentially encompassing environmental considerations, falls within the jurisdiction of the Member States and, therefore, decisions on whether to permit third-country nationals to enter, stay, and avoid

[384] EU Regulation 2016/399 of 9 March 2016, *on a Union Code on the rules governing the movement of persons across borders*, in OJ L 77 (23 March 2016), at 1-52.

[385] Council Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 *on common standards and procedures in Member States for returning illegally staying third-country nationals supra* note 349

[386] CJEU, Case C-638/16 PPU, *X and X v. Belgium* (Opinion), ECLI:EU:C:2017:93, paragraphs 44 and 130

removal on humanitarian grounds remain within the purview of competent national authorities.

3.6. Seasonal Workers Directive

Another interesting EU law tool to be analysed is the Seasonal Workers Directive.[387]

Seasonal cross-border migration can be described as "*people who work abroad during a given period, or international circular labour migration, which is organised through international agreements.* [388] Under the Seasonal Workers Directive, a seasonal worker is intended as *a third-country national who retains his or her principal place of residence in a third country and stays legally and temporarily in the territory of a Member State to carry out an activity dependent on the passing of the seasons, under one or more fixed-term work contracts concluded directly between that third-country national and the employer established in that Member State".* [389] Circular migration might be an opportunity for environmental migrants to move between their work country and country of origin, enabling them to maintain a connection with their home and explore new means of livelihood. This approach is particularly advantageous when environmental conditions, such as floods or droughts linked to seasonal changes, make it challenging for the land to sustain livelihoods. This adaptive strategy allows individuals to navigate difficult environmental circumstances effectively. Furthermore, circular migration can contribute to building resilience against future environmental events. [390] Migrants engaging in circular migration may send remittances back to their home country and return with new knowledge and technology, enhancing the community's ability to cope with environmental challenges. Successful implementation of circular migration is more likely when

[387] Directive 2014/36/EU of the European Parliament and of the Council *on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers* L 94/375 (2014)

[388] D. Ionesco, D. Mokhnacheva, F. Gemenne, '*The Atlas of Environmental Migration*' 1st Edition Routledge (2017), at 74

[389] *Ibid*

[390] The Nansen Initiative, *Agenda for the Protection of cross-border displaced persons in the context of disasters and climate change* (2015), at 37

both the country of origin and destination acknowledge the link between environmental degradation and migration, implementing policies to anticipate and manage this form of mobility. [391]

Consequently, the Seasonal Workers Directive can be envisaged as a valuable instrument for individuals residing in areas affected by climate change effects. Its legal basis can be found in points (a) and (b) of Article 79(2) of the TFEU and it leaves the Member States to determine the volume of admission of third-country nationals coming to seek work.

A virtuous example of temporary and circular labour migration through a temporary work permit was implemented in 2001 between Spain and Colombia. [392] Given the significance of agriculture in Catalonia's economy and the reluctance of Spanish citizens to engage in agricultural work, a substantial 74.1% of those employed in the sector are migrants. [393] The primary agricultural union in Catalonia, took the initiative to organize a project aimed at recruiting potential seasonal workers from environmentally disrupted areas in Colombia. Working in collaboration with employers, Spanish authorities selected workers from candidate pools identified by Colombian authorities. One of the criteria for choosing communities of origin was their vulnerability to natural disasters. Due to the program's success, the Temporary and Circular Labour Migration was implemented between Spain and Colombia from 2006 to 2009. The European Commission stated that the program was "*a strong migration and development component and targeted communities affected by recurring environmental disruptions (such as volcanic eruptions, drought and floods"*. [394]

3.7. Other options? Resettlement programmes, humanitarian admission schemes and private sponsorships

[391] C. Weber, *'Climate Refugees and Climate Migration' supra* note 30, at 12

[392] Ministerio de asuntos exteriors, Acuerdo entre España y Colombia relativo a la regulación y ordenación de los flujos migratorios laborales, Official State Bulletin n. 159, 4 July 2001

[393] T. Rinke, '*Temporary and Circular Labor Migration: Experiences, Challenges and Opportunities'* The State of Environmental Migration IDDRI Study 06/2012, at 27

[394] European Commission Staff Working Document '*Climate change, environmental degradation, and migration' supra* note 295, at 28

While the applicability of EU asylum law provisions on environmental migrants seems quite burdensome, it is to note and highlight the possible application of ulterior options such as resettlement programs, humanitarian admission schemes, and private sponsorship that have been discussed at the EU level and that might fill the protection gap for environmental migrants.

Resettlement is defined by the UNHCR as "*the transfer of refugees from the country in which they have sought asylum to another State that has agreed to admit them as refugees and to grant them permanent settlement and the opportunity for eventual citizenship"*. [395]

Based on this, first, the EU issued a Decision [396] setting common priorities and financial support and, in 2014 adopted the AMIF Regulation [397] based on which "*resettlement means the process whereby, on a request from the [UNHCR] based on a person's need for international protection, third-country nationals are transferred from a third country and established in a Member State where they are permitted to reside with"* an international protection status or any other status which offers similar rights and benefits.

Recommendation No. 2015/914 [398] identifies resettlement as the transfer of "*individual displaced persons in clear need of international protection"*, on request of the UNHCR, from a third country to a Member State, in agreement with the latter, to protect against refoulement and granting the right to stay and any other rights like those granted to a beneficiary of international protection.[399] In consideration of the foregoing, it appears that existing resettlement schemes are hardly applicable to the protection needs of individuals displaced by environmental events because they would have to meet the criteria for international protection as

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[395] UNHCR, '*Resettlement Handbook*' Division of International Protection Revisited Edition Geneva (July 2011), at 36

[396] European Parliament and Council Decision No. 281/2012/EU, of 29 March 2012, amending Decision No 573/2007/EC *establishing the European Refugee Fund for the period 2008 to 2013 as part of the General Program "Solidarity and Management of Migration Flows*" OJ L 92 (2012), at 1-3

[397] EU Regulation No. 516/2014, of 16 April 2014, *establishing the Asylum, Migration and Integration Fund*, amending Council Decision 2008/381/EC and repealing Decisions No. 573/2007/EC and No. 575/2007/EC and Decision 2007/435/EC, in OJ L 150 (2014), at 168-194

[398] EU Recommendation 2015/914, of 8 June 2015, on *a European resettlement scheme* OJ L 148 (2015), at 32-37

[399] Council of the European Union, "*Outcome of the Council Meeting"* 3405th Meeting Justice and Home Affairs 11097/15 (2015)

refugees according to the Refugee Convention and beneficiaries of subsidiary protection under the Qualification Directive. This holds even if, at the national level, they do not attain formal refugee or subsidiary protection status but instead hold another status conferring similar rights and benefits under both national and EU law.

An interesting exception might be the Preparatory Action on Emergency Resettlement (hereinafter, PAER) [400] implemented in 2012, which supplemented the former European Refugee Fund. PAER aimed to swiftly assist individuals recognized by the UNHCR as urgently requiring international protection due to natural disasters, armed conflict, or extreme vulnerability. Unlike other schemes, PAER seemed to broaden its scope by encompassing situations involving natural disasters. However, despite this apparent inclusiveness, the PAER financial tool has thus far only facilitated the initial resettlement wave from Syria in 2012 and has not been extended to cover individuals displaced by environmental events.

On the other hand, humanitarian admission schemes (hereinafter, HAS) are cases in which "*a Member State admits a number of third-country nationals to stay on its territory for a temporary period of time in order to protect them from urgent humanitarian crises due to events such as political developments or conflicts"* [401] and can be both implemented at the national or EU level. [402] These programs seem more fitting for the environmental migration cause due to their broader scope of application that covers any third-country national-facing urgent humanitarian crisis. Nevertheless, they are implemented voluntarily and thus Member States are not compelled by them.

Lastly, it should be considered that the 2015 European Agenda on Migration called for Member States to fully make use of any available legal avenues for individuals in need of protection, including private or non-governmental sponsorships. In the

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[400] European Commission, Decision No. C(2012) 7046, of 10 October 2012, *concerning the adoption of the Work Programme serving as financing decision for 2012 for the Preparatory Action - Enable the resettlement of refugees during emergency situations to be financed under budget line* (2017)

[401] EU Regulation No. 516/2014, of 16 April 2014, *establishing the Asylum, Migration and Integration Fund*, amending Council Decision 2008/381/EC and repealing Decisions No. 573/2007/EC and No. 575/2007/EC and Decision 2007/435/EC OJ L 150 (2014), Article 2 (b)

[402] An example of HAS implemented by the EU is Recommendation C(2015) 9490, of 15 December 2015, for a voluntary humanitarian admission scheme with Turkey.

subsequent April 2016 Communication, [403] the Commission outlines steps to ensure and enhance safe and legal migration routes and, among those, it encourages Member States to resort to resettlement programs, humanitarian admission schemes and private sponsorship which could manifest in various forms, ranging from scholarships for students and academics to support for the integration of sponsored family members. It is interesting to consider how private sponsorship might be a viable alternative for admitting national environmental migrants into the territories of Member States because the costs are held by private groups or organizations. Some [404] argue that this approach not only contributes to raising public awareness and garnering support for the admitted individuals but also fosters a more welcoming environment as local communities are typically involved. Importantly, private sponsorship is likely to navigate legal and political obstacles posed by resettlement and humanitarian assistance schemes providing a realistic means of protection for environmental migrants.

3.8. The EU's environmental and climate policies: tackling the root causes of environmental migration

Environmental migration is primarily caused by the negative impacts of climate change, manifested through natural disasters and environmental deterioration. In certain situations, migration is not a voluntary choice; rather, it becomes a necessity when the living conditions in the home country become untenable for affected communities. In addition to formulating effective migration policies, as discussed in previous sections, a potential solution involves tackling the underlying and intrinsic causes of natural disasters and environmental hazards, such as global warming, while simultaneously strengthening the ability of affected populations to adapt to the adverse effects of climate change.

Efforts by the EU to combat climate change and provide financial assistance for adaptation measures in vulnerable countries yield positive outcomes in terms of

[403] Communication from the Commission to the European Parliament and the Council, '*Towards a Reform of the Common European Asylum System and enhancing legal avenues to Europe' supra* note 310

[404] G. Morgese, '*Environmental migrants and the EU immigration and asylum law: is there any chance for protection?*' *supra* note 380, at 69

mitigating environmental migration. These actions have the potential to, to some extent in the future, prevent the need for migration. The EU is actively engaged on both fronts, demonstrating a comprehensive approach to addressing the complex issue of environmental migration.

The EU has actively assumed a leadership role in addressing climate change from the early stages of international collaboration on this issue. [405] Simultaneously, over the years, it has set an example by establishing ambitious targets and policies for reducing greenhouse gas emissions, promoting renewable energy, and enhancing energy efficiency across its Member States spanning all sectors of the EU's economy and aligning with the international environmental agreements to which the EU is bound to. In addition to its domestic efforts, the EU and its Member States play a substantial role in supporting projects and programs designed to assist developing countries, which are most vulnerable to climate change impacts, by providing financial resources.

Before delving into EU climate policies and support for affected countries, it is pertinent to examine the legal foundations and competencies that underpin the EU action in the environmental sector.

3.9. EU environmental policy

At the beginning of the EU's history, the European Economic Community (hereinafter, EEC) had no mandate to address environmental protection. Only in the 1970s, the pressing need for environmental protection started to be acknowledged and the roots of EU environmental law were intertwined with the promotion of human well-being and economic considerations. [406]

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[405] Kulovesi K., '*Climate Change in EU External Relations: Please Follow my Example (or I Might Force You To)*' in Morgera E. (ed.), *The External Environmental Policy of the European Union: EU and International Law Perspectives*, Cambridge University Press (2012), at 115-123

[406] Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 *on the programme of action of the European Communities on the environment* OJ C 112, 20.12.1973, at 1–53

From the mid-1980s, the CJEU [407] started to affirm that environmental protection had become one of the essential objectives of the Community and, nowadays, the Lisbon Treaty highlights climate change as a global environmental issue requiring the EU's significant role and impact at the international level. [408] It explicitly links sustainable development to EU external relations, emphasizing the Union's contribution to fostering sustainable development.[409]

The Lisbon Treaty defines the objectives of EU environmental policy as "*preserving, protecting, and improving the quality of the environment; protecting human health; ensuring the prudent and rational utilization of natural resources; and promoting measures at the international level to deal with regional or worldwide environmental problems, and in particular combating climate change"* [410] and categorises environmental policy as an area of shared policy between the EU and the Member States.[411]

3.9.1. The EU fight against climate change and its climate goals

The Lisbon Treaty has explicitly imposed the fight against climate change as a priority in the EU environmental policy. [412] EU climate policy is composed of measures aimed at deterring climate change, especially by reducing greenhouse gas (hereinafter, GHG) emissions and diminishing the negative effects of global warming through adaptation strategies. Under Article 194 TFEU, the EU is committed to fostering energy efficiency, conservation, and the advancement of renewable energy. Additionally, Article 191(1) TFEU marks the acknowledgement of the EU's priority in its international battle against climate change.

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[407] CJEU, C-240/83 *Procureur de la République v Association de défense des brûleurs d'huiles usagées* (ADBHU) European Court Reports 1985 -00531

[408] M. Lee, '*The Environmental Implications of the Lisbon Treaty'* 10 Environmental Law Review 131 (2008)

[409] TEU Article 3 reads as follows: *"The Union [...] shall work for the sustainable development of Europe" but also that "...the Union shall [...] contribute to [...] the sustainable development of the Earth*" and Article 37 of the EU Charter affirms that *' a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.'*

[410] TFEU, Article 191paragraph 1

[411] TFEU, Article 4 states that *"Shared competence between the Union and the Member States applies in the following principal areas: (e) environment"*

[412] TFEU, Article 191 paragraph 1, fourth indent

The current legal foundation for climate action within the European Union is the 2030 Climate and Energy Framework. [413] This framework aims at reducing GHG emissions and securing energy supply for the period 2021-2030. [414] Despite its recent completion, a new phase of significant reform has already commenced, building upon the transformative vision outlined in the 2019 European Green Deal. The European Green Deal and its European Climate Law[415] envisions achieving climate neutrality by 2050 and reducing GHG emissions by at least 55% from 1990 levels by 2030. Another important target set out by the 2030 framework concerns the achievement of a fully functioning and connected internal energy market. [416] To meet the targets set by the European Climate Law, the Commission introduced the *Fit for 55 Package* [417] in 2021, consisting of 12 legislative proposals to revise EU climate and energy laws. Additionally, due to geopolitical events, such as the conflict in Ukraine, the EU has proposed ulterior reforms to expedite the energy and green transition and independence under the RePower EU. [418]

3.9.2. EU Emission Trading System (EU ETS)

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[413] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *Stepping up Europe's 2030 climate ambition Investing in a climate-neutral future for the benefit of our people* COM/2020/562 final

[414] EU Commission, '*European Energy Security Strategy*' COM(2014) 330 final, pillar 3 '*Moderating energy demand*' and pillar 5 '*Increasing energy production in the European Union'*

[415] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 *establishing the framework for achieving climate neutrality and amending Regulations* (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') PE/27/2021/REV/1 OJ L 243 (2021)

[416] In order to achieve a fully integrated EU energy market, the *Clean Energy for All Europeans* Package contains four pieces of legislation adopting EU market rules to the new market realities that are characterized by RES: the EU Directive *on common rules for the internal market for electricity* 2019/944 which replaces Electricity Directive (2009/72/EC), the new EU Regulation *on the internal market for electricity* 2019/943 which replaces the Electricity Regulation (EC/714/2009), the EU Regulation on risk preparedness in the electricity sector 2019/1941 and EU Regulation 2019/942 *establishing an EU Agency for the cooperation of energy regulators*, recasting the Regulation 713/2009

[417] European Parliament, '*Fit for 55 Package: Renewable Energy Directive'* EPRS PE 733.628 (2022) available at https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/733628/EPRS_ATA(2022)733628_EN.pdf accessed 22 December 2023

[418] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions *REPowerEU: Joint European Action for more affordable, secure and sustainable energy* COM/2022/108 (2022) final

The cornerstone of the European Union's policy to combat climate change and reduce greenhouse gases for the period 2021–30 is the EU Emission Trading System (hereinafter, EU ETS). [419] The latter consists of three pillars: the ETS Directive applicable to all sectors subject to emissions trading; the LULUCF Regulation concerning land use, land use change and forestry sectors; and the Effort Sharing Regulation (hereinafter, ESR) for all other sectors subject to neither the LULUCF Regulation nor the ETS Directive. The ETS operates through a cap-and-trade mechanism, wherein the predetermined total GHG emission allowances (the so-called 'cap') dictate the permissible emissions. Sectors covered by the ETS Directive are prohibited from exceeding their allocated CO2 equivalent. Companies within this system can trade the right to emit one tonne of GHGs, allowing for the free exchange of emission allowances among regulated entities. The ETS underwent an update [420] for the fourth trading period (2021–2030) to enhance the cost-effectiveness of emission reduction measures and encourage investments in carbon-efficient technologies. While the fundamental operation of the system remains mostly unchanged, the annual reduction of the emissions cap is set at 2.2%, intensifying the pressure to cut emissions. The ETS Directive has proven to be a useful tool for reducing greenhouse gas emissions: in 2018, emissions from installations covered by the EU ETS were 4.1% lower compared to 2017. [421]
The LULUFUC Regulation [422] implements a detailed legal basis for forest preservation and plant stocks serving as CO2 sinks. Its focus point is the no-debit rule: the total amount of GHG emissions from land use, land-use change and

[419] The European Parliament and The Council, Directive 2018/410/EC amending Directive 2003/87/EC *to enhance cost-effective emission reductions and low-carbon investments* OJ L 76, 19.3.2018 (2018)
[420] EU Directive 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC *to enhance cost-effective emissions reductions and low-carbon investments* and EU Decisions 2015/1814 OJ L 76 (2018)
[421] European Commission, Report from the Commission to the European Parliament and the Council: *report on the functioning of the European carbon market*, COM/2020/740 final (2020), at 27, 40 and 41
[422] Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 *on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework*, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU PE/68/2017/REV/1 OJ L 156, 19.6.2018

forestry sub-sectors must not exceed the total amount of removals by soil, plants and trees in both periods 2021–5 and 2026–30. [423]

For the remaining sectors not covered by the ETS, such as waste, transport, agriculture, and housing, the Effort Sharing Regulation [424] establishes binding targets for reducing GHG emissions from 2021 to 2030. The latter aims to achieve a 30% reduction in EU-wide emissions below 2005 levels in the covered sectors by 2030. [425] Member States are required to implement measures to meet these reduction targets at the national level, considering their economic capacity [426] and a progressive linear reduction factor imposes Member States to intensify their efforts to reach the emission targets.

3.9.3. The EU Green Deal

The European Green Deal is a "*strategy that aims to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use".* [427] The overarching objective of the EU Green Deal is for the EU to become the first climate-neutral continent by 2050 and it is composed of packages of different initiatives through a cross-sectoral approach in which all relevant policies contribute to the ultimate climate-related goal. To achieve the climate objectives, a swift phase-out of coal is needed to further decarbonization of the energy system. The Commission acknowledges the decreasing cost of renewables through the enforcement of legislation on the energy performance of buildings and proposes aligning transport prices with environmental and health impacts, promoting sustainable alternative transport fuels and improving public transport.

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[423] *Ibid*, point 4

[424] Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 *on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation* (EU) No 525/2013 PE/3/2018/REV/2 OJ L 156 (2018)

[425] *Ibid*, point 1

[426] *Ibid*, point 4

[427] European Commission *The European Green Deal supra* note 4

Crucially, the transition to a more sustainable and climate-neutral economy under the EU Green Deal includes the *Just Transition Mechanism*. This mechanism aims to provide targeted support to regions and sectors facing the greatest challenges in transitioning to a green economy.

For what concerns environmental migration, the Commission Communication on the European Green Deal [428] commits the EU to "*work with all partners to increase climate and environmental resilience to prevent these challenges from becoming sources of conflict, food insecurity, population displacement and forced migration, and support a just transition globally"*. If, on the one hand, the European Green Deal contours the European policy on ecological transition, it does not put in place any concrete actions regarding migration due to environmental disruptions. [429]

3.9.4. EU environmental policy: is there space for migration?

The EU actions implemented to combat climate change are part of the solution for what concerns environmental migration as they can, to some extent in the future, prevent the migration from taking place. Striving for a low-carbon economy is a means by which the EU aims to diminish its climate impact and, ultimately, to ensure that the global temperature increase remains significantly below 2°C compared to pre-industrial levels. The initiatives undertaken by the EU, spanning across different sectors of the economy, along with other nations actively engaged in combating climate change, will play a role in shaping the long-term environmental consequences of global warming.

Nevertheless, although particularly keen on carrying out specific policies for the fight against climate change, it does not specifically touch upon displacement caused by environmental and climate change. On the other hand, it appears that the EU is trying to address the issue's root causes by acting against climate change and providing financial support to developing nations that have been adversely affected

[428] *Ibid*

[429] C. Cournil, '*Les « déplacés climatiques », les oubliés de la solidarité internationale et européenne. De la gouvernance au contentieux'* Revue des droits de l'homme - N°22 (2022), paragraph 20

by natural disasters and environmental degradation. [430] The EU adaptation strategies to climate change in vulnerable countries are trying to prevent or minimize the vulnerability of those regions and are giving the population the option to remain in their countries. The next sections will outline the strategies implanted by the EU when it comes to addressing environmental migration in the EU's external environmental policies.

3.10. Addressing environmental migration in the EU's external dimension

As explained in the previous section, in response to the escalating significance of the topic, part of the overall EU policy framework has advocated for a bigger focus on displacement and migration caused by disasters, climate change, and environmental deterioration.

On top of that, the EU is at the forefront of the implementation of effective action to mitigate climate change in its external dimension on climate mobility, development cooperation and humanitarian aid. It is possible to depict three different policy regimes framed to prevent or minimize the vulnerability of vulnerable countries: addressing the root causes of migration in its development policies, carrying out short-term and long-term humanitarian assistance following displacement, and a security narrative that presents migration as a threat. [431]

Within its development policy, the EU has actively pursued collaborative partnerships with non-EU nations, directed towards mitigating the foundational factors driving migration and curtailing instances of irregular migration. This strategic approach has, at times, entailed a reallocation of priorities, potentially at the expense of conventional development objectives. [432]

Security considerations have also framed EU policies, especially alongside efforts to address the root causes of migration. This perspective frames climate-induced migration as a security threat, envisioning a significant population at risk of

[430] European Parliament, '*The future of climate migration'* PE 729.334 – March 2022, at 2
[431] *Ibid*
[432] R. Soto, G. Ariel, C. Le Coz, "*Re-shaping the root cause approach: Disentangling official development assistance and migration management"* Mixed Migration Centre (2022)

crossing borders due to climate change. Consequently, risk reduction takes precedence within this security-oriented framework. [433]

For what concerns humanitarian policy, the EU mostly focuses on disaster risk reduction, including reducing the risk of displacement of populations in disaster-prone areas. This approach to humanitarian assistance might contrast with responses required for long-term migration patterns, which are often linked to climate change. Implementing a focus on humanitarian aid may potentially side line the exploration of the intricate and underlying causes of displacement, whether arising from conflict or climate change. This trade-off entails the risk of prioritizing short-term solutions over comprehensive efforts towards long-term mitigation, adaptation, and development. [434] Emphasizing assistance to affected populations without a more inclusive strategy addressing the broader risk of climate-induced displacement highlights the challenge of formulating an approach capable of effectively addressing the multifaceted nature of climate-related mobility.

Furthermore, because climate mobility is a nascent funding priority for the EU, the latter, in collaboration with its Member States, plays a significant role as a major contributor to public climate finance for developing nations, especially those highly susceptible to the negative impacts of climate change. EU funding is currently split between its international climate finance commitments, research funding, and humanitarian, development, and climate funding under the Multiannual Financial Framework 2021-27, where most sources are concentrated.[435] Activities vary from funding research and supporting national governments in implementing relevant strategies or action plans, notably for disaster risk reduction and climate adaptation, to supporting the Platform for Disaster Displacement and the UN Secretary

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[433] J. Blocher, '*Climate Change and Environment related Migration in the European Union Policy: An Organizational Shift towards Adaptation and Development'* in Kerstin Rosenau-Williams, Francois Gemenne Organizational Perspectives on Environmental Migration Abingdon Routledge Chapter 3 (2016), at 44-46

[434] H. Hahn, M. Fessler, '*The EU's approach to climate mobility: Which way forward?*' Discussion Paper European Migration and Diversity Programme Sustainable Prosperity for Europe Programme (2023), at 15

[435] International climate finance refers to local, national, and global financing drawn from public and private sources to support climate change mitigation and adaptation. One component is the $100 billion financing goal by 2025 as well as several funds under the UNFCC Mechanism, such as the Green Climate Fund, the Adaptation Fund, and the new Loss and Damage Fund.

General's Action Agenda on Internal Displacement, among others. [436] On this line of reasoning, one of the Commission's goals is to further mainstream migration and displacement considerations into climate action. [437] A notable commitment was made during the COP24 in Katowice in December 2018, where the EU, its Member States, and other UNFCCC Parties pledged to mobilize $100 billion annually by 2020 and to support the implementation of long-term climate strategies in developing countries.

3.10.1. Climate change and adaptation measures

Over the past years, at the EU level, migration has been considered as a form of adaptation to climate change, where people affected reduce their vulnerabilities through migrating. In this sense, migration might be viewed as a strategy for diversifying or generating household income, and to acquire both financial and social resources that enhance climate resilience while reducing vulnerability to disasters. This notion has been thoroughly acknowledged by the Commission and therefore included in some policy areas. [438] An interesting example of a financial support instrument aiming at increasing the capacity to adapt to the effects of climate change established by the EU is the Global Climate Change Alliance Plus Initiative (hereinafter, GCCA+). [439] Launched in 2007, it was established to provide technical and financial support for adaptation and mitigation measures. [440] The initiative delineates five priority areas. Firstly, it focuses on adaptation to climate change, aiming to enhance the knowledge base of developing countries regarding the impacts of climate change and facilitate the development and implementation of effective adaptation strategies. Secondly, the GCCA+ addresses the reduction of CO2 emissions from deforestation in developing countries by creating incentives

[436] European Commission, '*COP27: Team Europe steps up support for climate change adaptation and resilience in Africa under Global Gateway'* Press release (16 November 2022)
[437] *Ibid*, at 25
[438] Joint Communication to the European Parliament and the Council, '*A Strategic Approach to Resilience in the EU's external action'* JOIN(2017)21 final
[439] EU, *Global Climate Change Alliance Plus Initiative – GCCA*, available at https://capacity4dev.europa.eu/groups/gcca-community_en accessed 12 December 2023
[440] European Commission, Communication from the Commission to the Council and the European Parliament*: building a global climate change alliance between the European Union and poor developing countries most vulnerable to climate change,* COM/2007/0540 final (2007)

for forest protection. Thirdly, it seeks to enhance participation in the Clean Development Mechanism (hereinafter, CDM), allowing developing countries to benefit from the global carbon market. The CDM enables companies and countries obligated to reduce emissions to invest in emission-reduction projects in developing nations. Fourthly, the GCCA+ promotes disaster risk reduction by improving climate monitoring and translating collected data into preparedness measures.

On this line of reasoning, the Joint Communication *A Strategic Approach to Resilience in the EU's External Action* [441] underlines that the EU's resilience approach "*will place a greater emphasis on addressing protracted crises, the risks of violent conflict and other structural pressures including environmental degradation, climate change, migration and forced displacement"*. Importantly, a dedicated section on resilience, migration and forced displacement acknowledges that "*migration and flight can be a legitimate adaptation strategy to severe external stresses"*. The Strategy suggests that "*the EU should work to further develop the following key dimensions of a resilience approach to migration and forced displacement by addressing root causes including climate change and environmental degradation, and the long-term consequences of forced displacement; fostering self-reliance, supporting host communities […] and understanding the drivers and the interlinkages between pressures"*, consequently providing the mandate for further work on this topic. The 2021 EU Strategy on Adaptation to Climate Change *Forging a climate-resilient Europe* [442] proposes increasing support for international climate resilience and preparedness, scaling up international finance to build climate resilience, and strengthening global engagement and exchanges on adaptation. It considers that "*adaptation strategies, programmes and projects should be designed in a conflict-sensitive way to avoid aggravating tensions. This is important to reduce the risks of climate-related displacement and better understand and manage the interconnections between climate change, security, and mobility"*. Moreover, the updated EU Strategy on

[441] Joint Communication to the European Parliament and the Council, '*A Strategic Approach to Resilience in the EU's external action' supra* note 438

[442] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *'Forging a climate-resilient Europe - the new EU Strategy on Adaptation to Climate Change' supra* note 26

Adaptation to Climate Change views adaptation strategies to "*mitigate the risks of climate-induced displacement"* as aligning somewhat with the notion of migration being considered a last resort. [443]

The emphasis remains on short-term responses, diverting attention from pursuing diversified adaptation initiatives. The 2022 *Commission Staff Working Document on Climate Change, Environmental Degradation, and Migration* [444] outlines measures to enhance the resilience and adaptation of communities affected by climate change, including planned relocation. However, the primary focus remains on disaster risk reduction as the predominant approach to minimize vulnerabilities, rather than actively promoting various policies to support migration as a form of adaptation.

3.10.2. Development partnerships and humanitarian aid

The EU Humanitarian Aid Regulation [445] describes natural disasters as situations requiring humanitarian action. Based on this Regulation, the Commission allocates the EU humanitarian budget and funds for humanitarian initiatives through an annual *Worldwide Decision*. Within this framework, the Commission formulates and publishes *Humanitarian Implementation Plans* (hereinafter, HIPs) which offer detailed insights into operational priorities. The HIPs, organized in geographical areas or global thematic priorities, specify the region of implementation, the humanitarian crisis, the objectives, the available funds, and potential partners for EU humanitarian assistance. Most of the annual budget of the humanitarian aid managed by the Commission addresses situations affected by forced displacement, arising from both conflicts and natural disasters.

Moreover, the European Consensus on Humanitarian Aid emphasises the need for risk reduction and vulnerability through enhanced preparedness in essential zones

[443] *Ibid*

[444] European Commission Staff Working Document, '*Addressing displacement and migration related to disasters, climate change and environmental degradation' supra* note 312

[445] Council Regulation (EC) No 1257/96 of 20 June 1996 *concerning humanitarian aid* OJ L 163 (1996)

vulnerable to natural disasters and climate change to avoid humanitarian crises and large numbers of displaced people.

In the 2017 European Consensus on Development *Our World, Our Dignity, Our Future*, [446] by committing to address the root causes of migration and forced displacement, it was stated how "*environmental degradation, climate change, extreme weather, and natural or man-made disasters can offset development gains and economic progress, especially for the poor. This can increase vulnerabilities and needs, jeopardise peace and stability and cause large-scale migration. In addition to dedicated actions, environmental considerations need to be integrated across all sectors of development cooperation, including through preventive action"*. [447]

In the 2021 *Communication on the EU's humanitarian action: new challenges, same principles*, [448]

climate and disasters are acknowledged as root causes of displacement and therefore "*mainstreaming climate change impacts and environmental factors into humanitarian aid policy and practice and strengthening coordination with development, security, and climate/environment actors to build resilience of vulnerable communities"* is needed. The Communication calls for an "*anticipatory approach to bolster the resilience of the forcibly displaced in regions vulnerable to climate-related and other hazards"* and build on "*more partnerships with climate and scientific communities to scale up action"*. Among the approaches envisaged, an increase in climate funds to enhance resilience and adaptation in the most disaster-prone countries and regions, and as part of the humanitarian development-peace nexus approach are proposed. The 2021 Disaster Preparedness Guidance Note [449] also includes recommendations on how to strengthen preparedness for displacement, including in the context of disasters, and calls to advocate for policy

[446] Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission, '*The new European consensus on development 'Our World, Our Dignity, Our Future'* 2017/C210/01 OJ C 210 (2017)

[447] *Ibid,* paragraph 43

[448] Communication from the Commission to the European Parliament and the Council *on the EU's humanitarian action: new challenges, same principles* COM(2021)110 final

[449] DG ECHO's Disaster Preparedness Guidance Note (2021) available at https://ec.europa.eu/echo/what/humanitarian-aid/disaster-preparedness_en accessed 22 December 2023

and legislative frameworks on disaster preparedness that also integrate displacement concerns among other risks.

3.10.3. External financing instruments

The European Union has established financial instruments for its external endeavours, enabling it to assist third countries in dealing with various priorities, including migration and displacement resulting from disasters, climate change, and environmental degradation. Now, under the Multiannual Financial Framework 2021-2027, the Neighbourhood, Development and International Cooperation Instrument – Global Europe (hereinafter, NDICI-GE) [450] is the main relevant instrument with an amount invested by the EU of 79,462 billion euros. Climate-related displacement and migration are at the intersection of two key EU priorities of the NDICI-GE: fighting climate change and addressing migration and forced displacement challenges. Indicatively, 10% of the fund should be used in actions supporting the management and governance of migration and forced displacement, particularly those actions directly targeting the root causes of migration.

Another external financing instrument implemented by the EU is the Instrument for Pre-Accession Assistance (hereinafter, IPA). This is the mechanism through which the EU, over the years, has provided the enlargement region and future Member candidates with financial and technical assistance for reforms. In the new multiannual financial framework for the period 2021-2027, the budgetary allocation for IPA III amounts to 14.162 billion euros and a part of these funds is dedicated to climate-related displacement and migration. Specifically, one of the thematic priorities outlined in Annex II of the IPA III regulation involves strengthening capacities to confront migration challenges at both regional and international levels.

[450] EU Regulation n°2021/947 of the European Parliament and of the Council of 9 June 2021 *establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe* amending and repealing Decision No 466/2014/EU of the European Parliament and of the Council and repealing Regulation (EU) 2017/1601 of the European Parliament and of the Council and Council Regulation (EC, Euratom) No 480/2009 PE/41/2021/INIT OJ L 209 (2021)

3.11. The EU preemptive measures addressing the root causes of climate change and environmental migration

The EU lacks a specific legal framework for addressing environmental migrants, and most Member States show little interest in legislating on this issue. Although particularly keen on carrying out specific policies for the fight against climate change within the internal and external policy instruments, it does not specifically touch upon displacement caused by environmental and climate change. Conversely, it looks like the EU is taking and implementing an alternative approach to tackle the issue of environmental migration. In its extensive environmental policy, by implementing provisions to combat climate change and reduce its negative effects and by providing financial support to developing nations that have been adversely affected by natural disasters and environmental degradation, it addresses the root causes of such migration – global warming and the lack of adaptive strategies. On the one hand, the measures aimed at fighting climate change will have a stake in its capacity to impact drivers of migration and exacerbate existing vulnerabilities, on the other, efforts to enhance adaptation strategies in countries susceptible to natural disasters and environmental deterioration can decrease the susceptibility of regions to environmental threats.

All in all, these measures might have long-term positive outcomes on the foundational reason why some people decide or are forced to migrate.

The crux of the issue is that, despite the rising interest at the EU level and the acknowledgement of the complex relationship between climate change mobilities and related challenges in modelling and projecting future scenarios, the EU's policy on environmental migration is the result of actions on migration, climate, development cooperation, and humanitarian aid. Each of these areas of interest considers the issue from a different perspective and therefore develops policy separately, often based on narratives that are both inconsistent with each other and counterproductive to successful policy outcomes. On top of that, these policies are often driven by conflicting policy objectives, reducing the coherence and credibility of their approach, and are only indirectly contributing to addressing the issue of environmental migrants.

The effectiveness of the EU's actions on environmental mobility will, therefore, depend on its capability to understand the complexity of the issue and, consequently, the willingness to grapple with the implications of it and its needed coherent and coordinated mechanism to tackle the issue.

As envisaged by the doctrine, [451] the EU must comprehensively carry out scientific evidence into policy and programming reflecting the various mobility patterns linked to rapid and slow-onset climate change. Moreover, the EU needs to map out the multilateral policy developments relating to climate and migration and double down on the EU's actions on environmental mobility in a coherent and coordinated way. Nevertheless, despite these root-causes policies, it is to acknowledge all the situations in which environmental degradation and natural disasters have extensively or irreversibly harmed the land and, therefore, neither combating climate change nor adapting strategies can adequately support the affected population. Consequently, it remains crucial to establish legal instruments capable of aiding migrants in escaping environmental disruptions.

3.12. Concluding remarks on the inadequacy of the framework offered at the international and European level

The analysis conducted in this chapter has highlighted the inadequacy of European instruments for the protection of climate change-induced displacement. It was seen that although some instruments address similar needs, these do not seem suitable for addressing the environmental migration phenomenon, although they may provide a starting point for the identification of ad hoc responses.

Environment-related forms of migration have been a topic of discussion at the EU level and all the major EU institutions have considered this issue and are actors shaping the policy process. Nevertheless, no coherent EU policy or normative framework directly addressing environment-related forms of migration and displacement exists.

[451] H. Hahn, M. Fessler, '*The EU's approach to climate mobility: Which way forward?*' *supra* note 434, at 28-30

In its external policy dimension, the EU regards climate change, and disasters as potential root causes for migration, but hardly offers any concrete actions. In the internal dimension, multiple institutions and actors have emphasised the link between climate change, environmental disasters and migration and the need for addressing the identified legal gaps at the EU level. With hardly any cases based on environmental change and disaster-related reasons for migration, European and national courts have not yet had to decide upon a claim by a migration directly caused by climate change or natural disasters.

The analysis of the EU legal framework explains how the multiple European human rights legal provisions do not, per se, refer to and protect environmental migrants. As a fact, the current structure of the CEAS does not include any form of protection for those displaced by climate change or any environmental factors. The analysis of the three forms of protection in the CEAS led to the conclusion that, formulated as they are, they do not yet provide possible linkage with existing legal categories. Refugee status under Directive 2011/95/EU reflects the 1951 Geneva Convention, and the specifications concerning the concept of persecution cannot exceed the limit of five grounds in Article 1A(2). Temporary protection cannot be deemed as a decisive resolving instrument: the doubts on terminology interpretation and, therefore, its scope of application when it comes to environmental factors are important instances to consider when discussing the possible use of the instrument. For what concerns subsidiary protection, it has been seen that among the hypotheses of serious damage in Article 15 of Directive 2011/95/EU, there is no reference to environmental or climatic factors, and even the attempt at a broad interpretation does not prove sufficient for offering protection. In particular, the reference to inhuman or degrading treatment can provide a useful tool only if connected to an extensive interpretation widening its meaning to include the risk of human rights violations caused by the effects of climate change or environmental degradation. Nevertheless, among the forms of protection analysed, the latter lends itself best to the possibility that the European context contemplates a form of protection for environmentally displaced persons as it is a form of complementary protection whose scope of application could be extended to relevant protection needs, most

notably those concerning displacement caused by environmental and climatic factors.

Conversely, the EU is particularly keen on implementing policies to tackle the overall issue of climate change through its internal and external policy instruments and its finance projects in vulnerable countries. Moreover, from an environmental perspective, both the EU and the Member States are part of international environmental agreements and have committed to taking far-reaching measures to fight climate change and financially support the enhancement of adaptive measures in developing countries. All in all, the EU's actions to protect environmental migrants in the environmental field are, now, more effective than the ones taken from a migratory point of view.

It can therefore be concluded that the relevant European instruments for possible protection concerning climate change-induced migration are inadequate, given the impossibility of their general application. As a result, protecting migrants from such environmental causes is mostly left to national jurisdiction, which implies that such protection may vary significantly within the EU.

For the sake of completeness of analysis, the next chapter will aim precisely at verifying the relevance of the solutions adopted at the national level and, therefore, of the good practices of Member States - to fill the gap present at the international and European levels and understand whether any type of protection is granted in national legislations. In particular, the chapter will focus on the solution offered by the Italian legal system, investigating the possibility of current protection and prospects for protection, considering plausible interpretative developments. Furthermore, the analysis will not fail to compare the Italian legal framework with other national solutions, to have a comprehensive view of the existing instruments.

CHAPTER IV: NATIONAL RESPONSES ADOPTED BY EU MEMBER STATES APPLICABLE TO ENVIRONMENTAL MIGRANTS: A COMPARATIVE APPRAISAL

4.1. Different levels of protection among Member States

As previously explained, the protection of migrants fleeing because of environmental factors is not provided at the international or European level per se. The above chapters have demonstrated how protection causes might be implicitly found in the extensive joint reading of EU provisions stemming from the environmental, asylum and human rights legal frameworks and of the CJEU's human rights-based interpretation but that, nevertheless, there is no explicit norm directly granting protection to those displaced due to environmental circumstances. The European legislation itself requires Member States to harmonise their national legislation and practices in line with the CEAS but, because the protection statuses do not cover all the possible instances, the EU has left the possibility for Member States to introduce complementary types of protection that find legitimacy for *compassionate, humanitarian, or other reasons,* [452] and that are rooted in their international obligations or are based on discretionary grounds adopted by national legislation. Complementary protection is provided by the EU Return Directive and allows Member States to adopt statuses on non-harmonised grounds provided they do not undermine and are compatible with, the EU acquis. [453] Consequently, by leaving Member States the competence to provide further complementary protection, the safeguard of this category of migrants is left to the willingness of Member States. It is to highlight that the need to complete the CEAS is widely shared among Member States but that, in the absence of harmonised provisions, the extent of protection provided can be arguably diverse. The reasons under which complementary protection is granted may concern, for instance, the protection of minors, general humanitarian reasons, cases of refoulement prohibition, climatic events, relocation programmes or exceptional circumstances; in most cases,

[452] Council Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 *on common standards and procedures in Member States for returning illegally staying third-country nationals supra* note 349, Article 6(4)
[453] *Qualification Directive supra* note 313, Article 3

complementary protection is based on general humanitarian reasons, with a significant margin of discretion for the deciding body. [454]

This chapter aims to shift the focus of the discussion by examining the relevant national legal frameworks and identifying which complementary protection statuses available in some Member States might set a best practice for protection in cases of environmentally induced displacements. To this end, national practices concerning non-harmonised protection that do not fall under the international protection scheme as envisaged in EU law were studied. Indeed, although in many EU Member States, there are complementary protection mechanisms, only a few of them have protection grounds that encompass climate-related migration. Among these states, Italy, France, Germany, Austria, Cyprus and Sweden were the only ones found to provide relevant national complementary protection, either through directly addressed provisions or through an extensive interpretation based on their national constitutional norms, such as, for the Italian case, Articles 2, 10 and 117 of the Constitution or on the pertinent European obligations, including Articles 2, 3 and 8 ECHR. On this account, the aforementioned national legal frameworks will be explained. This study will highlight possible protection avenues in which environmental threats are considered valid grounds and that could be mutuated into the EU legal framework as part of the EU's common efforts on climate change and migration management.

4.2. Preliminary remarks on the Italian case

Italy is a Mediterranean country with a population of around 60 million people. Until the 1970s, Italy was a large-scale emigration country that saw more people leaving the country rather than entering it. This scenario changed during the mid-1980s when the trend started to reverse. [455] Being a bridge between Europe and Africa and stretching into the Central Mediterranean Sea, its peculiar geographical

[454] European Migration Network, '*Comparative overview of national protection statuses in the UE and Norway*' available at https://home-affairs. ec.europa.eu/system/files/2021-02/emn_synthesis_report_nat_prot_statuses_final_en.pdf) accessed 07 February 2024

[455] European Commission, European Website on integration, '*Governance of migrant integration in Italy'* available at https://ec.europa.eu/migrant-integration/country-governance/governance-migrant-integration-italy_en accessed 08 January 2024

position has made it an attractive region for migration flows from Africa and Asia. [456] Italian migration politics and policies have always been characterised by a logic of exceptionality and emergency. The policymaking in this context has resulted from a 'wait-and-see' approach implemented through ad hoc interventions adopted whenever a crisis emerged, or a massive number of asylum-seekers arrived. The refugee crisis that the EU faced in the mid-2010s highly affected Italy. The number of rejections of asylum applications increased if compared to previous years, because of the complex interplay of many applications putting a strain on the national asylum system, the EU enforcement of restrictive asylum policy and the increasingly negative attitude to migration of Italian public opinion. [457]

If the 2020 COVID-19 pandemic made the flux of migrants decrease, recent reports on the migration flux to Italy indicate a growth in the migrant presence and the number of residence permits issued to third-country nationals. [458] The increase is not only due to the end of COVID-19 mobility restrictions but also to legislative reforms: first, there is an increase in positive recognition rates of asylum applications, because of 'new' complementary protection introduced in 2020; second, three-quarters of the work-related permits to stay are the result of the regularisation policy implemented in 2020. Nevertheless, migrants are still more exposed than natives to poverty, vulnerability, and exploitation because of the legislative obstacles to accessing social benefits and are subject to marginalisation and subjugation. [459] Results of numerous surveys state how economic factors are the main driving force of migration to Italy, followed by reaching friends and family and fleeing violence. [460] On the other hand, climate change is increasingly becoming one of the main factors of migration to Italy from countries particularly affected by extreme climate events. [461] It is also necessary to consider that Italy

[456] Migrants & Refugees Section, '*Migration Profile Italy*' (2021) available at https://migrants-refugees.va/it/wp- content/uploads/sites/3/2021/12/2021-CP-Italy.pdf accessed 08 January 2024
[457] I. Fontana, '*The Implementation of Italian Asylum Policy and the Recognition of Protection in times of Crises: between External and Internal Constraints'* Contemporary Italian Politics Vol.11 No.4 429-445 (2019), at 435
[458] IDOS Centro Studi e Ricerche, '*Dossier Statistico Immigrazione 2022 Scheda di Sintesi'*
[459] *Ibid*
[460] IOM Displacement Tracking Matrix, '*Flow Monitoring Surveys'* (2020)
[461] Migrants & Refugees Section, '*Migration Profile Italy*' *supra* note 456

experiences frequent natural calamities affecting both locals and migrants that result in internally displaced people. [462]

As explained earlier, the link between environmental disruptions and migration has strong ties, and to be able to understand environmental migrations and analyse the responses to them, the policies on environmental issues and climate change also need to be touched upon.

Italy has been described as a climate change hot spot, [463] a geographic area in which a joint change in the climate parameters of temperature, precipitation and variability aggravates the impact on the territory and people living there. This means that present and future damages in this geographic area will be worse than elsewhere.

Being part of the Paris Agreement, Italy has agreed to implement coordinated and shared strategies to mitigate pollution emissions and limit climate change. Among the policies implemented at the national level, it is worth mentioning the National Integrated Energy and Climate Plan 2030, [464] which is considered a first step towards deep decarbonisation of the nation, a circular economy, efficiency, and equal use of natural resources. It proposes concrete actions, with the ambitious aim of developing local governance policies to make cities resilient to climate change. Only in 2019, Climate Decree [465] implementing the urgent European Directive 50/2008 on air quality, was approved. The National Platform on Adaptation to Climate Change [466] implements actions whose aim is to decrease risks caused by climate change.

Despite these many initiatives on climate change, it must be remembered that Italy still lacks a climate law, unlike many other Member States, and that numerous reports indicate how the objectives stated in national policies and provisions are

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[462] Internal Displacement Monitoring Center, '*Country Profile: Italy, Dec. 2020'* available at https://www.internal-displacement.org/countries/italy accessed 09 January 2024

[463] A. Tuel, E.A. Etahir, '*Why is the Mediterranean a Climate Change Hot Spot*?' Journal of Climate Volume 3 (2020), at 5829

[464] Ministero dello Sviluppo Economico, Ministero dell'Ambiente e della Tutela del Territorio e del Mare, Ministero delle Infrastrutture e dei Trasporti, *' Piano Nazionale Integrato per il Clima (PNIEC)'* (2019)

[465] Decreto-legge 14 Ottobre 2019, n. 111, '*Misure urgenti per il rispetto degli obblighi previsti dalla direttiva 2008/50/CE sulla qualita' dell'aria e proroga del termine di cui all'articolo 48, commi 11 e 13, del decreto-legge 17 ottobre 2016, n. 189, convertito, con modificazioni, dalla legge 15 dicembre 2016, n. 229'*

[466] Ministero dell' Ambiente e della Sicurezza Energetica, ' *Piano Nazionale di Adattamento ai Cambiamenti Climatici'* (2022)

insufficient to tackle the issue of climate change. [467] Moreover, there is still no case law expressly dealing with climate change and the related public and private compliance obligations. [468] Only in 2021, the NGO 'A Sud' brought the first lawsuit before the Civil Court of Rome against the Italian Government under ordinary civil liability. It claimed that the country was failing to take the necessary steps to meet the temperature targets set by the Paris Agreement. The lawsuit, which is part of the campaign 'Giudizio Universale', [469] aims at ascertaining the extra-contractual liability of the Italian State in its inaction on the climate emergency and sentencing it to take all necessary steps. The case is, at the time of writing, still pending before the Court of Rome.

Despite this framework, which may suggest a lack of protection for the group of migrants to whom this thesis is referring, Italy is one of the fewest countries in the EU which has provided in its national legislation different forms of protection for environmental migrants. Consequently, an overview of the latter will specifically highlight how the Italian complementary forms of protection have determined not only the development of different interpretations and applications by jurisprudence and the administration but also allowed (and still allows) reflections on a concrete possibility of protection against environmental phenomena. Complementary protection, starting from its original formulation up to the recent amendments made by Decree-Law No. 20/2023, and its evolutive interpretation and application in compliance with the highest protection standards envisaged in EU law will be discussed. A reference to Constitutional Law 1/2022 will be made to discuss whether the introduction of the principle of respect for the environment as a constitutional principle might take a part in the protection of environmental migrants.

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[467] Regioni e Ambiente, ' *Climate Analytics: l'Italia dovrebbe ridurre le emissioni del 92% al 2030'* (2021) available at https://www.regionieambiente.it/climate-analytics-rapporto/ accessed 08 January 2024

[468] Sara Biglieri DENTONS, ' *Litigation Climate Change in Italy'* (2022) available at https://www.dentons.com/en/insights/articles/2022/september/12/litigating-climate-change-in-italy accessed 08 January 2024

[469] Giudizio Universale, '*Atto di citazione Causa legale "A Sud e altri VS Stato Italiano*"' Tribunale Civile di Roma 2021

4.2.1. Italian domestic migration and asylum law

Italian migration law is highly influenced by international and European law and by multiple legislative interventions that have been implemented over the years. Under Article 117 [470] of the Italian Constitution, Italy is compelled to exercise its legislative power in compliance with the obligations deriving from EU law and international law. Consequently, the international and European frameworks must be applied and implemented in its national legislation also with regard to the two forms of protection for third-country nationals under those legal regimes: the refugee status, within the meaning of Article 1(A) of the 1951 Geneva Convention; the subsidiary protection, complying with the EU Qualification Directive 2011/95. [471] In this sense, the analysis conducted in the previous chapters also applies to the Italian case: environmental migrants do not easily fall under the scope of application of the relevant international and EU provisions. Nevertheless, Italy has implemented an additional form of protection intended to supplement the asylum system dictated by international and EU law. The latter finds its legal basis, on the one hand, in the national competence left under EU law to adopt statuses on non-harmonised grounds and, on the other, under the national provision of the right to asylum. Indeed, parallel to the EU legal basis, the Italian complementary protection has a direct constitutional foundation in Article 10 of the Constitution, which ensures asylum to *foreigners who are prevented in their own country from exercising the democratic freedoms guaranteed by the Italian Constitution (...) in accordance with the conditions established by law.* [472] The extent and consistency of the complementary protection, and its relationship with the CEAS, have long been the subject of in-depth reflection by the Supreme Court. In several judgments, [473] the Court expressly clarified that complementary protection was, alongside the refugee status and subsidiary protection, the direct implementation of the right to asylum and that its interpretation must comply with constitutional values and the

[470] Article 117, paragraph 1 of the Italian Constitution reads as follows: *La potestà legislativa è esercitata dallo Stato e dalle Regioni nel rispetto della Costituzione, nonché dei vincoli derivanti dall'ordinamento comunitario e dagli obblighi internazionali.*
[471] The Italian legislative act implementing the EU Directive is: Decreto legislativo 251/2007 and, later amended Decreto legislative 18/2014
[472] Costituzione della Repubblica Italiana 22 December 1947, Article 10 paragraph 3
[473] Corte di Cassazione SSUU 32044/2018 and 32177/2018

obligations undertaken at the international and EU levels. Accordingly, an evolving development of domestic jurisprudence based on the full respect of fundamental rights and following the case law of supranational Courts, especially the ECtHR and the CJEU, has envisaged complementary protection as an elastic norm meant to protect the ineliminable core constitutive of personal dignity. [474]

4.2.2. The humanitarian protection under the Consolidated Act on Immigration

The Italian complementary form of protection was first created in the 1990s as a form of humanitarian protection and implemented in the Accession Protocol to the 1985 Schengen Agreement. [475] During the Parliamentary discussions for the implementation of the Schengen Agreement, the prohibition to refuse or revoke the residence permit to a third-country national when "*there are serious reasons, in particular of a humanitarian nature, or resulting from constitutional or international obligations of the Italian State"* was added. [476] This addendum was transposed in the 1998 Law n. 40 which later became the Consolidated Act on Immigration [477] (hereinafter, CAI) that regulated the whole Italian immigration policy without major legislative interventions until 2018. Article 5, paragraph 6 of the CAI provided that humanitarian protection in the form of a residence permit shall be issued in the presence of "*serious reasons, in particular of a humanitarian*

[474] M. Betti, ' *I fondamenti unionali e costituzionali della protezione complementare e la protezione speciale direttamente fondata sugli obblighi costituzionali ed internazionali dello Stato'* La Triste Parabola del Diritto all'Immigrazione Questione Giustizia 3/2023 9-16, at 15-16

[475] Legge 30 September 1993, n.388, *Ratifica ed esecuzione: a) del protocollo di adesione del Governo della Repubblica italiana all'accordo di Schengen del 14 giugno 1985 tra i governi degli Stati dell'Unione economica del Benelux, della Repubblica federale di Germania e della Repubblica francese relativo all'eliminazione graduale dei controlli alle frontiere comuni, con due dichiarazioni comuni; b) dell'accordo di adesione della Repubblica italiana alla convenzione del 19 giugno 1990 di applicazione del summenzionato accordo di Schengen, con allegate due dichiarazioni unilaterali dell'Italia e della Francia, nonche' la convenzione, il relativo atto finale, con annessi l'atto finale, il processo verbale e la dichiarazione comune dei Ministri e Segretari di Stato firmati in occasione della firma della citata convenzione del 1990, e la dichiarazione comune relativa agli articoli 2 e 3 dell'accordo di adesione summenzionato; c) dell'accordo tra il Governo della Repubblica italiana ed il Governo della Repubblica francese relativo agli articoli 2 e 3 dell'accordo di cui alla lettera b); tutti atti firmati a Parigi il 27 novembre 1990*

[476] Emendamento 14.2, in AP Camera, XI legislatura, III Commissione permanente, seduta dell'1.7.1993

[477] Decreto Legislativo 25 July 1998, n. 286 *Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*

nature or resulting from constitutional or international obligations of the Italian State" to fully implement the right to asylum as enshrined in the Italian Constitution and the international and European legal provisions. [478] The relevant residence permit was issued by the Questore who had the task of ascertaining, without any margin of discretion, on a case-by-case basis whether one of the prerequisites of Article 5(6) was present. [479] The permit had a duration of two years and it allowed to carry out work activities, employed or self-employed studies, access to reception centres, registration with the National Health Service and the right to equal treatment. It could be either converted for employment purposes or renewed (if the conditions for re-issuance were again established) and the possible refusal could be appealable before Civil Courts.

The CAI provided a complementary and residual form of humanitarian protection closing the system of international protection. Indeed, it was applied only when neither the refugee status nor the subsidiary protection could have been claimed: only after the non-recognition of the refugee status and subsidiary protection, did the competent Commission have to assess the existence of serious grounds for granting the right to a residence permit for humanitarian reasons and, if necessary, transmit the files to the Questore to issue the residence permit. [480]

Since these last-mentioned international forms of protection, as explained above, are difficult to apply to the category of environmental migrants, the institution of humanitarian protection could, at the domestic level, fill in this gap and ensure full compliance with the principle of non-refoulment and the constitutional right to asylum. This line of reasoning is supported by the fact that the provision of humanitarian protection was a general provision that did not envisage any specific

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[478] *Ibid*, Article 5, paragraph 6 (author translation, emphasis added)

[479] Regolamento di Attuazione d.P.R. 31 agosto 1999, n. 394 *Regolamento recante norme di attuazione del testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, a norma dell'articolo 1, comma 6, del decreto legislativo 25 luglio 1998, n. 286.*

Art. 11 comma 3, lett) c-ter entails the issue of the residence permit «*per motivi umanitari, nei casi di cui agli articoli 5, comma 6 e 19, comma 1, del testo unico, previo parere delle Commissioni territoriali per il riconoscimento dello status di rifugiato ovvero acquisizione dall'interessato di documentazione riguardante i motivi della richiesta relativi ad oggettive e gravi situazioni personali che non consentono l'allontanamento dello straniero dal territorio nazionale.»*

[480] C. L. Cecchini, L. Leo, L. Gennary, '*Permesso soggiorno per motivi umanitari ai sensi dell'art. 5, comma 6, d.lgs.n.286/98*' Scheda Pratica ASGI (2018)

or limited grounds under which the protection could have been granted. [481] The provision excluded any decisional discretion when the three general prerequisites were present, namely, serious humanitarian reasons or constitutional or international obligations. In particular, the serious humanitarian reasons created an open catalogue susceptible to evolution over time and allowed for an extensive interpretation that entailed the subjective and objective deprivation of human rights. [482] As noted by the Tribunal of L'Aquila, humanitarian reasons had to be interpreted broadly to encompass, inter alia, the migrant's exposure to famine, natural or environmental disasters and land grabbing, the general environmental and climatic conditions of the country of origin, if these are such as to jeopardize the core of basic human rights of the individual. [483] In addition, the Tribunal emphasised the negative consequences of climate change on already vulnerable groups, putting at risk the right to an adequate standard of living. Based on this jurisprudence, the temporary suspension of expulsion to the country of origin of Bangladeshi citizens, because of serious damage created by cyclone Sidr, [484] and of Nepali citizens, following the 2015 violent earthquake, was issued. [485] This approach was used in multiple and different situations in which serious natural disasters, floods, droughts, and famine played a crucial role in granting humanitarian protection. As will be explained thoroughly in the next section, although the jurisprudence, in most cases, did not directly recognise the negative effects of climate change as the direct cause of the migratory movements, this interpretation was the starting point for further case law oriented towards the protection of environmental and climatic

[481] As explained in Court of Cassation, I Civil Section 4455/2018
[482] CAI *supra* note 477
[483] Tribunale de L'Aquila Ordine 16 Febbraio 2018, at 4 *"[..] può trovare applicazione la protezione umanitaria poiché il Bangladesh, durante il periodo delle piogge, viene sommerso per gran parte del suo territorio. Infatti, la deforestazione forzata degli ultimi 40 anni ha strappato via le barriere naturali che mitigavano l'azione delle onde, e anche a causa dei cambiamenti climatici in corso, si registrano già significative variazioni nell'innalzamento del livello dell'acqua"*
[484] Ministero dell'Interno Circolare No. 400/C/2008/128/P/1.281 '*Bangladesh ciclone SIDR. Problematiche varie'* (2008)
[485] Corte di Appello di Genova, *'La protezione umanitaria dai lavori preparatori all'applicazione pratica. Breve excursus di giurisprudenza'* (2017) available at https://webcache.googleusercontent.com/search?q=cache:5zgKSRrQQUIJ:https://www.corteappello.genova.it/Distretto/formazione_magistrati.aspx%3Ffile_allegato%3D1768+&cd=1&hl=it&ct=clnk&gl=it accessed 10 January 2024

vulnerabilities, concerning not only the consequences of fast-onset events but also slow-onset processes. [486]

It is worth noticing that, in 2015, the National Commission for the Right to Asylum issued a directive that requested the issue of a residence permit for humanitarian reasons when the foreigner, to whom international or subsidiary protection could not be granted, was in the presence of "*serious natural disasters or other serious local factors hindering repatriation in dignity and safety"*. [487]

Moreover, Article 20 CAI [488] included another form of protection, temporary in nature, but that could have been issued in the case of environmental migration. Under Article 20, the President of the Council of Ministers had the power to adopt temporary protection measures to fulfil relevant humanitarian needs in the case of conflicts, natural disasters, or other serious events.

This national provision was indeed similar to the EU temporary protection under Directive 2001/55/CE. The affinity between the two forms of protection also seemed to be confirmed by a brief note published by the Senate Study Service, [489] in which the national temporary protection was defined as "*a collective temporary protection for humanitarian reasons"*. As the temporary protection at the EU level, the national provision was characterised by its collective nature, but its implementation did not require prior recognition of the existence of a mass influx of displaced persons.

4.2.3. Case law on Article 5 paragraph 6 CAI

[486] Examples of this extensive interpretation are: Commission Territoriale per il riconoscimento della protezione internazionale di Roma, Sezione II, Decisione del 21 Dicembre 2015 or Tribunale di Cagliari, Ordine of 31 Mazo 2019, n. 4043 or Tribunale di Milano, Ordine del 31 Marzo 2016, n. 64207 or Tribunale di Napoli, Ordine del 5 Giugno 2017, n. 7523

[487] Ministero dell'Interno Commissione Nazionale per il Diritto all'Asilo, *'Circolare Prot. 00003716'* (2015), paragraph 4 (author translation, emphasis added)

[488] The relevant provision reads as follows: *1. Con decreto del Presidente del Consiglio dei Ministri, adottato d'intesa con i Ministri degli affari esteri, dell'interno, per la solidarietà sociale e con gli altri Ministri eventualmente interessati, sono stabilite, nei limiti delle risorse preordinate allo scopo nell'ambito del Fondo di cui all'articolo 45, le misure di protezione temporanea da adottarsi, anche in deroga a disposizioni del presente testo unico, per rilevanti esigenze umanitarie, in occasione di conflitti, disastri naturali o altri eventi di particolare gravità in Paesi non appartenenti all'Unione Europea.*

[489] L. Borsi, '*Nota Breve: Protezione temporanea, protezione umanitaria, protezione temporanea per motivi umanitari*' Servizio Studi del Senato nota n. 80 (2015)

Given the qualification of humanitarian protection as a general, atypical, and complementary form of protection, it is useful to analyse the case law on the matter, in particular focusing on the effects of climate change and environmental disruptions as factors determining the need for protection.

In particular, the jurisprudence of merit, also thanks to what was established by the Circular of the National Commission for the Right of Asylum in 2015, recognised humanitarian protection due to natural disasters and the Supreme Court itself referred to drought and famine as factors that offer no guarantee of life within the country of origin.

The absence of a clear definition of the *serious reasons* referred to in Article 5, paragraph 6 CAI and, above all, of an exhaustive list of the cases covered by it has led to the relevance, in terms of protection, of the individual characteristics capable of delineating a situation of personal fragility or vulnerability in need of protection. [490] These situations include the needs of those who, in the face of natural disasters and other relevant environmental factors, if rejected, would have been denied the exercise of certain fundamental rights in practice. The jurisprudence emphasised how humanitarian protection allowed for the protection of subjective situations, like conditions of vulnerability of the applicants, but also objective situations, such as those relating to the country of origin as serious political instability, episodes of violence or insufficient respect for human rights, famine, natural or environmental disasters and similar situations. [491]

In judgment no. 4455/2018, [492] the Court of Cassation intervened on the content of Article 5 paragraph 6 CAI and, specifically, on the criteria for the correct application of the provisions on residence permits for humanitarian reasons. The Court clarified that a balance must be made between social integration acquired in Italy, the objective situation in the applicant's country of origin and the

personal condition to ascertain the actual deprivation of human rights. When explaining the meaning of vulnerability, the Court stated that this condition may also refer to the lack of the minimum conditions to lead a dignified existence in

[490] CAI *supra* note 477, paragraph 2.2
[491] Tribunale di Milano, ordinanza 8727/2015
[492] Corte di Cassazione, ordinanza I Sezione Civile 4455/2018

which the inescapable needs and requirements of personal life are not radically compromised. Consequently, vulnerability may also stem from a geopolitical situation, such as droughts, famine, or unsustainable poverty situations that offers no guarantee of life within the country of origin This interpretation linked to the violation of fundamental human rights highlighted even more the need to protect situations corresponding to slow-onset climatic processes, which are capable of compromising the satisfaction of needs and requirements for dignified living conditions.

4.2.4. The special protection under the Salvini Decree

The humanitarian protection stood still for decades until the adoption of Decree-Law 113/2018 (better known as the Salvini Decree). [493] Notwithstanding the international and European legal obligation to respect the principle of non-refoulment under both the refugee status and the subsidiary protection that were and are still in place, the new legislative provision touched upon the national and complementary humanitarian protection by repealing it and replacing it with the so-called special protection. The latter restricted the application of national humanitarian protection because it could be granted only on specific and restrictive grounds to which only specific residence permits were connected. [494] This means that complementary national humanitarian protection could not be granted anymore on general and expansive grounds and, therefore, that the cases under which the protection could be issued were restricted. The repeal of the general and atypical humanitarian protection has resulted in the absence of a safeguard clause closing the overall protective national framework. In addition, the duration of the residence permits was reduced, and the latter were not convertible into residence permits for work reasons: protection, at first linked to individual humanitarian needs, became

[493] Decreto Legge 4 Ottobre 2018, no. 113 *'Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica*', convertito con modificazioni dalla L. 1 dicembre 2018 n. 132

[494] Among the specific residence permits that the provision implemented, we can find permits for medical treatment, acts of particular civic value, cases of domestic violence, cases of exploitation in the labour sphere, and the vulnerable condition of minors.

an essentially temporary measure, whose recognition was linked to conditions of typified vulnerability.

It should be noted, however, that this reform did not find a favourable institutional climate or support from the judges in the application phase. [495] In this regard, it is to highlight the President of the Republic's letter accompanying the promulgation of the decree, in which he recalled that *"the State's constitutional and international obligations remain firm even if not expressly referred to in the normative text, and, in particular, what is directly provided for by Article 10 of the Constitution and what follows from the international commitments undertaken by Italy*". [496] It must be added the recognition of the transitional nature of the humanitarian protection regime by the Court of Cassation [497] which legitimised the judges to continue to apply to the previous institute for pending applications.

The Salvini Decree also introduced a calamity residence permit under Article 20-bis which stated that *"in the cases in which the country to which the foreign is supposed to return is in a situation of contingent and exceptional calamity that does not allow for safe return and stay, a calamity residence permit shall be issued"*. [498] The permit duration was six months, renewable for a further six months if the conditions of exceptional calamity continued. The permit also allowed for work but could not be converted into a residence permit for employment reasons. By reading the provision, it seems that the permit could have been applied to possible environmental migration as the one that was once provided by Article 20 CAI. [499] The main difference between the provisions is that under Article 20 bis, the protection is based on an individual request and the grant is subject to the discretionary power of the administration. Moreover, the legislator did not qualify the nature of the calamity, meaning that both natural and man-made environmental disasters were potentially covered, and the contingent and exceptional nature of

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[495] F. Perrini, *'Il riconoscimento della protezione umanitaria in caso di disastri ambientali nel recente orientamento della Corte di Cassazione'* Ordine internazionale e diritti umani349-362 (2021), at 359

[496] Presidenza della Repubblica, '*Decreto Sicurezza e Immigrazione: Mattarella emana e scrive a Conte'* (2018) available at https://www.quirinale.it/elementi/18098 accessed 10 January 2024 (author translation, emphasis added)

[497] Corte di Cassazione, ordinanza I sezione Civile 4890/19 and SSUU 29460/19

[498] CAI *supra* note 477, Article 20 bis (author translation, emphasis added)

[499] C. Scissa, '*La protezione per calamità: una breve ricostruzione dal 1996 ad oggi'* Forum di Quaderni Costituzionali 136- 147 (2021), at 143

calamitous events inevitably restricted the scope of the rule to sudden and singular events, such as earthquakes or floods, thus leaving slower-onset events uncovered by such cases of special protection.

4.2.5. Case law under the Salvini Decree

Although the Salvini Decree restricted the general scope of application of humanitarian protection and the residence permits could not cover the entire scope of constitutional asylum, the jurisprudence on the matter has interpreted the newly implemented provisions extensively.

Having a more restrictive legislative framework, it was through case law that it was possible to save the precedent human-rights approach through an interpretation of the residence permits not as an exhaustive list of humanitarian cases, but only as an example, because the "*openness and residuality of protection do not allow for typifications".* [500]

In judgment no. 7832/2019, [501] the first section of the Court of Cassation ruled on the appeal lodged by a Bangladeshi citizen against a judgment of the Court of Appeal of Naples. The third-country national had left the country of origin because of the situation of extreme poverty caused by the *"disastrous climatic situation of the country of origin, to the determination of which the government authorities had contributed".* [502] According to the Court, the catastrophic situation deduced is relevant, even within the provisions of the Salvini Decree, which at the time of the judgement was still in force. The Court stated that the situation in which the Bangladeshi citizen found himself was "*able to give rise to protection of a humanitarian nature under the 1998 CAI"*, also observing that *"such a situation was also considered worthy of protection in the new typified system of granting permits for humanitarian reasons introduced by the Salvini Decree, whose Article*

[500] Corte di Cassazione SSUU n. 29460/2019, point 10 and as stated in the judgement: *le basi normative non sono affatto fragili, ma a compasso largo: l'orizzontalità dei diritti umani fondamentali, col sostegno dell'articolo 8 della Cedu, promuove l'evoluzione della norma elastica, sulla protezione umanitaria a clausola generale di sistema, capace di favorire i diritti umani e di radicarne l'attuazione.*

[501] Corte di Cassazione, I Sezione Civile 7832/2019

[502] A. Brambilla, M. Castiglione, '*Migranti ambientali e divieto di respingimento'* Rubrica Diritti Senza Confini Questione Giustizia (2020)

20 bis provides precisely for the issuance of a six-month residence permit for calamity when the country to which the foreigner should return is in a situation of contingent and exceptional calamity that does not allow for safe return and stay". [503] As a result, the judges proposed endorsing an evolutionary interpretation of humanitarian protection considering the 2018 permit specifically by investigating whether the repeated floods *"amount to disasters that do not allow the return to the country of origin in safe conditions".* [504]

Later a year, the Court was seized to interpret the legitimacy of a decree through which the Tribunal of Ancona rejected the grant of humanitarian protection to a Bangladeshi citizen. [505] The Court found that the disruption of the house of the applicant due to two consecutive floods was "*relevant for the recognition of protection for humanitarian reasons, since it may affect the applicant's vulnerability and expose the applicant to the risk of living conditions that do not respect the minimum core of fundamental rights that integrate his dignity".* [506] The Court explains how the judge seized must verify whether the negative effects of these floods can be *"configured as calamities that do not allow the return to the country of origin and the stay in conditions of safety".* [507]

4.2.6. The special protection under the Lamorgese Decree

The multiple criticisms that the Salvini Decree was subject to create the necessity to implement a new provision. In 2020, Decree-Law 130/2020 (better known as Lamorgese Decree) was implemented and later converted into Law 173/2020. [508] The Lamorgese Decree only touched upon the national complementary form of protection by amending the calamity residence permit under Article 20-bis CAI, which provided for the issuance of residence permits in the context of a serious (rather than a contingent and exceptional) calamity. This new provision allowed for

[503] Corte di Cassazione 7832/2019 *supra* note 501 (author translation, emphasis added)
[504] *Ibid*
[505] Corte di Cassazione, I Sezione Civile, 2563/2020
[506] *Ibid*, paragraph 5.1. (author translation, emphasis added)
[507] *Ibid*, paragraph 5.3. (author translation, emphasis added)
[508] Decreto Legge 21 Ottobre 2020, no. 130 *Disposizioni urgenti in materia di immigrazione, protezione internazionale e complementare, modifiche agli articoli 131-bis, 391-bis, 391-ter e 588 del codice penale*

a broader interpretation of calamity based on the degree of severity rather than on its progression over time. Nevertheless, the legislator still did not define the nature of calamity; therefore, it could be referred to as any man-made disaster, natural event or even sanitary one. Additionally, the provision did not specify the maximum duration of renewal, thus potentially suggesting that the initial permit could be renewed based on the environmental disruption faced in the country of origin. [509] The conversion bill for Decree Law 130/2020 stated that "*the amendment restores the formula already established in the administrative practice, which gave prominence to the calamity qualified as serious"*. [510] The replacement of the words contingent and exceptional with the word serious envisaged possible broader protection for environmental migrants because the new wording lent itself to include not only exceptional phenomena but also those more gradual changes and slow-onset processes generated by climate change.

Moreover, Article 1 paragraph 1 (e) partially amended the Salvini Decree and partially reintroduced what was previously codified in humanitarian protection. It still retained the provision of special and specific residence permits but recalled and reattached the necessity to respect international and constitutional obligations when issuing residence permits. Therefore, Article 19 CAI provided a special form of protection that prohibited refoulment in violation of international and constitutional obligations (proposing what was previously also stated in Article 5, paragraph 6 of the CAI) and when there is the risk that the applicant could face inhuman or degrading treatment or the violation of the applicant's right to a private and family life. [511] Moreover, the Lamorgese Decree provided again the convertibility of the protection into a residence permit for employment reasons and, therefore, repealed the disparity of treatment that had been created between the three forms of legal protection implementing constitutional asylum during the existence of Decree-Law No. 113 of 2018; in fact, only residence permits issued because of the recognition

[509] *Ibid*, article 1 paragraph 1 f) and (i) (author translation, emphasis added)
[510] Camera dei Deputati, Disegno di legge *Conversione in legge del decreto-legge 21 ottobre 2020, n. 130, recante disposizioni urgenti in materia di immigrazione, protezione internazionale e complementare, modifiche agli articoli 131-bis, 391-bis, 391-ter e 588 del codice penale, nonché misure in materia di divieto di accesso agli esercizi pubblici ed ai locali di pubblico trattenimento, di contrasto all'utilizzo distorto del web e di disciplina del Garante nazionale dei diritti delle persone private della libertà personale* (2727)
[511] *Ibid*, article 1 paragraph 1 (e) (author translation, emphasis added)

of the refugee status or subsidiary protection could be converted. It is thus clear that the new version of Article 19 invoked typically humanitarian guarantees: the humanitarian grounds of the system repealed by the 2018 Decree Law and the protection of the person that derives from the ECHR and the Constitution. In this way, the norm tended to reaffirm a principle of humanity. [512]

4.2.7. Case law under the Lamorgese Decree

On 24 February 2021, the Court of Cassation delivered what has been referred to as a landmark [513] ordinance [514] firmly declaring that the existence of a state of environmental degradation in the country of origin of a protection seeker, entailing significant human rights violations, authorizes the acceptance of humanitarian protection status. The facts of the case were related to a Nigerian citizen who applied for humanitarian protection on the grounds of the state of environmental degradation in the Niger Delta region. The instance was rejected by the Appeal Court of Ancona. In the ruling, the Court of Cassation describes the criteria under which the recognition of humanitarian protection can be granted in cases in which the country of origin of the asylum seeker is deteriorated by environmental hazards. According to the Court, when it is established that an environmental disaster situation exists in a specific area, to assess the presence of serious threats in the applicant's country of origin and the associated vulnerability that justifies the granting of humanitarian protection, it is necessary to verify if such an environmental degradation situation exists. [515] It concludes how, in addition to military conflicts, environmental conditions can violate and limit the enjoyment of the rights to life, liberty, and self-determination. [516] In delivering the judgement, the Court relied explicitly on the Teitiota case. The national Court must determine

[512] F. Negozio, F. Rondine, *'Analysing National Responses to Environmental and Climate-Related Displacement: A Comparative Assessment of Italian and French Legal Frameworks'* Quarterly on Refugee Problems Vol.61 Issue 1 53-70 (2022), at 61
[513] F. Vona, *'Environmental Disasters and Humanitarian Protection: A Fertile Ground for Litigating Climate Change and Human Rights in Italy?'* The Italian Review of International and Comparative Law 1 146-158 BRILL (2021), at 147
[514] Corte di Cassazione II Sezione Civile, No. 5022/2021 *I.L. v. Ministry of the Interior and Attorney General at the Court of Appeal of Ancona*
[515] *Ibid*, parahraphs 5-6
[516] *Ibid*, paragraphs 8-9

whether the applicant's place of origin has an environment and climate that could seriously jeopardize that person's right to life and undermine the minimal, ineradicable bar for the effective enjoyment of fundamental human rights. After this assessment, the Court concluded that there was no doubt that the case at hand concerned a situation of environmental degradation that the judge of the first instance did not consider all the conditions capable of granting humanitarian protection and that, therefore, the appeal had to be upheld.

The ordinance is the result of well-established case law that, over the years, the Court of Cassation has created and implemented through an evolutionary interpretation in which environmental conditions, capable of affecting human rights, are a major factor when granting humanitarian protection. What is interesting to note and that differentiates this judgement from the previous ones, is that the Court made no explicit reference to the need to conduct a comparative evaluation of the applicant's subjective situation in the country of origin and his level of integration in the host country. Furthermore, the applicant did not have to prove being personally affected by the state of environmental degradation and, thus, it did not impose a heavy burden of proof on the applicant. [517] It seems that the ordinance solely relies on the objective situation of environmental degradation in the country of origin without mentioning any individual and personal assessment. If, on the one hand, the Court explicitly mentions the line of reasoning of the Teitiota ruling, it departs from it when it bases its decision on solely objective circumstances. This point is interesting to emphasize because it might give room to the possibility of extending the principle of non-refoulment in all cases in which environmental disruptions occur, also when only generalised.

4.2.8. Recent developments and the Cutro Decree

After the February 2023 shipwreck [518] along the coast of Cutro, the Government

[517] Lamorgese Decree *supra* note 508

[518] A. Hernandez-Morales, *' Dozens dead in migrant shipwreck off Italian coast'* EU Politico available at https://www.politico.eu/article/dozens-dead-migrant-shipwreck-italy-coast-calabria-fishing-boat/ accessed 11 January 2024 or O. Q. Obasuy, *'European and Italian responsibilities in the Cutro massacre'* Open Migration (2023) available at

implemented another Decree Law, the so-called Cutro Decree, [519] to better regulate irregular immigration and restrict, once again, the application of humanitarian protection. [520] The Decree is in line with another recent provision [521] which limits non-governmental organizations in their search and rescue operations based on praising NGOs as a pull factor of illegal immigration. [522]

Along this line of reasoning, the Cutro Decree amends [523] Article 19 CAI by repealing the third and fourth index of paragraph 1.1, which stated the criteria under which an infringement of the right to respect for private and family life caused by removal from Italy could be established and, therefore, deletes the expressed humanitarian guarantees. The new provision will only apply to applications made after it enters into force and makes the already issued residence permit only renewable once for a maximum of one year. [524]

As it stands today, the prohibition of expulsion, refoulement and extradition and the consequent right to a special protection permit are now applicable to cases in which, in the event of removal from Italy:

- there is a risk of persecution on grounds of race, sex, language, nationality, religion, political opinion, personal or social conditions, sexual orientation or gender identity (Article 19)
- there is a risk of torture or inhuman or degrading treatment (Article 19, paragraph 1)
- the obligations set out in Article 5(6) CAI apply (Article 19, paragraph 1). [525]

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https://openmigration.org/en/analyses/european-and-italian-responsibilities-in-the-cutro-massacre/ accessed 11 January 2024

[519] Decreto Legge 10 Marzo 2023, no.20 *'Disposizioni urgenti in materia di flussi di ingresso legale dei lavoratori stranieri e di prevenzione e contrasto all'immigrazione irregolare.'*

[520] Open Polis, *'Il decreto Cutro colpisce I diritti dei richiedenti asilo'* (2023) available at https://www.openpolis.it/il-decreto-cutro-colpisce-i-diritti-dei-richiedenti-asilo/ accessed 11 January 2024

[521] Legge 24 Febbraio 2023, no.15, '*Conversione in legge, con modificazioni, del decreto-legge 2 gennaio 2023, n. 1, recante disposizioni urgenti per la gestione dei flussi migratori.'*

[522] ASGI, '*Il decreto-legge 2 gennaio 2023, n. 1, convertito in legge 24 febbraio 2023, n. 15 (Disposizioni urgenti per la gestione dei flussi migratori). Una prima lettura dell'ASGI'* (2023), at 3

[523] Cutro Decree *supra* note 519, Article 7, paragraph 1

[524] *Ibid*, article 7, paragraphs 2 and 3

[525] CAI *supra* note 477, Article 19: *1. In nessun caso può disporsi l'espulsione o il respingimento verso uno Stato in cui lo straniero possa essere oggetto di persecuzione per motivi di razza, di sesso, di orientamento sessuale, di identità di genere, di lingua, di cittadinanza, di religione, di opinioni politiche, di condizioni personali o sociali, ovvero possa rischiare di essere rinviato verso un altro Stato nel quale non sia protetto dalla persecuzione.*

It is to depict and understand if, after all, is there still any room for the enforcement of humanitarian protection under the legal regime implemented by Decree Law 20/2023 and, if so, under which circumstances. Concerning the first profile, humanitarian protection in the national legal system still exists. The repeal implemented by the 2023 Decree does not eliminate the right to respect for private and family life, which has its foundation in Article 8 ECHR and as regards family life, in Articles 29, 30 and 31 of the Constitution, thus in sources that are superordinate to ordinary legislation. Article 7 of Decree-Law No 20/2023 only deletes the criteria by which the 2020 legislature intended to guide the public authority, administrative and judicial, in recognizing the right, and to avoid interpretative and applicative discretions and for greater consistency within the Italian legal system.

Secondly, the legislative reform, although it has emptied of prescriptive meaning Article 19 CAI, coincides with refugee status under paragraph 1 and subsidiary protection under paragraph 1.1. Article 19 paragraph 1.1 still retains the systematic and serious violations of human rights in the country of origin when assessing the grounds for issuing a residence permit, for which its concrete operativeness will have to deal. It must be highlighted that the reference to Article 5, paragraph 6 CAI still pertains and that cannot be repealed since it is considered by doctrine and jurisprudence to be the implementation of Article 10 of the Constitution and to be the completion and integration of the asylum legislation under the international and European legal regime. [526] It is recalled that Legislative Decree 251/2007, directly implemented European standards and required the competent authority for the recognition of international protection to assess the applications and to order the termination or revocation of protection considering the "*serious humanitarian reasons preventing the return to the country of origin"* is still in force. [527]

1.1. Non sono ammessi il respingimento o l'espulsione o l'estradizione di una persona verso uno Stato qualora esistano fondati motivi di ritenere che essa rischi di essere sottoposta a tortura o a trattamenti inumani o degradanti o qualora ricorrano gli obblighi di cui all'articolo 5, comma 6. Nella valutazione di tali motivi si tiene conto anche dell'esistenza, in tale Stato, di violazioni sistematiche e gravi di diritti umani.

[526] ASGI, '*L'inammissibile fretta e furia del legislatore sulla protezione speciale. Prime considerazioni*' (2023) available at https://www.asgi.it/notizie/linammissibile-fretta-e-furia-del-legislatore-sulla-protezione-speciale-prime-considerazioni/ accessed 09 January 2023

[527] Decreto Legislativo 19 Novembre 2007, n.251 *Attuazione della direttiva 2004/83/CE recante norme minime sull'attribuzione, a cittadini di Paesi terzi o apolidi, della qualifica del rifugiato o di*

Therefore, even following the recent reform, the right to respect for private and family life will continue to represent an essential element for the recognition of special protection, according to what the ECtHR and the Italian Court of Cassation have judged upon, just as all the constitutional or international obligations to which Italy is bound must be taken into consideration.

What, however, seems to affect the protective regime considerably and negatively, concerns the abrogation of the right to ask for recognition directly to the Questore with the consequence that today special protection is expressly referred to only within the asylum procedure. [528]

The modification, once again, traces back to the Salvini Decree in which the criteria for obtaining humanitarian protection were very strict. It is a step backwards compared to the Lamorgese Decree, which had made special protection a mechanism capable, at least in part, of replacing humanitarian protection, because it restricts the guarantees for migrants applying for humanitarian protection. [529]

For what concerns environmental migrants, it is also to note that Article 20-bis repeats the 2018 Salvini Decree version and, therefore, limits the application of the calamity permit only to contingent and exceptional circumstances and establishes the non-convertibility of the relevant permit into a work permit and the renewability only for a further six months. The precariousness of a non-convertible residence permit can hardly be reconciled with the very prerequisites for its issue such as the violation of human rights or natural disasters affecting the capability of enjoyment of human rights.

4.2.9 Italian constitutional reform on environmental protection

If on the one hand, the new amendments to the Italian provisions on humanitarian protection seem to want to repeal it, it is interesting to mention a constitutional

persona altrimenti bisognosa di protezione internazionale, nonchè norme minime sul contenuto della protezione riconosciuta, Articles 3 and 9

[528] ASGI, *'La riforma della protezione speciale a seguito del D.L. n. 20 del 10 marzo 2023 e le modifiche in materia di conversione di tale permesso e di quelli per cure mediche e calamità'* Una prima prospettiva esegetica - Scheda di analisi giuridica a cura dell'ASGI (2023), at 6

[529] As a matter of fact, the safeguard of private and family life is enshrined in article 8 of the ECHR to which Italy is part and, therefore, it is an international obligation to which Italy is compelled to because of Article 117, paragraph 1, of the Italian Constitution.

reform that entered into force in March 2022 and that provides environmental protection. [530] It amends Articles 9 and 41 of the Italian Constitution by introducing the protection of the environment, biodiversity, and ecosystems, as well as animal protection into the fundamental principles of the Italian Constitution and in the interest of future generations. Moreover, it provides a unique legal provision because it explicitly demands that economic activities be oriented towards achieving the overarching environmental objectives set out in the international and EU environmental and climate change regimes. Commentators stress how this reform might have an impact on climate change litigation in Italy [531] because the safeguarding of the environment has finally reached the status of a fundamental principle.

The principle of environmental protection and Italy's migration and climate commitments under EU law might set grounds to pursue environmental protection in both internal and external policy measures. By applying to the interests of present and future generations, it can be regarded as the duty to ensure not only the possibility of the future generation's existence but a dignified one. Based on this reasoning, the reform provides a conceptual and legal background to oblige the Italian State to implement structured and effective policies not only to improve the coordination of the flux of migrants but also to act directly on the causes of environmental migrations. [532] This means that, in the external dimension, Italy could support measures to reduce the impacts of dire environmental conditions in

[530] Legge Costituzionale 11 Febbraio 2022 n.1, '*Modifiche agli articoli 9 e 41 della Costituzione in materia di tutela dell'ambiente'* GU Serie Generale n.44 del 22-02-2022 which added an ulterior comma to Article 9 of the Constitution, *Tutela l'ambiente, la biodiversita' e gli ecosistemi, anche nell'interesse delle future generazioni. La legge dello Stato disciplina i modi e le forme di tutela degli animali* and recasted Article 41 of the Constitution, *L'iniziativa economica privata è libera. Non può svolgersi in contrasto con l'utilità sociale o in modo da recare danno alla salute, all'ambiente alla sicurezza, alla libertà, alla dignità umana. La legge determina i programmi e i controlli opportuni perché l'attività economica pubblica e privata possa essere indirizzata e coordinata a fini sociali e ambientali.*

[531] M.A. Tigre, '*Guest Commentary: New Italian Constitutional Reform: What it Means for Environmental Protection, Future Generations & Climate Litigation'* Sabin Center for Climate Change Law Columbia Law School (2022)

[532] V. Regazzi, '*Ambiente e migrazioni: due fenomeni complessi. Riflessione sull'interrelazione delle cause e delle possibili soluzioni*' «Lessico di Etica Pubblica» numero 2 (2022), at 50

migrants' countries of origin and leverage the integration of migrant workers in the green labour market, [533] actions all in line with the EU environmental policies.

The other aspect to be considered refers to the interpretation of already existing national provisions. This constitutional amendment could have some impact on the position of environmental migrants as an interpretative criterion for extending and expanding the prerequisites for the recognition of international protection. This principle could be used in the application phase to expand, in a constitutionally compliant sense, the perimeter of the requirements established for the two forms of international protection and, as suggested by the doctrine, how "*the protection of the rights of climatic migrants/refugees as such can also be recognised, if desired, in other provisions, in particular in Article 2 and perhaps indirectly in the new wording of Article 9"*. [534]

On top of that, it is to recall the 2021 Cassation judgement under which the Court inaugurated a new jurisprudential orientation that emphasises the need to recognise the existence of environmental migrants, clarifying how beyond the labels of refugee, climate migrant and environmental migrant, it is necessary to implement legal avenues for protection and an organised management of migration, given a phenomenon, such as climate change, that seems inevitable. [535] In this sense, the new Article 9 of the Constitution also comes into play by requiring that the above-mentioned principles be applied more strictly: the protection of the environment, as a good that is constitutionally guaranteed, must also be understood as the right to an environment that guarantees fair and adequate living conditions. Some [536] also argue that the recognition of this form of protection - insofar as it is linked to the protection of the right to life - does not require the asylum seeker to prove that he has reached a certain level of integration in the territory, because the fundamental right to life, must be recognised in any case.

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[533] C. Scissa, '*The potential role of the Italian Constitutional reform on environmental protection in enhancing migrants' livelihood'* «Lessico di Etica Pubblica» numero 2 Questioni-Inquiries (2022), at 30-33

[534] C. Panzera, '*Attuazione, tradimento e riscoperta del diritto di asilo*' Quaderni Costituzionali 4 (2022), at 823-826

[535] Corte di Cassazione, *I.L. v. Ministry of the Interior and Attorney General at the Court of Appeal of Ancona supra* note 514

[536] A. Stevanato, '*I migranti ambientali nel decreto-legge n. 20 del 2023. Che cosa resta della loro protezione?*' Saggi Corti Supreme e Salute 2 (2023), at 17

4.2.10. Concluding observations on the Italian case

As demonstrated, the Italian legislative framework on the protection of migrants has had a bumpy road over time. The humanitarian protection envisaged in Article 5, paragraph 6 of the CAI, represented the closing rule of the entire asylum regulatory system, a measure to safeguard the constitutional and international duties of the State, which find their source in the Constitution and in particular (but not only) in Article 10 and 117, and whose content, over time, was decline and increasingly confronted with the broad catalogue of human rights. In this way, situations of vulnerability, such as the subjective conditions experienced in the countries of origin and the violation of fundamental rights, and the open catalogue of rights under Article 2 Constitution [537] became fully relevant. It was substantially providing safeguards for migrants and, thus, it was the only provision that could preferably also entail the protection of environmental migrants. If the Salvini Decree repealed most of the grounds under which protection could be granted, the Lamorgese Decree tried to create a more homogenous regime of international protection. Under this regime, the protections became detached from the interests of the State and took the same legal situation as their premise: the interest of the person, often in the form of a subjective right. A certain unity of the system thus emerged. The special protection permit differed - in its normative prerequisites - from the other residence permits and international protections, but it shared their substance: it is for the protection of the person and, in this matter, represented a subjective right, the right to asylum. Although the new provisions of the Cutro Decree seem to turn back in time and aim at diminishing the safeguards,
nothing has changed concerning the obligation to issue a residence permit for special protection when expulsion is prevented by international, European or constitutional obligations: the prerequisites are essentially the same as those that required the issuance of a residence permit for humanitarian reasons.

[537] Article 2 Italian Constitution reads as follow: *La Repubblica riconosce e garantisce i diritti inviolabili dell'uomo, sia come singolo sia nelle formazioni sociali ove si svolge la sua personalità, e richiede l'adempimento dei doveri inderogabili di solidarietà politica, economica e sociale.*

Indeed, the reference to serious humanitarian reasons has been erased, but it is very difficult to envisage humanitarian reasons that do not also fall within the category of constitutional obligations, such as, for instance, the right to asylum under Article 10, inviolable rights under Article 2, the right to the full development of the human person under Article 3, or international and European obligations, to name a few, the rights under Articles 3 and 8 of the ECHR.

Beyond the scope of the two major protections under the CEAS, what complementary protection must ensure is that, in case of a return, no asylum seeker is deprived of the enjoyment of human rights below the ineliminable core constituting personal dignity. This can be observed by examining the case law of the Court of Cassation [538] itself, which, always basing itself on constitutional principles or EU or international law, has held that national complementary protection is the legal form apt to implement the obligation of non-refoulement and to protect situations of vulnerability to be safeguarded within the constitutionally and internationally protected fundamental human rights framework. The vulnerability was considered as the result of an assessment of several factors to be compared with the integration achieved by the migrant in the host country, but that, nevertheless, particularly serious situations of deprivation of human rights in the country of origin could give rise to the grant of humanitarian protection even in the absence of an appreciable level of integration in Italy. In particular, the Court of Cassation found that if the return to the country of origin is likely to result in a significant deterioration of private and/or family life conditions, inasmuch to constitute a violation of Article 8 ECHR, there is a serious humanitarian reason to recognise the need for protection. Along this line of reasoning, the Court [539] typified as a protectable condition of vulnerability, the one that results from natural disasters. Consequently, case law has framed the phenomenon of climate and environmental change within the notion of vulnerability through a case-by-case assessment of the individual asylum seeker situation taking into account, among others, the specific area of origin and its conditions, the personal condition of the applicant and the analysis of the consequent displacements. In the context of the

[538] Corte di Cassazione SSUU, ordinanza 24413/2021or 18455/2022

[539] Corte di Cassazione, *I.L. v. Ministry of the Interior and Attorney General at the Court of Appeal of Ancona supra* note 514

individual case study, the jurisprudence has affirmed that the adverse effects of environmental circumstances seriously affect the enjoyment of human rights and that, therefore, they trigger Italy's nonrefoulement obligations under domestic and international law.

4.3. The French legal framework on international protection and its case law

France, like most EU countries, does not have specific institutions working on climate-related migration and displacement issues. However, multiple organizations research and analyse the phenomenon, such as the NGOs Cimade, Caritas France Foundation, France Terre d'Asile and the National Institute of Demographic Studies. Relevant discussions at the international and European levels have been conducted by France, for instance, chairing the Global Forum on Migration and Development in 2022-2023 and choosing the focus on the impact of climate change on human mobility and tackling the negative effects of climate change. [540]

For what concerns the national asylum and migration legal system, France has laid down in the Code on the Entry and Residence of Foreigners and the Right of Asylum [541] (CESEDA), sometimes referred to as the Aliens Code, the legislative and regulatory provisions relating to the law on foreigners. The legal framework is composed of four types of protection. Firstly, being France [542] a signatory party to the Refugee Convention, the refugee status is embedded in its national legislation. [543] Moreover, the French Constitution entails refugee status, which, compared to

[540] Global Forum on Migration and Displacement France Chairmanship available at https://www.gfmd.org/meetings/france-gfmd-2022-2023/overview accessed 16 January 2024

[541] Code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDA) available at https://www.legifrance.gouv.fr/download/file/pdf/LEGITEXT000006070158.pdf/LEGI accessed 10 January 2024

[542] UNHCR, *States parties, including reservations and declarations, to the 1951 Refugee Convention France*, at 1 available at https://www.unhcr.org/fr-fr/en/media/states-parties-including-reservations-and-declarations-1951-refugee-convention accessed 10 January 2024

[543] CESEDA *supra* note 541, Article L 511-1 reads as follows : *La qualité de réfugié est reconnue :*
1° A toute personne persécutée en raison de son action en faveur de la liberté ;
2° A toute personne sur laquelle le Haut-Commissariat des Nations unies pour les réfugiés exerce son mandat aux termes des articles 6 et 7 de son statut tel qu'adopté par l'Assemblée générale des Nations unies le 14 décembre 1950 ;
3° A toute personne qui répond aux définitions de l'article 1er de la convention de Genève du 28 juillet 1951 relative au statut des réfugiés.

the one based on the Refugee Convention has a more political dimension and needs a proactive activity to entail protection for those who take an action to protect freedom in their countries and are persecuted for this reason. [544]

Lastly, subsidiary protection is based on the relevant EU law provisions. Furthermore, national law provides a right to asylum status for those falling within the mandate of the UNHCR. [545]

None of these statuses has been granted to those contending climate and environmental disasters as a ground for their recognition. [546] It is to point out, however, that in 2018, during the drafting proposal of the asylum and migration law, an article for the government to draw up guidelines for taking account of climate-induced migration and to strengthen its contribution to international and European work on this theme was suggested. The latter was later declared inadmissible because it did not comply with the Constitution. A year later, another draft law was proposed to implement a national and international strategy for the displacement of populations that are victims of climate change. [547] To date, however, no action has been taken on the proposal.

Moreover, the French legal system does not entail any humanitarian and complementary protection based on the principles of non-refoulement or the prohibition of torture and, consequently, does not address in any norms climate-related displacement. Nevertheless, the national legal system includes multiple temporary residence permits such as, for instance, residence permits for study reasons, for family reunification, for internship for employment reasons, for professional activity or in case of victims of human trafficking and smuggling.

Ces personnes sont régies par les dispositions applicables aux réfugiés en vertu de la convention de Genève susmentionnée. and Article L 511-9, *Dans les cas prévus aux 1° et 2° de l'article L. 511-8, lorsque la reconnaissance de la qualité de réfugié résulte d'une décision de la Cour nationale du droit d'asile ou du Conseil d'Etat, la juridiction peut être saisie par l'Office français de protection des réfugiés et apatrides ou par le ministre chargé de l'asile en vue de mettre fin au statut de réfugié. Les modalités de cette procédure sont fixées par décret en Conseil d'Etat.*

[544] CESEDA *supra* note 541, Article L 711-1. The French National Court on Asylum has not provided a precise definition of the concept of 'action for freedom'. It includes different types of action made to protect rights and freedoms of people. However, it does have to include a personal, individual and proactive role of the applicant in order to fall under such a category

[545] D. Bourriez, '*Les défis de la détermination du statut de réfugiés par le HCR'* Revue des droits de l'homme (2022), at 21

[546] *Ibid*, at 63-64

[547] European Migration Network, '*Displacement and migration related to disasters, climate change and environmental degradation'* (2023), at 6-7

Among these different residence permits, the residence permit for private and family life seems interesting for the object of this thesis. [548] The latter is issued in cases such as a third-country national in France for family reunification, a third-country national living in France since the age of 13 with one or both parents, a third-country national living in France or having completed at least one academic cycle or, finally, third-country nationals whose state of health needs treatment. [549]

Under the CESEDA, a foreigner residing habitually resident in France is fully entitled to a temporary residency permit for private and family life if his state of health requires treatment, the lack of which could have exceptionally serious consequences, and if, concerning the health services and characteristics of the health system of the country of origin, he would not have the effective possibility to benefit from appropriate treatment. Consequently, the residence permit can be issued only when it is ascertained that there is a distress situation of exceptional gravity, the absence of treatments in the country of origin and that the applicant has resided in France for at least one year. [550]

After a medical opinion issued by a panel of doctors and verification of effective access to medical treatment in their country of origin, the prefect may issue a permit for medical treatment to the person concerned. [551] The permit lasts two years and it is renewable according to the duration of the treatments but for a maximum of 4 years.

In a decision filed on 18 December 2020, [552] the Court of Appeal of Bordeaux granted the aforementioned temporary residence permit for medical treatment to an asylum seeker from Bangladesh who, given the health and environmental conditions in the country, would not have had any access to the essential medical treatment he needed. The applicant arrived in France in 2011 and obtained a health residence permit on the grounds of a respiratory disease requiring special treatment that was not available in his country of origin. In 2017, the Haute Garonne Prefecture decided not to renew his residence permit and issued a deportation order

[548] CESEDA *supra* note 541, Article L 313-11
[549] CESEDA *supra* note 541, Article L 313-11- L 313-15 and Articles R 313 -20 -R 313-34-4
[550] CESEDA *supra* note 541, Article L 313-324
[551] CAA de Bordeaux, 2ème chambre, 18/12/2020, 20BX02193, 20BX02195, Inédit au recueil Lebon, paragraph 4
[552] *Ibid*

because adequate treatment was available in Bangladesh. The applicant then appealed the decision. The Bordeaux Court had to assess the adequacy of the Bengali health system in treating the plaintiff's disease and the environmental conditions of the country of origin. The judges found the unavailability of the prescribed medication and argued that, since Bangladesh is one of the most polluted countries in the world, the pollution would have worsened the applicant's respiratory disease.[553] Finally, the Court noted that access to health services and their quality in Bangladesh are not comparable to European standards and that, therefore, a return to the country of origin would condemn the applicant to an undoubted aggravation of his condition. The Court therefore ordered the issue of a residence permit for medical treatment because of the serious environmental and health conditions of the country of origin.

This case is relevant for the position of environmental migrants because it is the first time that, in France, environmental degradation is considered a possible risk for the violation of the right to health and that it can be deemed as grounds against expulsion. Nevertheless, the requirements to fit in the residence permit, as it stands today, are quite strict and involve health being negatively affected in case of return to the country of origin. It is recalled that people fleeing from environmental disruptions might not satisfy this requirement since the consequences on health represent only one aspect of the general issue. Eventually, this means that the decision might positively affect only a minority of persons displaced that fall into this high threshold and limited scope of application. [554]

4.4. The German legal framework on international protection and its case law

In the German legal framework, the right to asylum has a constitutional status as a fundamental right and it is enshrined in Article 16a of the German Basic Law. [555]

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[553] *Ibid*

[554] European Migration Network, '*Displacement and migration related to disasters, climate change and environmental degradation' supra* note 547, at 67

[555] Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 19 December 2022 (Federal Law Gazette I p. 2478)
Article 16a reads as follows: *(1) Persons persecuted on political grounds shall have the right of asylum.*

The German Asylum Act [556] transposes into national law the international and European obligations to which Germany is bound and, therefore, the Act regulates international and subsidiary protection procedures. Asylum applications are decided by the Federal Office for Migration and Refugees and can be reviewed by administrative Courts. [557] In an ordinary asylum case brought before an administrative Court, three forms of protection are examined: refugee status according to the Refugee Convention, subsidiary protection based on the European Qualification Directive and a ban on deportation based on German immigration law and the ECHR. Refugee and subsidiary protection are laid down in the German Asylum Act under Sections 3 and 4 whereas the ban on deportation is to be found in the German Residence Act under Section 60. [558] The latter is based on Germany's human rights obligations under the ECHR and renders deportation inadmissible when contrary to the ECHR and, therefore, when a foreigner is threatened with inhuman or degrading treatment or punishment in her or his country of origin within the meaning of Article 3 ECHR. This peculiarity entails the fact that specific and degrading humanitarian conditions may also give rise to a breach of Article 3 ECHR and, here, the case of environmental migrations becomes relevant. The national nonrefoulement obligation could apply to environmental migrants when degrading humanitarian conditions emanate from poverty or environmental conditions. [559] As envisaged in the EU legal framework, German Courts have interpreted the notion of inhuman and degrading treatment as clarified by the ECtHR and the CJEU. Article 3 ECHR imposes an obligation of nonrefoulment when there are serious reasons that the applicant runs the risk of facing inhuman or degrading treatment in his country of origin. [560] Among these reasons, humanitarian conditions give rise to

[556] German Asylum Act in the version promulgated on 2 September 2008 (Federal Law Gazette I, p. 1798), last amended by Article 2 of the Act of 11 March 2016 (Federal Law Gazette I, p. 394)
[557] *Ibid*, Subchapters 1 and 2
[558] Residence Act in the version promulgated on 25 February 2008 (Federal Law Gazette I p. 162), most recently amended by Article 4b of the Act of 17 February 2020 (Federal Law Gazette I p. 166) Sections 60 (2) and (5) reads as follows: *(2) Foreigners may not be deported to a state where they face serious harm as referred to in section 4 (1) of the Asylum Act. […] (5) A foreigner may not be deported if deportation is prohibited under the terms of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms.*
[559] C. Schloss, '*Climate migrants - How German courts take the environment into account when considering non-refoulment*' Völkerrechtsblog (2021) available at https://voelkerrechtsblog.org/climate-migrants/ accessed 12 January 2024
[560] BVerwG judgment 10 C 15/12 (31 January 2013) paragraphs 21 et subsequents

a breach of Article 3 ECHR in very exceptional cases where the humanitarian grounds against removal are compelling. [561] These circumstances must be evaluated through a weighted summary assessment of the facts of the case [562] in which the social and economic conditions in the country of origin as well as the applicant's situation are analysed. Humanitarian grounds can reach the nonrefoulment threshold when the applicant finds himself in a situation of extreme material poverty that does not allow him to meet his most basic needs or puts him in a state of degradation incompatible with human dignity. [563] This applies also when the humanitarian conditions are solely or even predominantly attributable to poverty or a naturally occurring phenomenon and natural disasters such as German Courts have ruled. [564] The latter have mentioned natural catastrophes while assessing whether the deportation will result in cruel or degrading treatment because of the humanitarian situation in the place of origin. In certain instances, the judges concluded that the overall humanitarian situation was not serious enough and just briefly referenced natural disasters concerning Ethiopia, Mali, and Togo. On the other hand, the consequences of natural disasters were thoroughly examined by German courts in several rulings in Afghanistan, Iraq, and Somalia. These nations had frequent natural disasters, such as droughts, floods, or extreme cold which caused severe shortages of food and water and have put the population in a state of great vulnerability and difficult economic situation. Notwithstanding the humanitarian situation and general living conditions, the Courts concluded that it is necessary to consider the individual circumstances of the applicant and whether he will find sufficient means for a dignified life and not encounter inhuman or degrading treatment. [565]

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[561] *Ibid*, paragraph 25 when citing ECHR *Sufi and Elmi v UK* 8319/07 and 11449/07 (28 June 2011), paragraphs 218 and 278

[562] BVerwG decision, 1 B 2/19 (13 February 2019), paragraph 15

[563] CJEU C-163/17 *Abubacarr Jawo v Bundesrepublik Deutschland supra* note 358, paragraphs 90 et seqq

[564] C. Schloss, *'The Role of Environmental Disasters in Asylum Cases: Do German Courts Take Disasters into Account?'* in Climate Refugees Global, Local and Critical Approaches Part III - Regional and Local Perspectives and Solutions 261-276 Cambridge University Press (2022), at 268-274

[565] *Ibid*, at 272-273

It is to highlight a decision granted by the Higher Administrative Court of Baden-Württemberg [566] concerning the request for protection coming from an Afghan national. In the judgement, the Court annulled the repatriation decision by taking into consideration the social and economic conditions of the country and the individual's particular situation. Specifically, the Court considered the economic situation of the country and its general political instability, the effective access to food and housing and the impact of the current health crisis and the environmental conditions. It was acknowledged that the poor humanitarian conditions in which the population lived were exacerbated by environmental conditions, such as climate change and natural disasters, [567] as indicated in a report from the European Asylum Office and that most of the internally displaced people in Afghanistan fled because of natural disasters, especially floods and droughts. [568] In considering environmental factors among the grounds for considering the applicant's refoulment to be unlawful, the Court thus promoted a broad interpretation of the concept of vulnerability, recognising the impact these have on the fundamental rights of the person. In this case, the German Court has relied on the prohibition of inhuman or degrading treatment based on the broad interpretation given by the ECtHR of the effects of environmental degradation due to climate change on individuals considering Article 3 ECHR. [569]

All in all, the study of the German legal framework and the analysis of the national judgements highlight the restrictive application of Article 3 ECHR in only very exceptional circumstances, in line with the ECtHR's case law. The overall assessment of the humanitarian conditions led to a nonrefoulement obligation only in situations in which the threshold of individual vulnerability reached a tipping point. Among the factors considered, environmental aspects are not deemed as determining elements on their own, but they support applications for a ban on deportation based on the German national provision under Section 60 of the German Residence Act and the referred Article 3 ECHR. Moreover, it is to

[566] VGH Baden-Wuerttemberg, judgement – A 11 S 2042/20 (17 December 2020)
[567] *Ibid*, points 65-68
[568] S. Villani, *'Reflections on Human Rights Law as Suitable Instrument of Complementary Protection Applicable to Environmental Migration'* Diritto, Immigrazione e Cittadinanza Fascicolo n. 3/2021, at 24
[569] *Ibid,* at 25

underline how at the international level, Germany has advocated for the need to address climate-induced migration and displacement through new, complementary international legal tools and has supported the Secretariat of the State-led and EU-chaired Platform on Disaster Displacement, as a member of the Steering Group and through financial supports. [570] Moreover, it supports and funds partner countries to incorporate climate-related migration into national plans and to develop guidelines and capacity-building in modelling and forecasting. [571]

Indeed, numerous German institutes are addressing, in their research, the intersection between climate change and migration. [572] For instance, the Deutsche Gesellschaft für Internationale Zusammenarbeit is studying the issue through the implementation of programmes such as the Global Programme Human Mobility in the Context of Climate Change whose aim is to support countries in the sustainable management of human mobility in the context of climate change. [573]

4.5. The Cypriot legal framework on international protection

On the topic of environmental migration, it is important to note the Cypriot participation in the project 'End Climate Change, Start Climate of Change', [574] co-financed by the European Commission within the framework of the Development Education and Awareness Raising programme. [575] The latter foresees the growth of EU citizen's awareness of environmental migration.

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[570] Federal Republic of Germany, Statement ILC Report (73rd session) (2022)

[571] Examples of programmes and projects on the topic are: Strategic Plan on Human Mobility in the Context of Climate Change by the Organisation of Eastern Commission (OEC) available at https://pressroom.oecs.int/oecs-strategic-plan-on-human-mobility-in-the-context-of-climate-change accessed 16 January 2024 and the Global Programme on human mobility in the context of Climate Change available at https://migrationnetwork.un.org/projects/global-programme-human-mobility-context-climate-change accessed 16 January 2024

[572] Examples of research institutes working on the topic are: Potsdam Institute for Climate Impact Research and the Robert Bosch Foundation

[573] Deutsche Gesellschaft für Internationale Zusammenarbeit, *Human mobility in the context of climate change project* available at https://www.giz.de/en/worldwide/67177.html accessed 16 January 2024

[574] Climate of Change available at https://climateofchange.info/about-the-project/ accessed 16 January 2024

[575] Climate of Change, '*What is the DEAR programme*?' available at https://climateofchange.info/development-education-and-awareness-raising-programme/ accessed 16 January 2024

Cyprus is a party to international human rights treaties, specifically the 1951 Refugee Convention, and the EU and, therefore, it implements the relevant asylum and migration legal framework in its national legislation. The Republic of Cyprus adopted its first Refugee Law in 2000 and assumed responsibility for refugee status determination in 2002. The Asylum Service of the Ministry of Interior is the first-instance decision-making body while appeals are examined by the Special Court of International Protection. [576]

As envisaged in the international and European provisions, the cornerstone of the asylum legislation is the principle of nonrefoulment. All persons with international protection, namely refugees, beneficiaries of subsidiary protection status and persons with status based on humanitarian grounds are protected by it. Cypriot Law No. 6/2000 [577] implements the Geneva Convention and, under Articles 13(2)(c) [578] and 19(a), [579] provides for the possibility of granting protection based on humanitarian grounds in cases in which the threshold for international protection is not overcome. Still, a humanitarian ground exists when expulsion is not possible in law or fact. The provision seems rather broad and there are no further specifications as to what is meant by 'any humanitarian reason'. On the other hand, Article 29(5) [580] entails the prohibition of expulsion for any person who may be at risk of being subjected to torture, inhuman or degrading treatment or punishment in the sending country. However, paragraph 4 of Article 29 reserves only to beneficiaries of international protection the guarantee against expulsion to countries where there is

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[576] UNHCR *Cyprus Protection* available at https://www.unhcr.org/cy/protection/#:~:text=In%20summary%2C%20Cypriot%20asylum%20law,Special%20Court%20of%20International%20Protection. accessed 12 January 2024

[577] Cypriot Refugee Law No. 6(I) of 2000, available at: http://www.refworld.org/docid/4a71aac22.html

[578] *Ibid*, Article 13, paragraph 2, letter c) reads as follows: "*The Head, following the examination of the report of the competent officer, may, by a decision: […] (c) Reject the application and grant the applicant temporary stay status on humanitarian grounds, by virtue of Section 19A".*

[579] *Ibid*, Article 19 letter a) states: *"The Head, by a decision, shall grant status of residence on humanitarian grounds to any applicant who is not recognized as a refugee or who is not granted subsidiary protection status. (2) Status of residence on humanitarian grounds may be granted - (a) For any humanitarian reason, provided that this reason does not constitute a reason upon which subsidiary protection may be granted; (b) When the deportation of the applicant is impossible in law or in fact; (c) When the applicant stands a fair chance of obtaining a visa from another safe country which may be willing to consider his asylum request".*

[580] *Ibid*, Article 29 paragraph 5 states: "*The issuance of a deportation order against any person to a country where he would run the risk of being subjected to torture, inhuman or degrading treatment or punishment is prohibited".*

a risk to their life, liberty, or personal safety also due to environmental destruction.[581]

4.6. The Austrian legal framework on international protection and its case law

Austria, being an EU Member State and a party to most of the international human rights treaties, applies and implements the relevant legal frameworks. The policy discussion on climate change and its related migration and displacement is characterised by several parliamentary discussions which led to the mention of the issue in the last Three-Year Programme on Austrian development policy and its identification as a key challenge in the current Three-Year Programme which refers to the years 2022-2024. [582] Moreover, it implemented the Austrian Development Cooperation policy intending to mitigate climate-related migration by reducing emissions to not worsen the environmental crisis, strengthening the resilience of people living in developing countries and protecting people forced to migrate through a focus on humanitarian relief and assistance combined with a development cooperation approach. [583]

Regarding the national legal framework, Austrian asylum or migration law does not expressly protect environmental grounds. The central piece of legislation governing migration and asylum is the Asylum Act [584] which regulates the application procedure for international protection and subsidiary protection under EU law. In compliance with EU asylum law and its international obligations, the Austrian Asylum Act defines an application for international protection as an application for refugee or subsidiary protection status. [585] The eligibility criteria for refugee status

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[581] *Ibid*, Article 29 paragraph 4 reads as follows: "*No refugee or a person with a subsidiary protection status shall be deported to any country where his life or freedom will be endangered or he will be in danger of being subjected to torture or inhuman or degrading treatment or punishment or persecution for reasons of sex, race, religion, nationality, membership of a particular social group or political opinion or because of armed conflict or environmental destruction".*

[582] European Migration Network, '*Displacement and migration related to disasters, climate change and environmental degradation' supra* note 547, at 8 and 10

[583] *Ibid*, at 11

[584] Austrian Federal Act Concerning the Granting of Asylum (2005 Asylum Act – Asylgesetz 2005) Federal Law Gazette (FLG) | No. 100/2005 available at https://www.unhcr.org/media/austria-federal-act-concerning-granting-asylum-2005-asylum-act-asylgesetz-2005-federal-law accessed 15 January 2024

[585] *Ibid*, Chapter , Article 2(13)

refer to the refugee definition of the Refugee Convention [586] while the one referring to subsidiary protection refers to Articles 2 or 3 ECHR. [587] The latter, by directly mentioning the ECHR, is broader than the definition of serious harm in Article 15(b) Qualification Directive. As a fact, the eligibility criteria of the Asylum Act do not mention a requirement of an actor of serious harm in the country of origin for granting subsidiary protection. In 2019, the Austrian Supreme Administrative Court [588] clarified that in Austria the granting of subsidiary protection did not require the involvement of an actor and that a real risk of an Article 3 ECHR violation was sufficient. [589] By not granting the status of beneficiary of subsidiary protection contrary to the Asylum Act, a violation of Article 3 ECHR and the constitutionally guaranteed right to equal treatment of foreign nationals were violated.

Furthermore, Austria has implemented provisions of protection on humanitarian or compassionate grounds in cases in which neither international nor subsidiary protection applies. A residence title must be granted if a deportation would violate Article 8 ECHR and, specifically, if the right to private and family life would be violated. [590] The criteria envisaged are the situation of the applicant in Austria, the ties to his or her country or origin and whether the applicant has the possibility of creating a dignified livelihood upon return. [591] Moreover, a residence title for particularly exceptional circumstances exists, but environmental factors will not play a relevant role since the eligibility criteria relate to the individual situation of the applicant in Austria and can be granted to a limited group of persons. [592]

Based on this national legal framework is interesting to analyse the jurisprudence of Austrian Courts on the grant of refugee status and subsidiary protection to critically depict if there is any space for protection for environmental migrants. Natural disasters were mentioned in the legal reasoning concerning refugee status and played an important role in many decisions concerning the granting of a

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[586] *Ibid*, Chapter 2 Section 1
[587] *Ibid,* Chapter 2 Section 4, Article (2)
[588] VwGH 21 May 2019, Ro 2019/19/0006
[589] VfGH 4 December 2019, E1199/2019
[590] Asylum Act *supra* note 584, Section 55(1)
[591] M. Ammer, M. Mayrhofer and M. Scott, '*ClimMobil - Judicial and policy responses to climate change-related mobility in the European Union with a focus on Austria and Sweden* (KR18AC0K14747) Synthesis Report Ludwig Boltzmann Institute and Raoul Wallenberg Institute (2022), at 9
[592] *Ibid*

subsidiary protection status. [593] In the first case, disaster situations had a marginal role because they were regarded as irrelevant to granting asylum. The Courts stated that being economic issues, they would not qualify as persecution, in line with the overall interpretation of the Refugee Convention. On the other hand, when ruling on subsidiary protection statuses, the Courts reviewed environmental circumstances when there was a real risk of inhuman or degrading treatment upon return to the country of origin under Article 3 ECHR and the Asylum Act. The Courts had to assess the individual circumstances of the claimant considering the general situation in the receiving country during the nonrefoulment assessment. According to the Austrian Supreme Administrative Court, the return to the country of origin can constitute a violation of Article 3 ECHR if the basic needs of human existence of the applicant cannot be met in extremely exceptional circumstances. The risk must be assessed by analysing the personal situation of the applicant and the general human rights situation in the country of origin. In this assessment, the environmental factors played a critical role. The Austrian Courts considered the disasters and specifically evaluated the impact of the disaster on the overall general situation of the country of origin, with a specific focus on security, the supply situation, and individual aspects (such as family support, gender, wealth, health, or professional situation) when assessing the eligibility for subsidiary protection. The impact of the disaster was mostly evaluated based on the report on Country-of-Origin Information and a real risk assessment.

In a case study conducted on the Austrian legal framework, [594] the results stated that in 36.5 %of the decisions, an explicit reference to a disaster or other environment-related issues or - in most cases one amongst other –reasons to not return to the country of origin and grant subsidiary protection.

The Austrian Court's consideration of disasters when assessing the nonrefoulement principle under Article 3 ECHR confirms the importance of this principle when implementing protection statuses for environmental migrants. It can be deemed as an example of an approach to dealing with the legal status of third-country nationals

[593] *Ibid*
[594] *Ibid*, at 16

who are unable to return to their countries of origin due to the impacts of disasters.

4.7. The Swedish legal framework on international protection

It is interesting to choose Sweden as one of the case studies for this research to investigate the national provisions for temporary protection for people fleeing natural disasters, which, although not in force anymore, might provide important insights for further developments for the development of new norms of international protection to address cross-border displacement in the context of disasters and climate change. First, Sweden is a party to the Refugee Convention and the EU and, therefore, it implements the relevant provisions in its national legislation.

In 1996, the Swedish government proposed and later implemented, a national legal framework for protecting people who, despite not meeting the requirements for international protection, were still in need of protection due to environmental degradation and disasters. [595] The provision was incorporated into the Aliens Act [596] and under Chapter 4, it contained a category for a person otherwise in need of protection which refers to *a person otherwise in need of protection in this law as 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*

1. needs protection because of an external or internal armed conflict or because of other serious tensions in the home country feels a well-founded fear of being exposed to serious harm or

2. is unable to return to her home country because of an environmental disaster. [597]

The grounds under which this protection status could have been granted included, as well, the inability to return to one's country of origin due to environmental disasters. As indicated in the preparatory work, only sudden disasters would be included as 'environmental disasters' in the law, while slow-onset disasters and

[595] M. Scott and R. Garner, '*Nordic Norms, Natural Disasters, and International Protection'* Nordic Journal of International Law 91(1) (2022), at 110

[596] Swedish Government Aliens Act Utlänningslag 2005:716 available at https://www.government.se/contentassets/784b3d7be3a54a0185f284bbb2683055/aliens-act-2005_716.pdf accessed 17 January 2024

[597] *Ibid*, Chapter 4 Section 2a(2)

degradation of people's livelihoods do not fall under the definition and the grant of protection was precluded when Sweden's capacity of receiving aliens was at stake.[598]

At first, if the protection category person otherwise in need of protection had remained in the Swedish legal framework, it could be argued that it would have been the legislation needed to protect environmental migrants from the risks faced due to climate change. However, a review of judicial decisions found that no one has ever been granted subsidiary protection in Sweden on environmental grounds both on rapid and slow natural events. [599] Moreover, the study notes that judicial authorities frequently failed to take into consideration claims relating to disasters, even when the provision was expressly invoked by the claimant. These structural factors, the general wording of the provision, a very narrow eligibility criteria created a category of international protection that was no more extensively applicable than the refugee and subsidiary protection status. Due to the non-implementation of the provision and to not deviate from the regulations of other EU countries, this national norm was repealed in 2021.

Nevertheless, the subsidiary protection status harmonized under the EU Qualification Directive still applies and has been implemented in the Swedish Aliens Act. Under the latter, a person can obtain the subsidiary protection status if they experience personal and political insecurity. [600] On the other hand, Chapter 5 states that exceptions can be made for a person who does not meet the requirements for refugee status or subsidiary protection status and a temporary or permanent residence permit can be issued. The applicant must find himself in exceptionally distressing circumstances and an overall assessment of the person's state of health, adaptation to Sweden and the situation in the country of origin must be made. In these cases, it can be argued that a residence permit can be also granted for distress caused by climate change because of its possible negative effects on the person's

[598] *Ibid*

[599] M. Ammer, M. Mayrhofer and M. Scott, '*ClimMobil - Judicial and policy responses to climate change-related mobility in the European Union with a focus on Austria and Sweden supra* note 591, at 106

[600] Swedish Aliens Act *supra* note 596, Chapter 4.2

state of health and the situation in the country of origin. [601] However, the exceptionality of the status indicates the uncertainty under which those seeking protection from climate change would be granted a residence permit.

Therefore, it is not possible to say with certainty that an environmental migrant would be guaranteed protection under Swedish law, especially due to the lack of legal status for climate refugees in the Swedish Aliens Act after the removal of the status person otherwise in need of protection.

4.8. The Member State's response to environmental migrants: possible solutions?

This analysis aimed to show that climate change and environmental degradation and their effects on migratory movements are increasingly debated and addressed by a growing number of Member States. Increasingly, several of them include the issue as part of their wider policies focusing on development cooperation and humanitarian aid, and as part of research projects and initiatives.

Moreover, the study on national provisions has tried to stimulate reflections on the role of the principle of nonrefoulment as a protection instrument in cases of environmental migration and to demonstrate how these national provisions might be examples of how protection for people displaced in the context of natural disasters and climate change might be possible outside the scope of the Refugee Convention and the subsidiary protection status under EU law. Despite the lack of a specific legal framework to address environmental migration, these evolutive national provisions and interpretations may lay the foundation for future cases in which the impact of environmental circumstances may provide grounds for protection. The legal analysis reveals different approaches among Member States and divergent extent of implementation.

The Italian case suggests that complementary protection regimes such as the former humanitarian protection or the current special protection, have a broad spectrum and might likely prove efficient for environmental migrants. The Courts' human

[601] M. Kaplan, *'Climate Refugees – deserving of protection? A study on climate refugees and their rights to protection*' Stockholm University Master's Essay in International Relations, at 41

rights-based interpretation of national provisions unveils cases in which environmental conditions can amount to profound human rights violations and legitimize the need for protection especially since they are based on individual vulnerability rather than on the severity of the environmental or climate-related events considered to be triggering the displacement. This line of reasoning could also be implemented at the EU level as a unique perspective where environmental threats are considered valid grounds for protection and as a restriction on removal to environmentally unsafe countries. An evolutive interpretation of the already existing international and European provisions and customary norms (such as the non-refoulment principle) through the human-rights-based approach entailed by the dynamic interpretation of the Italian Courts, could provide for extensive applicability of the norms to situations in which climate change and environmental disruption are the cause of displacement and promote an overall best practice.

The French legal system, although not providing any specific provision on humanitarian protection, has recognised as grounds against expulsion environmental degradation to be granted when those impair the enjoyment of the right to health. This interpretation is relevant to the case of environmental migrants but integrates a high threshold and limited scope of application since people fleeing from environmental disruptions might only eventually suffer from negative health consequences.

Conversely, Germany and Austria have offered in their case law instances in which environmental factors can be considered among the grounds for the prohibition of refoulment based on a broad interpretation of the concept of vulnerability and Article 3 ECHR. If, on the one hand, Austria attaches the need to grant protection under the subsidiary status to those situations in which human rights are at stake, regardless of the involvement of an actor, on the other, Germany led to a nonrefoulement obligation only in situations in which the threshold of individual vulnerability reached a tipping point.

For what concerns national legal frameworks, it is noted that Cyprus endorses the right to beneficiaries of international protection guarantee against expulsion to countries where there is a risk to their life also due to environmental destruction.

Lastly, the Swedish case shows how the presence of a specific norm but a very narrow eligibility criterion granting protection does not always entail the actual recognition of it. Although the Swedish Aliens Act explicitly stated that the definition of the persons 'otherwise in need of protection' encompasses people who flee their country of origin and are unable to return due to an environmental disaster, it is still a limited provision and the fact that protection can be denied in cases where the Swedish asylum system is considered not capable of handling an excessive number of applications, is a strong limitation.

Ultimately, these national cases suggest the creation of alternative instruments of protection, outside of the international protection and subsidiary ones, and based on a compliant reading of the relevant international, European and constitutional human rights norms. [602]

Despite the lack of a specific legal framework to address persons displaced due to natural disasters and climate change-related harm, already existing provisions based on a human rights approach and the principle of non-refoulment can play a significant role. The national case law expansively interprets asylum and migration provisions in light of potential environmental threats to migrants' rights which are not only deemed as the main cause of displacement but also as grounds under which protection can be granted. Indeed, these national cases take into account the unbearable material deprivation that might be caused by environmental conditions and apply nonrefoulement obligations and humanitarian reasons to cases where removal to climate change-affected countries would be unsafe. The EU policy response could promote a similar extensive application and expansive interpretation of already existing provisions as implemented in the national legal frameworks analysed. Indeed, several Member States have reported discussions and debates on the impact of climate change on migration either as part of their national policies or as an advocacy policy in the European forum. It is relevant to note the German position which advocated for a focus on the legal protection of persons affected by climate change and to further survey applicable international legal frameworks, or

[602] For the relevant European and international principles see: Articles 2, 3,8 ECHR and Articles 2,3,18 EU Charter or the principle of nonrefoulment under Article 33 of the Geneva Convention
For the relevant Italian Constitutional principles see: Articles 2,3,10, 117 of the Constitution

the French one, promptly financing the EU-chaired Platform on Disaster Displacement, and calling to urgently tackle the damaging effects of environmental factors on migration. [603] These national prompts and actions could further Member States to pursue policy and normative initiatives within the EU to introduce new ad hoc disciplines aimed at providing effective protection measures or expansively interpret the already existing ones. For instance, although environmental threats arguably fall outside of the scope of the QD, an extensive interpretation of the latter considers environmental phenomena as capable of affecting the enjoyment of human rights and, therefore, as possible grounds for granting protection based on the principle of nonrefoulment laid down in the EU Charter, could provide the level of protection needed. Moreover, considering the EU's obligations to promote and protect the enjoyment of human rights, the creation of an ad hoc instrument of complementary protection in which environmental circumstances affecting the lives of the affected population are deemed as the principal and direct cause of displacement could be proposed. In particular, by taking inspiration from the national provisions on humanitarian and complementary protection, the proposal shall widen the scope of the application of asylum provisions in compliance with the provisions on respect of human rights and, therefore, apply to those displaced for environmental reasons.

Therefore, it is possible to argue that these national provisions and case law may inspire a comprehensive EU approach to climate change and migration that both builds upon existing instruments and upholds the CEAS.

[603] European Migration Network, '*Displacement and migration related to disasters, climate change and environmental degradation' supra* note 547, at 9-10

CONCLUSIONS

The present dissertation has underscored the pivotal role of climate change and environmental disruptions in affecting migration scenarios. Indeed, not only do they overwhelm ecosystems but also degrade the living conditions of those populations unable to counter, mitigate and/or adapt to them which, consequently, find themselves in need of migrating. This multifaceted and compound phenomenon is reflected in a scarce, if non-existent, internationally common definition of the issue and, therefore, the guarantee of a legal status and a mechanism for comprehensive protection.

In this complex and rather controversial setting, this thesis proposed to examine the issue from a legal standpoint. One of the assumptions of this research is that it is also the EU's responsibility to reduce the harmful influence of human activity on the global climate, and thus to respond to the humanitarian crises and displacement resulting from it due to its reputation as a global human rights leader. For these reasons, the relevant EU acquis was analysed in all its instances.

A transverse study of the phenomenon, across multiple international regulatory disciplines and different legal systems, found a lack of a defined legal and policy framework capable of responding comprehensively to the phenomenon and proved the complex and multicausal nature of the migratory phenomenon at stake. Arguably, the international asylum framework tends to be inapplicable because environmental factors do not fall under the stringent hypotheses envisaged and the efficacy of an additional Protocol including the protection of environmental refugees is fraught with doubts. The same conclusion applies to international environmental law, a further Protocol to the UNFCC would consider the root causes of migration but only those produced by climate change. On the other hand, existing human rights instruments - likely to generate nonrefoulement obligations - may be capable of extending the scope of protection. Herein, the expansive interpretation given by national Courts according to which environmental factors are regarded as determinative for the evaluation of inhuman and degrading treatment, ties in well with international and European commitments for the protection of human rights.

Further to this analysis, it appeared important to assess what are the most adequate EU legal instruments that can regulate the phenomenon discussed. A similar fate within the European Union matched the overall inadequacy of the instruments analysed at the international level. Indeed, multiple EU Institutions and actors have acknowledged the issue and called for governance policy developments but the analysis reveals a lack of operationalising measures.

The current structure of the European asylum system and further provisions based on humanitarian grounds do not contemplate any form of protection for those who move due to climate change and, in general, make no provision for other migratory phenomena linked to environmental factors.

On the other hand, the EU has been particularly keen on addressing the root causes of this type of migration. It provides numerous instruments apt to the fight against climate change and financial aid to implement adaptation strategies for vulnerable countries through internal and external tools and participating in international agreements.

The crux of the problem is that, despite growing interest and acknowledgement of the phenomenon, the EU's policy on environmental migration is a result of migration, climate, development cooperation, and humanitarian aid actions. Each of these areas of expertise approaches the issue from a distinctive point of view, resulting in a policy that is often built on narratives that are incompatible with one another and counterproductive to successful policy outcomes. Furthermore, these initiatives are frequently motivated by contradictory policy goals, undermining the coherence and legitimacy of their approach and only indirectly addressing the issue of environmental migrants.

National complementary forms of protection that find legitimacy for compassionate, humanitarian, or other reasons were analysed. The red thread connecting all the reflections conducted is represented by human rights-based practices extensively interpreting the national legislation. Here, it is relevant to highlight the Italian case. Despite the lack of normative consistency, a human rights-based approach considering environmental factors as one of the main drivers of migration capable of impairing fundamental human rights and dignified living conditions was followed. Reasonably foreseeable threats triggered by

environmental degradation give rise to Italy's nonrefoulement obligations under domestic and international law to grant a residence permit for humanitarian reasons, and in other circumstances, as the factor to be taken into consideration when assessing a condition of vulnerability deserving protection.

The overall study of policies and legal frameworks at the international, European and national levels in the sectors that align the multi-faceted nature of the environmental migration phenomenon found a lack of a comprehensive and structural normative framework capable of protecting this category of displaced people. What the research illustrates is that the solution to better management of environmental migration is setting up a coherent and effective legal and policy framework that could be possibly implemented at the EU level.

On the one hand, addressing the root causes of such migration - global warming and the lack of adaptive strategies – appears fundamental to supporting the communities affected and, at least partially, avoiding migration. Among these, in the EU external policy, taking far-reaching measures to fight climate change and directing aid funds and crisis tools for the enhancement of adaptive measures in developing countries are examples of concrete actions.

On the other hand, this phenomenon also has to be dealt with from the migratory side and the necessary development of legal tools specifically addressing the needs and interests of environmental migrants. To this end, protection avenues could be addressed through the creation of additional measures or an expansive interpretation of the already existing ones.

A possible reform of the CEAS that widens protection for emerging new causes of migration, such as environmental ones, seems feasible and could seize upon the New Pact on Migration and Asylum. The pending proposal for a Union Resettlement Framework suggests providing safe and legal pathways to vulnerable third-country nationals in need of international protection, including people with socio-economic vulnerability. This category widens the scope of the application of resettlement beneficiaries and, therefore, might also include those displaced for environmental reasons and whose socio-economic vulnerability depends on them.

Indeed, this new measure could explicitly grant protection in the form of resettlement to environmental migrants at the EU level.

Nevertheless, it is important to note the Union's restricting approach to migration. Arguably, negotiating protection for additional categories of migrants sounds unlikely, given Member States' reluctance to assume additional protection responsibilities and further restrict their sovereignty coupled with the cumbersome process of negotiating or amending international instruments. Although supranational solutions may be able to respond more organically, there are evident practical obstacles and application limitations.

For these reasons, an evolutive interpretation of current legal tools could be considered, extending their scope to new vulnerabilities emerging from climate change and environmental degradation. For the EU's efforts on climate and migration to be truly comprehensive and effective, it should address the nexus between the two by (1) promoting an extensive application of existing protection instruments and human rights law; and (2) extensively interpreting asylum and migration provisions in light of potential environmental threats to migrants' rights. For instance, even though environmental circumstances fall outside of the scope of the QD, an extensive application of this instrument might serve the purposes of environmental migration. A broad and consistent interpretation of the EU Charter and the ECHR might consider the deprivation of socio-economic rights, that may happen in the occasion of natural disasters or environmental degradation, ill-treatment and, therefore, could be interpreted as in to give protection to environmentally displaced people. The relevant prohibition of torture or inhuman, degrading treatment or punishment is closely linked to respect for human dignity and its breach requires a particularly high threshold as in the case where State authorities' acts or omissions create a situation of extreme material deprivation. It could be subsumed that environmental conditions entailing extreme material deprivation caused by the State's actions or inertia might, in certain circumstances, amount to a violation of the prohibition of torture, inhuman and degrading treatment and punishment and, consequently, meet the threshold of serious harm under Article 15(b) QD.

Another example could be the expansive use of the Return Directive. Arguably, a return decision must respect the principle of nonrefoulment by taking into consideration the returnee's situation and, in some instances, Member States can grant a right to stay for compassionate humanitarian or other reasons. Among those, an expansive interpretation could envisage environmental and climatic changes capable of diminishing the chances of fully enjoying fundamental rights.

In this context, both non-refoulement and humanitarian reasons become relevant and an expansive interpretation of the exceptions to removal would also be consistent with the human rights approach adopted at the international level, as in the *Teitiota* case, at the European level both in the ECtHR and CJEU case law and the national level. In particular, if we take into consideration the ECtHR's interpretation, although no express reference is made to the issue of environmental migration, the inclusion of the protection of the environment within the right to life under Article 2 ECHR and the prohibition of inhuman or degrading treatment under Article 3 ECHR could allow for indirect reflexes of protection for those persons who, fleeing from environmental and natural phenomena, wish to resist deportation or seek international protection on the assumption that the situations they risk suffering in their countries of origin violate those rights enshrined in the ECHR and to which the EU and its Member States are called upon to respect. Moreover, a push towards this interpretation is represented by existing national initiatives which have shown that an expansive interpretation of existing norms results in environmental threats to be considered as valid grounds for protection in compliance with the full respect and implementation of human rights standards.

By adopting this human-rights-based approach, the EU would set a remarkable example and reinforce its reputation as a global human rights leader, while protecting people displaced by environmental catastrophes.

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