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Environmental migrants under the law of the European Union

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Anno Accademico 2019/2020

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INTRODUCTION

Climate change and migration are two crucial issues demanding an immediate and adequate response from legislators. Climate change is transforming the terrestrial, aquatic and marine ecological systems, inducing droughts, flooding, desertification, soil contamination, wildfires and extreme weather in several areas of the world. These events hit each and every country of the world, demonstrating the global nature of climate change that, as such, needs global responses. In some regions, also, the natural hazards are likely to further increase existing vulnerabilities, such as poverty, water scarcity, food insecurity, spreading of infectious and waterborne diseases and conflicts. Such risks, created or exacerbated by the natural hazards, can cause displacement, both internal and international.

Environmental displacement is a phenomenon recognized by both the European Union (EU) and the international community, that have discussed it in a number of occasions. Nonetheless, it does not exist an entity – be it an international organization, a specialized UN agency or a similar organism or multilateral task force created under an *ad hoc* international agreement - entrusted with the task of creating a legal framework for cross-border environmentally displaced people and several actors could, in theory, develop such a framework.

The thesis will examine the possibilities available to the EU for protecting this category of migrants by using existing internal and international legal instruments or by creating new legal tools. The EU and its fundamental values can be affected by the phenomenon of environmental migration, in particular human rights: the right to life, the right to asylum and the prohibition of torture and inhuman or degrading treatment or punishment as enshrined in the EU Charter of Fundamental rights, 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 are just few examples of the implications of climate migration within the EU system.

Thus, considering the potential impact of climate migration within the EU, it appears crucial to examine the competences of the EU in the field of migration and

environment, with the aim of identifying the allocation of both internal and external powers between the EU and its Member States.

Today's States perceive the regulation of migration as a national prerogative, even if they, alone, are not capable of addressing properly the migratory phenomenon because of its global nature: today's legislators are quite reluctant to provide support to migrants, especially a category not fully recognized such as environmental migrants. For this reason, it is required an examination of the role of the European Courts, namely the European Court of Human Rights and the European Court of Justice, as entities capable of interpreting the law in an evolutionary manner. Although the EU is not yet a member of the European Convention of Human Rights and considering the rank that the ECHR has in EU legal order as set in Article 6 TUE, the European Court of Human Rights and the European Court of Justice influence each other. Moreover, many provisions of the ECHR are partially mirrored by the ones of the European Charter of Fundamental Rights; thus, the clarifications given by the two Courts acquire a very significant value in the present analysis.

In the same line of identifying solutions complementary to the one of establishing the most suitable legal instrument for the protection of environmental migrants, the focus is also put on the pre-emptive measures that the EU could adopt, in terms of fighting climate change and building adaptive capacities regarding the adverse effects of climate change in the regions of the world particularly vulnerable.

The first Chapter of the thesis has the purpose of presenting the issue of displacement caused by environmental factors. In particular, the link between natural disasters and environmental degradation, caused by climate change, and the phenomena of displacement and migration of the people affected by these events will be explored. Having acknowledged that climate change is, in fact, a cause of migration, the figure of the environmental migrant is investigated: from the fact that it does not exist yet a common definition or term to define and describe those who flee because of natural hazards, to the narratives that media, political leaders, international organizations and think-tanks have made about environmental migration. These two aspects are fundamental because they constitute the basis of a potential legislative response to the phenomenon: while an internationally agreed

definition is useful to identify those in need of protection and their rights, how environmental migrants are portrayed – as victims, security threats, adaptive agents or political subjects – influence the legal way in which such protection is accorded. The final section of the Chapter is dedicated to the recommendations made by various actors – the EU, the UN, the Nansen Initiative and NGOs – to address the issue better.

The second Chapter initiates the examination of the legal instruments, already available or to be created, that can regulate the phenomenon of environmental migration. In particular, the external competences of the EU for what concerns the participation in or the creation of international agreements regarding climate migration are studied. The legal options for the EU are various: creating a new legal framework, letting the Security Council deal with the matter, modifying the Convention relating to the status of refugee or adding a new Protocol to the UNFCCC. All these solutions need to be examined comparatively, assessing what is the most adequate for the protection of environmental migrants and taking into account the exigencies of the EU. The role of the European Courts is also analyzed in the Chapter, as well as the principles that emerged in judgements regarding naturally occurring harms.

After the assessment of the international instruments, the third Chapter is dedicated to the internal solutions of the EU, in the form of existing legislation concerning the phenomenon of migration. The evolution of the EU migration and asylum policy will be explained in order to present a historical and legal context to the measures under examination. The latter are the Qualification Directive, the Temporary Protection Directive and the Seasonal Workers Directive: the analysis of these pieces of legislation will include the study of the relevant provisions suitable for the protection of environmental migrants and the obligations of the Member States, under the Directives. The ultimate aim is to verify the appropriateness of these measures for what concerns the protection of cross-border environmentally displaced people. However, recognizing that the EU has not yet developed a legal instrument that specifically addresses the need of environmental migrants, a part of the discussion will be dedicated to the initiatives of those

Member States that created legislation regulating the entry and stay of people fleeing from natural disasters.

Finally, the fourth Chapter, reiterating the close link between environmental migration and the adverse effects of climate change, describes the efforts of the EU to combat climate change and to financially support the development of adaptation measures in countries particularly vulnerable to natural hazards are examined as ways to prevent, in the long term, migration to take place.

The evolution of the EU's environmental policy will be explored to understand the growing importance the EU has given, over time, to environmental matters and the fight against climate change. Indeed, the goals of the EU for what concerns limiting the production of greenhouse gas emissions, enhancing the use of renewable energy and improve the energy efficiency of the EU are ambitious, as well as the measures put in place in order to achieve them. The EU is also part of relevant international agreements, whose policies are coherent with the EU ones and that bring to a global level the resolution of the present environmental challenges.

The second part of the Chapter is dedicated to the creation of and participation in funds developed to support the mitigation and adaptation strategies of communities affected by the negative effect of climate change as ways to render the vulnerable countries adapt to sustain livelihoods.

CHAPTER I

CLIMATE CHANGE AND ENVIRONMENTAL MIGRATION: INTERRELATED ISSUES OF EVER-INCREASING INTEREST FOR THE EUROPEAN AND INTERNATIONAL COMMUNITY

The UN Internal Displacement Monitoring Centre (IDMC) and the Norwegian Refugee Council (NRC) identify environmental hazards as the leading cause for internal and international displacement¹. In this Chapter it will be analyzed how natural disasters and progressive environmental decline may be a direct cause of displacement, as well as an indirect cause.

Environmental displacement and climate change are, in fact, two crucial and complex topics in today's world. On the one hand, climate change - caused mainly by human activities - has had, in the last decades, a severe impact on the environment: it has modified the earth in terms of precipitations, sea-level rise and increase of temperatures. These changes are already causing damages to human health and terrestrial and aquatic ecological systems. Deterioration of environmental conditions, as well as natural disasters, are causing cross-border displacements, that become part of the broader migratory phenomenon that hit mainly Europe in recent years. Migration is currently a very discussed topic for its implications in the countries of destination, that find themselves, as a consequence of the migratory influx, tackling economic, social and political difficulties. The two events – climate change and migration – are therefore strictly linked in some situations.

International and regional organizations have addressed the issue of environmental displacement, acknowledging first of all its existence and proposing recommendations to deal with the phenomenon. The international community has not however reached a common definition for those who flee because of the effects of climate change: thus, the various terminologies and definitions used to describe

¹Apap Joanna, *The concept of 'climate refugee': towards a possible definition*, European Parliamentary Research Service, 2019, at 2.

this category of people will also be discussed in the Chapter; a shared definition is the first step to identify who are the people in need of protection and, therefore, to properly address the issue.

The EU has recognized the problem of climate change-related migration as well as the necessity to find an adequate solution to the problem. A variety of papers were commissioned to understand the issue better, as it will be shown in paragraph 4. The EU's position on the matter is not yet completely consolidated and the migratory crisis of 2015, who caused a rise of nationalism in a high number of Member States, had posed more difficulties in talking about protection of migrants. For this reason, environmental displacement was seen, at an EU level, also as a security threat.

1. The predicted effects of climate change

As mentioned before, climate change endangers places, species and people. It is important, however, to acknowledge which are the risks for the environment and, consequently, understand the impacts on communities living in areas vulnerable to the effects of climate change. This type of analyses is relevant not only to recognize better the root causes that force people to leave their country but also to identify the areas in which the adaptive capacities of the people affected should be reinforced, so that migration can be avoided altogether, as it will be described in Chapter 4.

1.1. The response of the environment to climate change

One of the major consequences of climate change is the raising of temperatures and, by the end of 2099, temperatures are expected to increase between 1,8°C and 4°C². It may lead, on the one hand, in certain areas, to the rise of evaporation rates which, in turn, results in an increment of the amount of moisture circulating; therefore, because of the quantity of moisture, intense precipitation happens, potentially triggering flooding. On the other hand, warmer temperatures may lead to drought

² Brown O., *Climate Change and forced migration: observations, projections and implications*, Human Development Report Office, 2007, at 9.

and desertification³; by 2050 it is estimated that in the sub-Saharan Africa there will be up to 10% less rainfall annually: this could have a substantial impact on the people who sustain themselves mostly through rainfed agriculture⁴.

Meanwhile, a global sea-level rise between 5cm and 82cm is expected by the end of 2100; it will cause an increase of flooding, especially in the large deltas' regions and low elevation coastal zones.

Lastly, climate change will worsen the health of a significant number of people, especially as a result of malnourishment and diseases that are sensitive to temperature and precipitation⁵; moreover, it may exacerbate the incidence of infectious diseases such as malaria, waterborne diseases such as cholera and cardio-respiratory diseases⁶.

Not only natural hazards but also human-made hazards will put human lives at risk (e.g. land degradation through the use of fertilizers, drilling or mining); in 2014, for example, a human-made disaster happened in Zimbabwe because a dam failed and 2000 people lost their homes.

A disaster may also be triggered by a combination of natural causes and human actions, as articles 1 of the United Nations Framework Convention on Climate Change (UNFCCC) underpin defining climate change as “*a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods*”⁷.

³ National Aeronautics and Space Administration (NASA), *Climate change: Trends&Patterns*, available at: <<https://gpm.nasa.gov/science/climate-change>>

⁴ Graf Keyserlingk J., *Immigration Control in a Warming World: Realizing the Moral Challenges of Climate Migration*, Imprint Academic, 2018, at 52.

⁵ Nyong A., *Impacts of climate change in the tropics: the African experience*, 2005, at 4 and 12.

⁶ O'Brien K., Sygna L., Leichenko R., Adger W.N., Barnett J., Mitchell T., Schipper L., Tanner T., Vogel C., Morteux C., *Disaster risk reduction, climate change adaptation and human security: a commissioned report for the Norway Ministry of Foreign Affairs*, University of Oslo, 2008, at 10-11.

⁷ United Nations Framework Convention on Climate Change, 1992.

1.2. The response of humans to climate change

In the mid-1990's it was estimated that at least 25 million people had to leave their houses because of difficulties linked to climate change, as pollution, land degradation, droughts and natural disasters; of these 25 million, ten million people had escaped from recent droughts, and only half of them returned home. It was stated that the numbers of those that were called 'climate refugees' were comparable to the ones of refugees for reasons of wars or political persecution⁸.

In 2018, the United Nations High Commissioner for Refugees (UNHCR) stated that since 2009 a person every second was displaced by a natural disaster, with an average of 22.5 million people environmentally displaced by climate events⁹.

The IDMC and the NRC reported that the chance of being displaced by a natural disaster is today 60% superior than it was in the 1970s¹⁰. The Centre links this percentage to a variety of causes and, among them, the fact that an increasing number of people live in areas prone to natural disasters and environmental degradation.

Normann Myers¹¹ claimed that *"when global warming takes holds there could be as many as 200 million people overtaken by disruptions of monsoon systems and other rainfall regimes, by droughts of unprecedented severity and duration, and by sea-level rise and coastal flooding"*¹².

As the Intergovernmental Panel on Climate Change (IPCC) has stated, *"an increased availability of water in some parts of the world and a reduced availability of water in others, a risk of hunger resulting from a decrease in crop yields, an increased risk of storms, floods, coastal flooding and submersion due to a rising*

⁸ Myers N., *Environmental refugees: an emergent security issue*, Organization for Security and Co-operation in Europe, 2005.

⁹ UNHCR, *Environment, disasters and climate change*, available at: <<https://www.unhcr.org/environment-disasters-and-climate-change.html>>.

¹⁰ IDMC and NRC, *Global Estimates 2015: People Displaced by Disasters*, 2016, at 19.

¹¹ Normann Myers is a biologist who has worked, among others, with the UN Environmental Programme, the World Bank, the Climate Institute, and Oxford University.

¹² Myers N., *Environmental refugees: a growing phenomenon of the 21st century*, The Royal Society, Volume 357 (1420), 2001, at 1.

sea-level and an overall negative impact on health, are overall the most relevant to the displacement of people”¹³. The amount of people that will be victims of flooding is projected to be between 10 and 25 million annually by 2050 and between 40 and 140 million annually by 2100, depending on future emissions¹⁴.

It is projected that by 2050, 685 million people, living in more than 570 cities, will live with less freshwater available: about the 10% of the water scarcity will be caused by climate change. It may cost some regions up to the 6% of their gross domestic product and, consequently, it may cause migration from the affected areas¹⁵. Scarcity of water leads to a decline in the ability of a community to diversify its income when the latter is mainly produced by farming or herding.

Three scenarios of migration caused by the effects of climate change can be identified according to UNESCO analysis¹⁶:

1. Sudden-onset disasters, such as flooding, windstorm, wildfires and mudslides may cause displacement when the inhabitants of the affected areas are evacuated or decide autonomously to migrate before the natural disaster or right after it happened. Their displacement may last a brief period or may be long-term, depending to what extent the area suffered the impact of the natural event and on the State’s capacity of recovery. Moreover, if these events happen frequently, communities are motivated to move permanently.
2. The long-term effects of climate change cause slow-onset environmental degradation. Examples of this phenomenon are the rise in the sea-level, the salinization of the groundwater and soils, the thawing of the permafrost, drought and desertification. The degradation of the environment may be the

¹³ IPCC, *Climate Change 2007: Synthesis Report*, 2007, as cited in Van Duren C., *The legal obligations for the European Union to protect climate-induced migrants crossing European borders*, Master thesis, Tilburg Law School, 2018, at 7.

¹⁴ Nicholls R.J. and Lowe J.A., *Benefits of mitigation of climate change for coastal areas*, Global Environmental Change volume 14(3), 2004, at 239.

¹⁵ UNESCO World Water Assessment Programme, *The United Nations world water development report 2020: water and climate change*, 2020, at 20.

¹⁶ Kälin W. and Schrepfer N., *Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches*, UNHCR, 2012, at 13-17.

cause of decisions of individuals to move permanently away from their country as an adaptation strategy. Some areas may become inhabitable because of the effects of climate change: in such a situation people are forced to move because there is not a way to live in their country anymore. A lot of small low-lying islands are currently environmentally stressed by the sea-level rise, which could lead to the migration of their inhabitants due to the loss of large portions of the coasts and infrastructures caused by flooding and lands' erosion. Other consequences of the rise of the level of the sea are the loss of the coral reef, damages to the ecosystem on which many islanders depend and the intrusion of seawater in cultivated lands¹⁷. It is predicted that populations living at an altitude of less than 1 meter above sea-level will be directly vulnerable in a few decades¹⁸. In extreme cases, the islands become less and less capable of sustaining livelihood, so that people are forced to migrate in other countries permanently. However, *“whether migration will be the main response to sea level rise will depend on the capacity of communities and governments to respond through a range of options such as increased protection infrastructure, the modification of land use and construction technologies and managed retreat from highly vulnerable areas”*¹⁹.

3. Unrests, violent acts and armed conflicts may be caused, at least partially, by the effects of climate change. Thus, the inhabitants of the affected areas are motivated to move not only because of the scarcity of resources, but also because said conflicts. Two scenarios can be described:
 - a. There may be a decrease of natural resources – water, food, agricultural lands and pasture lands – following environmental changes: people may start to fight over the scarce resources

¹⁷ McAdam J., *Climate Change, Forced Migration, and International Law*, OUP Oxford, 2012, at 126.

¹⁸ IPCC 2007, *Contribution of Working Group I to the Fourth Assessment Report of the IPCC*, Cambridge University Press.

¹⁹ Tacoli C., *Crisis or adaptation? Migration and climate change in a context of high mobility*, *Environment and Urbanization* 21(2), 2009, at 519.

available. When the State cannot adapt, on the one hand, to the change of climate and is incapable, on the other, to equitably distribute the resources available, and the whole situation causes violent conflicts, people may decide to leave the country.

- b. Environmentally displaced people may cause stress in the country in which they move, increasing the demand for natural resources there. It may amplify conflicts over natural resources already existing in that area or contribute to overpopulation.

1.3. The reasons why some people affected by environmental events do not migrate

When talking about environmental displacement, it is crucial to notice that not every person affected by natural disasters or environmental degradation decide to move to another country. Two categories of persons will be briefly described: those who are unable or unwilling to move from their land and those who are displaced within their country.

On the one hand, people may choose not to migrate because of their resilient capacities and their ability to adapt; on the other, some people are forced to stay in their country. They become trapped in a land that, in many cases, cannot sustain them anymore, because after a natural disaster there is often a scarcity of food, sources of income and health care. Moving requires resources and individuals may find themselves without any possession.

Then, some move inside their country and they are the majority of the people displaced by environmental reasons. They are ‘internally displaced’ in order to find more fortunate environmental conditions in other regions or low-skilled jobs in urban centres. In many cases, they try to return home as soon as this is an available option to them. The 1998 United Nations Guiding Principles on Internal Displacement²⁰ describes internally displaced individuals as “*persons who have*

²⁰ Guiding Principles on Internal Displacement, 1998

been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of (...) natural or human-made disasters, and who have not crossed an internationally recognized State border.” The Principles on Internal Displacement is a non-binding document that identifies the rights of internally displaced people in order to provide guidance to Governments and inter-governmental organizations.

2. The various causes of environmental migration: environmental factors are not always the only reasons that lead to migration

People, most of the times, do not migrate because of one single reason. The effects of climate change, for example, exacerbating already existing difficulties inside a country (e.g. food security, poverty, weak institutions), put a strain on the adaptive capacity of a community; when natural disasters are added to social and economic stresses, people may decide to leave their lands. In fact, as the Chairperson of the 2011 Nansen Conference in Climate Change and Displacement has underpinned, *“climate change acts as an impact multiplier and accelerator to other drivers of human mobility”*²¹. Robin Mearns, an expert of climate change of the World Bank, stated that climate change *“tends to amplify existing patterns, rather than provoke entirely new flows of people”*²². There are several reasons that may add to the environmental one - e.g. poverty, unemployment, rapid urbanization, population pressures, malnutrition – and that, eventually, may encourage people to leave because the latter find themselves too vulnerable in their land.

O’Brien et al. theorized what is vulnerability to environmental changing conditions²³. One of the results from their studies is that vulnerability is unevenly

²¹ NCR and IDMC, *The Nansen Conference: climate change and displacement in the 21st century*, 2011, at 18.

²² Karin Rives, *"Climate Migration" Gains the World's Attention*, 2011, as cited in Flautre H., Lambert J., Keller S. and Lochbihler B., *Climate Change, Refugees and Migration*, The Greens/EFA in the European Parliament, 2013, at 2.

²³ O’Brien K., Sygna L., Leichenko R., Adger W.N., Barnett J., Mitchell T., Schipper L., Tanner T., Vogel C., Morteux C., *Disaster risk reduction, climate change adaptation and human security: a commissioned report for the Norway Ministry of Foreign Affairs*, University of Oslo, 2008, at 14.

distributed both across and within countries because it is a combination of several factors: social, economic, historical, geographical, political and environmental ones. Some individuals (e.g. children, older people, disabled people and women) are likely to be more affected by the effects of climate change. The 2001 IPCC Third Assessment Report defines vulnerability in this context as “*the degree to which a system is susceptible to, or unable to cope with, adverse effects of climate change, including climate variability and extremes. Vulnerability is a function of the character, magnitude and rate of climate change, and the degree to which a system is exposed, along with its sensitivity and adaptive capacity*”²⁴. Vulnerability is the combination of three elements: exposure, meaning how much the area is prone to environmental hazards and the intensity, duration and frequency of the latter; sensitivity, in particular to which extent the community is affected by those impacts; adaptive capacity, as the ability to cope with and adapt to environmental change²⁵.

Astri Suhrke²⁶ noted that in the literature on environmental change and migration, two viewpoints could be identified: the maximalist one and the minimalist one²⁷. The maximalists assert that environmental change is the direct cause of migration. The minimalists, conversely, claim that climate change is only one of the several reasons that lead to displacement: according to them migration is multi-causal and it is impossible to isolate climate change as *the* cause of migration. It is remarkable how Olivia Dun and François Gemenne deal with the issue: “*it is interesting to note that in determining whether or not someone is a ‘Convention refugee’ it is not necessary to determine whether or not the reason leading to persecution (political opinion, race, nationality, religion or membership of a particular social group) is the main reason for displacement but whether or not it happened. Once this link is*

²⁴ IPCC 2001, *Third Assessment Report: Climate Change 2001: Impacts, Adaptation and Vulnerability*, Cambridge University Press, at 6.

²⁵ Borges I.M., *Environmental Change, forced displacement and international law: from legal protection gaps to protection solutions*, Routledge, 2019, at 23-24.

²⁶ Astri Suhrke is a political scientist that worked with various UN agencies (especially UNHCR) and the World Bank.

²⁷ Suhrke A., *Pressure Points: Environmental Degradation, Migration and Conflict*, 1993, at 4-7.

established then the decision maker can grant the person refugee status without considering whether or not the reason was the main cause leading to the persecution. Could/should the same be done for people displaced by environmental factors?”²⁸.

3. The figure of the climate migrant

3.1. The definition’s problem

One of the main problems when talking about the mobility of people as a response to the effects of climate change is how to define them. The lack of a proper definition shared by international institutions and experts affects the elaboration of adequate estimations of how many people move as a consequence of environmental change; this, in turn, hinders the delineation of policies addressing the phenomenon. Environmental migration was addressed in 1985 by the United Nations Environmental Programme (UNEP), that commissioned to the researcher Essam El-Hinnawi a report on “Environmental Refugees”²⁹. The latter are defined by El-Hinnawi “*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*”. Since then, lots of discussions arose about the correct terminology to describe this category of persons. Myers, for example, used the term ‘environmental refugees’ to define “*...people who can no longer gain a secure livelihood in their erstwhile homelands because of drought, soil erosion, desertification, and other environmental problems*”³⁰.

Terms such as ‘environmental refugee’ and ‘climate refugee’ were often used to highlight the gravity of the matter. It is said that, literally, these people ‘seek refuge’ from the effects of climate change; any other expression, in the view of those who

²⁸ Dun O. and Gemenne F., *Defining ‘environmental migration’*, Forced Migration Review, 2008, at 10.

²⁹ Hinnawi E., *Environmental Refugees*, United Nations Environment Programme, 1985.

³⁰ Myers N., *Environmental refugees in a globally warmed world*, Bioscience Vol. 43, 1993, at 752.

prefer these terms, would undermine the urgency of the issue³¹. The expression 'refugee', moreover, brings along less negative bias than the term 'migrant'. A migrant tends to be perceived as a person that voluntarily moves to a more attractive lifestyle: the 'pull' of the destination is more emphasized than the 'push' of the country of origin.

However, the term 'refugee', as to define those that flee from environmental pressures, is not accurate from an international law standpoint. The UN 1951 Convention and the 1967 Protocol relating to the status of refugees, give the following definition: "*a refugee is 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 to or, owing to such fear, is unwilling to avail himself of the protection of that country*"³². Three main elements compose the definition: refugees are those people that (1) find themselves outside their country, (2) are unable or unwilling to be protected by their State, (3) have a well-founded fear of being persecuted on the basis of race, religion, nationality, membership of a particular social group, or political opinion. While environmentally displaced people may meet the first two elements, they are not discriminated because of the effects of climate change.

Several people contested the use of the term 'refugee' in this context. First of all, in the 2011 Nansen Conference, it was pointed out that misleading words, such as 'environmental refugee' and 'climate refugee', in order to describe those that flee from slow-onset or rapid-onset climate events, must be avoided. The UNHCR itself has harshly criticized such linguistic choice as it has no basis on international refugee law.

The study "Climate Refugees: legal and policy responses to environmentally induced migration" prepared by the Directorate General for internal policy and requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, proposes other expressions: "*Because of the fact that the term 'environmental refugee' has been challenged both in the academic and political*

³¹ Brown O., *Migration and Climate Change*, International Organization for Migration, 2008.

³² Convention Relating to the Status of Refugees, 1951, article 1.

*debate, we suggest to use 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"*³³.

The International Organization for Migration (IOM) provides the following definition: “*Environmental migrants are persons or groups of persons, who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or chose to do so, either temporarily or permanently, and who move either within their country or abroad*”³⁴. This definition incorporates a multitude of relevant elements: time (temporarily or permanently), space (internally or internationally), choice (they are obliged to leave or choose to do so), a multiple push and pull factors (compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions). Anthony Oliver-Smith³⁵ criticized this definition because it can “*suggest that nature is at fault, when in fact humans are deeply implicated in the environmental changes that make life impossible in certain circumstances*”³⁶.

Fabrice Renaud³⁷ on the basis of the IOM’s definition, has theorized three sub-categories of ‘environmental migrant’³⁸. Firstly, the environmental emergency migrant, who is an individual obliged to leave his home in the event of a rapid

³³ Kraler A., Cernei T. and Noack M., *‘Climate Refugees’: legal and policy responses to environmentally induced migration*, European Parliament – Directorate General for internal policies, 2011, at 4.

³⁴ International Organization for Migration, *Discussion note: Migration and the Environment*, 2007, at 1-2.

³⁵ Anthony Oliver-Smith is a professor of anthropology at the University of Florida.

³⁶ Thornton F., *Climate Change and People on the Move: International Law and Justice*, OUP Oxford, 2018, at 19-20.

³⁷ Fabrice Renaud is a professor of Environmental Risk and Community Resilience at the University of Glasgow, who also worked at the United Nations University Institute for Environmental and Human Security,

³⁸ Renaud F.G., Dun O., Warner K., Bogardi J., *A Decision Framework for Environmentally Induced Migration*, International Migration vol. 49, 2011, at e14-e15.

natural disaster in order to find a safe place to stay and save his life. Secondly the environmentally forced migrant, who is a person forced to leave his home “*in order to avoid the worst of environmental deterioration*”. In this case, there is less urgency because the environmental degradation is slower compared to the previous situation. Lastly, he theorized the figure of the environmentally motivated migrant, a person that decides to leave his country because of the progressive worsening of the environmental conditions that lead to the decline of his life. Migration does not constitute the last resort available, and social-economic factors may constitute a dominant reason to move.

3.2. The ways in which environmental migrants have been portrayed by the international community over the years

International actors – media, political leaders, international organizations, think-tanks – have categorized, over time, the figure of environmental migrant in a number of ways. These various interpretations have influenced and directed policy actions of governments that have dealt with the issue. In “Being(s) framed”³⁹, the authors analyze four representations of climate migrants that have emerged in the environmental migration policy sphere:

1. Environmental migrants as victims: this vision, put forward mainly by International Non-Governmental Organizations (NGOs), pictures environmentally displaced people as defenseless and passive, in need of charity and asylum; thus, developed countries are described as the saviours. The aim of the victim approach has been the rise of awareness regarding the issue of environmental displacement and, eventually, the creation of adequate policies and funding projects. One of the critics made is the one of Professor Greg Bankoff, who argues that this vision duplicates the colonial one, which saw the Global North as advanced and skilled⁴⁰. Moreover, this

³⁹ Ransan-Cooper H., Farbotko C., McNamara K.E., Thornton F., Chevalier E., *Being(s) framed: the means and ends of framing environmental migrants*, Elsevier Ltd., Volume 35, 2015.

⁴⁰ Bankoff G., *Rendering the world unsafe: ‘vulnerability’ as Western discourse*, Disasters vol. 25, 2002.

idea does not focus on the actions that developed countries may actually do in order to improve environmental conditions, such as cut gas emissions.

2. Environmental migrants as security threats: formulations of the security threat narrative are found mainly in journalists' reports and papers of defense-aligned bodies in the Global North, who tend to use expressions such as 'floods of refugees'. Humanitarian organizations and environmental NGOs, on the other hand, do not use this rhetoric. The consequence of this vision, within States, is usually putting up barriers, mobilizing the army and protecting the sovereignty of the country. An example of this kind of narrative happened when, in 2015, the United States Secretary of State alerted the United States ambassadors that 'climate refugees' would represent a security threat.
3. Environmental migrants as adaptive agents: migration is seen as an adaptation response, rather than a failure to adapt; the Cancun Adaptation Framework, for example, officially recognized migration as an adaptation strategy⁴¹. This vision is primarily supported in recent years by international climate change negotiations, conventions and conferences, as it is shown in the next paragraph. Migration as an adaptation scheme is linked to policies such as circular migration that allows migrants to help their country of origin through remittances, but also through the sharing of know-hows and technologies. Kiribati's President, Anote Tong, has significantly supported this approach by introducing the concept of 'migration with dignity', that is the long-term goal of the Kiribati's government⁴². However, remittances are rarely used as a way to improve the environmental conditions of a community but are mainly helpful at an individual/household level⁴³.

⁴¹ COP, *Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010*, UN, 2011, paragraph 14(f).

⁴² McNamara K.E., *Cross-border migration with dignity in Kiribati*, Forced Migration Review vol. 49, 2015, at 62.

⁴³ Craven, L., *Migration-affected change and vulnerability in rural Vanuatu*, Asia Pacific Viewpoint, Volume 56(2), 2015, at 227.

4. Environmental migrants – but also non-migrants - as political subjects: it is a recent and a still-emerging concept, that receives way less attention than the three previous views. The idea is that people affected by natural disasters or slow-onset degradation have, on a certain extent, a leverage on the decisions of the institutions regarding environmental deterioration and the way to deal with it. Consultations, bottom-up approaches to policymaking and participation in decision making are important tools in this context. Those who support the political role of (non-)migrants propose policies that offer potential migrants a higher degree of choice in their mobility decisions via participation in the legislative process regarding the labour sector and the more efficiently relocation of resources; in fact, they highlight the correlation between environmental displacement and other policy areas.

Those different approaches are not alternatives, but they may coexist; in the recent UNFCCC negotiations, for example, both the victim and the adaptive agent concepts are included.

4. The issue of environmental displacement: the role of the EU, the UN, NGOs and the Nansen Initiative in the global discussion

In order to analyze the instruments, both at international and EU level, that can better regulate climate migration, it is useful to examine the way in which various actors – the EU, the UN, the Nansen Initiative and NGOs – address the matter.

The heterogeneity of the entities that discussed the matter reflects that of the possible subjects that could take policy actions on the issue both at a regional and international level. Since there is not one single entity entrusted with the task of building a legal framework to deal with environmental migration, the recommendations made are addressed to the general international community. There are, in particular, two areas of action: building adaptation and resilience within the countries affected and regulating cross-border environmental migration. From an international point of view, it seems, as it will be explained more in-depth in the next Chapter, that entities that are already dealing with pollution prevention

and climate change mitigation are the best suited to handle the issue of environmental migration.

Since the analysis that will be carried out revolves around how the EU could face the issue of environmental displacement in the future, it seems quite problematic how actions of the EU could interact with the ones of international fora of which the EU and/or its Member States are part. In the next Chapters, the analysis of the concrete actions that could actually be taken by international and regional actors will be mostly based on the following proposals.

4.1. The European Union

Since 2008 the European Union (EU) considers environmental displacement as a topic in its own right, being the subject of political consultations and technical documents⁴⁴.

The first mention of the connection between climate change and migration happened in 2007 in the Commission Green Paper “Adapting to Climate Change in Europe: options for European Union action”⁴⁵. The document stresses that the EU, together with its Member States and third countries, must take adaptation actions as well as mitigation ones in the context of climate change: the latter is a global issue, and the Green Paper must also have an external dimension. In the section of the document that focuses on the EU external actions, it is pinpointed that the EU Common Foreign and Security Policy has an essential role in strengthening the EU’s ability not only to prevent and deal with conflicts over scarce natural resources, but also to cope with the effects of natural disasters caused by climate change (e.g. forced migration and internal displacement of people). An interesting section of the document is the one in which the authors acknowledge the responsibility of developed countries for the current global situation regarding

⁴⁴ Ionesco D., Mokhnacheva D., Gemenne F., *The Atlas of Environmental Migration*, Routledge, 2017, at 115.

⁴⁵ European Commission, *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 actions*, 2007.

climate change and emphasize that, precisely for the role they play in worsening environmental conditions, they need to sustain adaptation actions in developing countries.

The Green Paper motivated the Council to request the High Representative of the EU for Foreign Affairs and Security Policy and the Commission to assess the potential implications of climate change regarding the safety of the EU. The request brought to the elaboration of the “Joint Paper on Climate Change and International Security”⁴⁶ that, first of all, recognized climate change as a “*threat multiplier which exacerbates existing trends, tensions and instability*” and, as such, it may put the EU under security risk. It then lists several negative consequences that may arise due to climate change: among some that also may be causes of migration - conflict over resources, economic damage, border disputes following a loss of territories as a consequence of retreating coastlines and submersion of lands, tension over energy supply – environmentally-induced displacement is mentioned (“*Europe must expect substantially increased migratory pressure*”).

More recently, in 2017, the European Commission’s European Political Strategy Centre published “10 trends shaping migration”⁴⁷: the third trend analyzed is climate change, that “*dwarf [...] all other drivers of migration*”. The document also notices that, between 2008 and 2016, there were more people internally displaced by natural disasters than by conflicts and wars.

4.2. The United Nations

The UN is probably the international organization that, most of all, discussed the matter on environmental migration through its specialized agencies and treaties. As it was previously mentioned, it was the UNEP that commissioned the report “Environmental Refugees” to Essam El-Hinnawi, who coined that term.

The UNFCCC, of which also the EU is a party, being the treaty that is engaged with the issue of climate change, often addressed the matter of environmentally

⁴⁶ European Commission and High Representative, *Climate change and international security: paper from the High Representative and the European Commission to the European Council*, 2008.

⁴⁷ European Political Strategy Centre, *10 trends shaping migration*, 2017.

displaced people. The focus is generally put on the need of building resilience, enhancing adaptation strategies and reducing vulnerabilities. These objectives were expressed in various situations.

Firstly by the Paris Agreement⁴⁸, reached in 2015, of which the UNFCCC is the ‘parent’ treaty; although its main goal is to reduce gas emissions so that the global temperature does not rise more than 2°C by the end of the century, it also aims at improving the ability of the countries affected by adverse climate events to deal with them through adaptation and reduction of the existing vulnerabilities. To these ends, it was urged the creation of a taskforce dealing with displacement caused by climate change through “*recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change*”. The Task Force on Displacement (TFD)⁴⁹ was thus constituted and started working in 2017. During COP23 the TFD met for the second time and presented its recommendations during COP24 in Katowice⁵⁰. It invited all the parties to the agreement to enhance research, data gathering and sharing of information to comprehend better and control human mobility in the context of environmental degradation and natural disasters. It also requested the parties to consider formulating laws and policies addressing environmental displacement without neglecting the respect of human rights.

Secondly, the Cancun Adaptation Framework⁵¹, established during the UN Climate Change Conferences held in Cancun in 2010, organized in the context of the UNFCCC, revolves around enhancing adaptation of those affected by the effects of climate change⁵². In the same place, the Adaptation Committee⁵³ was created in

⁴⁸ Paris Agreement, 2016.

⁴⁹ United Nations Framework Convention on Climate Change, *Task Force on Displacement*, available at: <<https://unfccc.int/node/285#eq-2>>

⁵⁰ COP, *Report of the Conference of the Parties on its twenty-fourth session, held in Katowice from 2 to 15 December 2018*, UNFCCC, 2019.

⁵¹ Conference of the Parties, *Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010*, UN, 2011.

⁵² UNFCCC, *Intro to Cancun Agreement*, available at: <<https://unfccc.int/process/conferences/the-big-picture/milestones/the-cancun-agreements>>

⁵³ UNFCCC, *Adaptation Committee*, available at: <<https://unfccc.int/Adaptation-Committee>>

order to, *inter alia*, supply technical support to the Parties, share knowledge and good practices and provide recommendations.

On the basis of paragraph 14(f) of the 2010 Cancùn Adaptation Platform⁵⁴ the Advisory Group on Climate Change and Human Mobility was created. It is a dialogue forum, the role of which is to give technical support to the Parties of UNFCCC in dealing, during global climate negotiations, with the issue of displacement as a consequence of the effects of climate change. Moreover, it “*work[s] to ensure that aspects of human mobility addressed under the UNFCCC are coherent and based on the most recent evidence, findings and experience (research, best practices, data, etc.)*”⁵⁵.

Thirdly, the Sendai Framework for Disaster Risk Reduction 2015-2030⁵⁶, adopted at the Third UN World Conference in Sendai in 2015, is a global agreement to reduce disaster risks across the globe by strengthening the resilience of communities and easing the negative effects of climate change. It is the result of stakeholders’ consultations and inter-governmental negotiations. The EU played a crucial role in the negotiations of the agreement and still today sustains EU Member States and third countries in achieving the Sendai goals. In 2016, the European Commission published an action plan to include the Sendai priorities into the policies of the EU⁵⁷. Migrants are included among the stakeholders that governments should engage with when constructing and implementing plans and policies. Their value is also recognized because migrants participate in building the

⁵⁴ Paragraph 14(f) of the 2010 Cancùn Adaptation Platform: “...Invites all Parties to enhance action on adaptation under the Cancun Adaptation Framework [...] by undertaking, *inter alia*, the following: (f) Measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels”.

⁵⁵ Advisory Group on Climate Change and Human Mobility, COP23, Bonn, Germany, available at: <<https://environmentalmigration.iom.int/sites/default/files/COP23/COP23%20Advisory%20Group%20on%20Climate%20Change%20and%20Human%20Mobility.pdf>>.

⁵⁶ Sendai Framework for Disaster Risk Reduction, Third UN World Conference Disaster Risk Reduction, 2015.

⁵⁷ European Commission, *Action plan on the Sendai Framework for Disaster Risk Reduction 2015-2030: a disaster risk-informed approach for all European Union policies*, 2016.

resilience of communities providing material and immaterial resources, their knowledge and abilities and capacities. Then, four priorities are listed, which must be the main focuses of States in taking actions. The priority number two is about “*strengthening disaster risk governance to manage disaster risk*”; in order to do so, policies on prevention, mitigation, response and recovery must be developed, as well as strategies and coordination within and across sectors. Transnational cooperation also is needed to be fostered in order to enable policies regarding the sharing of resources, the building of resilience and reduction of disaster risk, including displacement risk.

Lastly, the New York Declaration for Refugees and Migrants⁵⁸ adopted by the UN General Assembly in 2016 starts by saying that “*since earliest times, humanity has been on the move. Some people move [...] in response to the adverse effects of climate change, natural disasters (some of which may be linked to climate change), or other environmental factors*”. The Declaration expressed the necessity of a closer collaboration among States on developing tools to deal with the protection of the environmentally displaced.

The Declaration led to the creation of the Global Compact for Safe, Orderly and Regular Migration⁵⁹, that clarified 23 objectives in order to achieve, precisely, a safe, orderly and regular migration. In particular, Objective 2 is about “*minimize the adverse drivers and structural factors that compel people to leave their country of origin*”. More specifically, one of the commitments is to eliminate the reasons that oblige people to leave their country through, in the case of environmental degradation, building resilience and disaster risk reduction or mitigating climate change’s effects. It is also highlighted the importance of reinforcing cooperation among States. Objective 5, then, emphasizes the necessity of creating methods of regular migration linked to job-seeking or education also for those “*compelled to leave their countries of origin due to slow-onset natural disasters, the adverse effects of climate change, and environmental degradation, such as desertification, land degradation, drought and sea level rise*”. Both the European External Action Service (EEAS) and the European Commission support the Global Compact for

⁵⁸ New York Declaration for Refugees and Migrants, 19 September 2016.

⁵⁹ Global Compact for safe, orderly and regular migration, 10 December 2018.

Safe, Orderly and Regular Migration stating that “[t]he Compact will also underpin the EU’s existing work with third countries and international organizations. All these aspects correspond closely to the EU’s priorities and objectives”⁶⁰. The Global Compact then received validation by the European Parliament, that also held that international cooperation regarding migration must be based on the respect of human rights and that the Universal Declaration on Human Rights (UDHR) must be taken in high consideration when defining policy regarding immigration⁶¹.

4.3. The Nansen Conference and its aftermath

The Nansen Conference on Climate Change and Displacement⁶² was a meeting held in Oslo in 2011 that saw the participation of more than 200 subjects; among them there were governments, non-governmental organizations, researchers and intergovernmental organizations. It was hosted by the Norwegian Government in partnership with the NRC and the Centre for Climate and Environmental Research. The Conference wanted to create a multidisciplinary dialogue regarding climate change, natural disasters and population movements; it focused on how to build resilience, adaptation capacities and preventive measures in communities of areas affected by the effects of climate change. During the Conference, there were elaborated the so-called Nansen Principles, as the basis for actions to be made in order to prevent and manage environmentally induced displacement. For example, the first principle states: “*Responses to climate*

⁶⁰ European External Action Service, *Questions and Answers: what is the Global Compact for safe, orderly and regular migration?*, 2018, available at: <https://eeas.europa.eu/headquarters/headquarters-homepage/53761/questions-and-answers-what-global-compact-safe-orderly-and-regular-migration_en>; see also European Commission, *What is the global compact for safe, orderly and regular migration?*, 2018, available at: <<https://www.eumonitor.eu/9353000/1/j9vvik7mlc3gyxp/vktgguaydzy?ctx=vh77h7u7qdx6>>.

⁶¹ European Parliament, *MEPs strongly welcome the Global Compact on Migration*, 2018, available at: <<https://www.europarl.europa.eu/news/en/press-room/20181210IPR21430/meps-strongly-welcome-the-global-compact-on-migration>>.

⁶² NCR/IDMC, *The Nansen Conference: climate change and displacement in the 21st century*, 2011.

and environmentally-related displacement need to be informed by adequate knowledge and guided by the fundamental principles of humanity, human dignity, human rights and international cooperation”.

As a result of the Conference, the Nansen Initiative⁶³ was launched in 2012 by Switzerland and Norway, “*with the aim of addressing potential legal and protection gaps for people displaced across borders owing to environmental change and extreme weather conditions*”⁶⁴. It is a state-led consultative process that sees the involvement of several stakeholders. Its objective is to reinforce cooperation and solidarity among international actors to protect environmentally displaced people; it does not aim to build new legal standards or policies. The Nansen Initiative mirrors the increasing awareness of several countries regarding the challenges linked with the phenomenon of environmental displacement⁶⁵.

On the basis of the Nansen Principles, intergovernmental regional consultations and civil society meetings took place, the result of which was consolidated in the Agenda for the protection of Cross-Border Displaced Persons in the context of disasters and climate change⁶⁶. The Protection Agenda wants, first of all, to improve the capacity of States and other actors to protect cross-border environmentally displaced persons by listing a variety of effective practices. The protection accorded to cross-border disaster-displaced persons may have two configurations: States can allow persons affected by the effects of climate change to stay in their territory at least temporally; otherwise, they can abstain from returning people to disaster-affected countries. The Protection Agenda identifies three areas, that were perceived as priorities by the stakeholders consulted, in which actions must be taken. Firstly, it is considered important to collect data and numbers not only

⁶³ The Nansen Initiative, available at: <<https://www.nanseninitiative.org>>.

⁶⁴ Apap J., *The concept of ‘climate refugee’; towards a possible definition*, European Parliamentary Research Service, 2019, at 7.

⁶⁵ Bodansky D., Brunnée J., Rajamani L., *International Climate Change Law*, OUP Oxford, 2017, at 324.

⁶⁶ *Agenda for the Protection of cross-border displaced persons in the context of disasters and climate change*, December 2015.

regarding people displaced in the context of environmental disasters, but also regarding those who are at risk of being displaced for environmental reasons. Secondly, it is suggested to enhance the use of humanitarian protection measures for environmentally displaced persons by also reviewing existing domestic law: most States do not have legal instruments that address whether environmentally displaced persons shall be admitted to another country or under which circumstances they may be returned. Lastly, strengthening the management of disaster displacement risk in the country of origin by building the resilience of people living in areas prone to natural disasters or environmental degradation is considered a priority. A suggested coping strategy to deal with potential influx of migrants is the develop of legislations on temporary, circular or permanent migration.

In order to implement the Protection Agenda and the Nansen Principles the Platform on Disaster Displacement (PDD)⁶⁷ was created in 2016: its objective is to raise awareness on displacement – both internal and international - after a sudden-onset disaster or as a consequence of slow-onset environmental degradation; it also has the aim to give support to governments coping with these events by helping them implement the Agenda for the protection of Cross-Border Displaced Persons in the context of disasters and climate change. The Platform endorses measures such as infrastructure improvement, urban planning and risk reduction in order to diminish vulnerability and build the resilience of the communities at risk; planned relocation in situations when people are obliged to leave their home in order to survive, with a view of helping their return when the emergency is terminated.

4.4. NGOs

When, in the early 2000's, the link between migration and climate change was clearly understood at the international level, also NGOs started to deal with the issue. An example is the Climate Change Centre, created in 2002 by the

⁶⁷ Platform on Disaster Displacement, available at: <<https://disasterdisplacement.org/>>.

International Federation for the Red Cross to understand better the effects of climate change and reduce the impact of extreme-weather events on vulnerable people⁶⁸.

At the EU level, NGOs such as European Environmental Bureau, Climate Action Network Europe or Friends of the Earth most of the times do not directly deal with environmental displaced persons but tend to focus on broader issue like adaptation and building resilience in the context of natural disasters and environmental degradation⁶⁹.

The Annual Consultation between UNHCR and NGOs is a major event in which NGOs have the opportunity to be heard by the UNHCR about forced displacement. Regional consultations also take place herein, in order to address the specific issues at a more localized level. In the 2012 Consultation, a session was entirely dedicated to the nexus between migration, refugees and climate-induced displacement. It was praised the work of the Nansen Initiative as an effective way to achieve a protection framework for environmentally displaced people. Nonetheless it was recognized that both NGOs and the UNCHR need to work with States to support people displaced because of the effects of climate change. Most importantly, it was expressed the need for a legal protection framework for environmentally displaced people.

During the 2018 regional session with the representative of African NGOs, the fact that climate change and natural disasters are among the causes of displacement in the continent was highlighted. It was noticed how much it is important to reduce the impact on communities and plan adaptation strategies in the case of slow-onset events. To these ends, efforts to enhance partnership between local, regional and international actors are considered essential.

⁶⁸ McAdam J., *Climate Change Displacement and International Law: Complementary Protection Standard*, UNHCR, 2011, at 5.

⁶⁹ Weber C., *Climate Refugees and Climate Migration*, Green European Foundation asbl, 2019, at 21.

5. The interconnection between climate change and environmental migration: from the acknowledgment of the issue to the research of a solution

Migration caused by the negative effects on climate change – sudden-onset disasters, slow-onset degradation, violent conflicts – is a more and more present issue in today's world.

Predictions on how climate change will affect the environment in the future allow to picture the way in which populations that live in areas particularly vulnerable to environmental events will be affected. Some of them, in the aftermath of a natural disaster or as a consequence of the deterioration of their land, remain within the borders of their country and others flee to other States.

Thereby, a growing number of international actors started recognizing at least the existence of this category of persons, without, however, being capable of find a common term to identify them: expressions such as climate or environmental refugee, environmental migrant, environmentally induced migrant are found scattered throughout the literature. The refusal, by the UNCHR, of the term 'environmental refugee' is a hint of what will be shown in the next Chapter, namely the fact that it also rejects almost completely any involvement in the matter of environmental displacement. The increasing interest by the international and regional actors to the matter, as demonstrated in paragraph four, is also explained, as it will be described in the next Chapters, by the fact that proposals have been made on modifying existing legal regimes or creating new ones to include environmental migrants in protection frameworks.

CHAPTER II

THE ROLE OF THE EU IN INTERNATIONAL LEGAL INSTRUMENTS FOR THE PROTECTION OF ENVIRONMENTALLY DISPLACED PEOPLE

1. When migration is necessary: the need for international and European legal responses to the phenomenon

Adaptation within the country in which the natural disaster or environmental degradation has happened is often the first option to attempt for affected communities, as it will be explained in Chapter IV. However, in some situations, people cannot cope with the consequences of climate change inside their borders, because it is not possible, too onerous or too dangerous⁷⁰. One of the circumstances in which adaptation is not feasible is described by Oli Brown⁷¹: “*migration may be the only possible adaptive response in the case of some of the Small Island and low-lying states where rising seas will eventually flood large parts of the country*”⁷². Thus, internal and international migration may be considered adaptation strategies. Migration is also useful in diversifying income sources and strengthening resilience in the home countries of migrants. The latter often send remittances to their country of origin: in the aftermath of a natural disaster, remittances to the areas affected help them to recover; remittances may also be employed in preventive measures in disaster-prone regions.

It does not exist yet a protection regime for environmental migrants fleeing rapid-onset natural disasters or slow-onset environmental degradation: “*current legal frameworks neither facilitate nor support cross-border movement in the context of*

⁷⁰ Mayer B., *The International Legal Challenges of Climate-induced Migration: Proposal for an International Legal Framework*, Colorado Journal of International Environmental Law and Policy, Vol. 22, No. 3, 2011.

⁷¹ Oli Brown is an Associate Fellow with the Royal Institute of International Affairs who worked with the UNEP and the UNDP

⁷² Brown O., *Migration and Climate Change*, IOM, 2008.

climate change-related impacts”⁷³. Since migration for environmental reasons is already a reality, there is a need to regulate at the international level this phenomenon. As it was pinpointed in the previous Chapter, environmental displacement is a global issue and, as such, the best way to tackle it is through international cooperation.

The Chapter aims to explore the role of the EU in this field and its potential adhesion to international legal instruments that could potentially provide protection to climate migrants. Several actors could, as said, address the matter, since it does not exist an institution or an organization specifically designed to deal with displacement as a consequence of climate change.

As an international actor, the EU, via its direct or indirect participation in international arenas, could either be involved in the development of a legal framework for the protection and support of people fleeing from natural disasters or participate in already existing arenas. In doing so, the EU would exercise its external competences; thus, it is important to examine the ways in which the EU may use such competences.

2. The EU as an external actor: participation in international institutions and treaty-making power

As article 21 TEU affirms, “*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*”.

The participation of the EU in international organisations that could potentially offer support to environmental migrants or the creation, by the EU and other international parties, of legal instruments for the protection of this category of people are both possible solutions to tackle the issue. The possibility, for the EU, to conclude and negotiate international agreements and to become a member of

⁷³ McAdam J. and Limon M., *Human rights, climate change and cross-border displacement: the role of the international human rights community in contributing to effective and just solutions*, Universal rights group, 2015.

international organizations derives from the assignment to it of legal personality, as article 47 TEU provides.

2.1. The participation of the EU in international organisms

The EU may face several problems when it intends to participate in an international institution: some organizations do not permit entities other than States to be members to them; therefore, in these situations, the EU has to rely solely on the Member States in order to be represented in international fora.

The full membership of the EU in international organisations is an exceptional situation; one example is the participation of the EU in the WTO.

In most cases, the EU has the role of ‘observer’ or ‘enhanced observer’ status. This is the case, for instance, with the UN, of which only States can be members. All the Member States of the EU are members of the UN, while France is also a permanent member of the Security Council. Since 1974 the EU had the status of permanent observer at the UN. Then, a resolution of 2011 of the UN General Assembly granted the EU enhanced participation rights: it is invited to participate in the general debate of the General Assembly; it has now the possibility to present proposals and amendments orally that shall be put to the vote at the request of a Member State.

Lastly, there are organs in which the EU has not even an observer status; the EU, in these situations, must rely on its Member States to pursue its interests. An example is the UN Security Council. Although the EU is not a Member of the UN Security Council, its interests are nonetheless protected because “*member States which are members of the Security Council will, in the execution of their functions, defend the positions and the interests of the Union, without prejudice to their responsibilities under the provisions of the United Nations Charter. When the Union has defined a position on a subject which is on the United Nations Security Council agenda, those Member States which sit on the Security Council shall request that the High Representative be invited to present the Union’s position*”⁷⁴.

⁷⁴ Treaty on European Union (TEU), article 34.

2.2. The treaty-making power of the EU

Another way in which the EU may participate in international fora, besides being a member of an international institution, is through treaty-making. However, the possibility for the EU to make treaties depends mainly on two factors: whether the EU has the competence to conclude the treaty and the acceptance of the EU's authority by its potential treaty partners⁷⁵.

The allocation of powers between the EU and its Member States is governed by the principle of conferral⁷⁶, according to which competencies that have not been conferred upon the EU by its Member States shall remain with the Member States. For what concerns immigration policy, the competence on the topic is a shared competence between the EU and its Member States⁷⁷. The legal basis for possible

⁷⁵ Cremona M., *Who can make treaties? The European Union*, The Oxford Guide to Treaties, 2012.

⁷⁶ Treaty on the European Union, 2007; article 5: “*the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States*”.

⁷⁷ Treaty on the Functioning of the European Union (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;*”

action by the EU in the area are article 67 TFEU⁷⁸ and articles 77⁷⁹, 78⁸⁰ and 79⁸¹ TFEU. The articles do not confer a broad competence to the EU to conclude international agreements on immigration and asylum policy. However, since the EU “*enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined by the Treaty*” and “*this authority arises not only from an express conferment by the Treaty, but may equally flow from other provisions of the Treaty*”⁸², the EU may conclude international agreements on the

⁷⁸ 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...*”

⁷⁹ 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.”

⁸⁰ Treaty on the Functioning of the European Union, 2008; 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-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties...*”

⁸¹ Treaty on the Functioning of the European Union, 2008; 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 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.”

⁸² C-22/70, Commission v Council, ECJ, 31 March 1971.

base of the internal powers conferred to it in the Treaty. The principle just explained is the parallelism doctrine developed by the ECJ, according to which the internal competences of the EU should be matched by the external competence. Despite the fact that the EU has legal personality⁸³, there are still limitations to its power to make treaties, as several agreements can be negotiated only by States. Among the international agreements that do not provide for the participation of the EU, it is particularly relevant, in the present discussion, to refer to the Convention relating to the status of refugees – also called Geneva Convention – and its Protocol⁸⁴. The Geneva Convention is the major international instrument with regard to asylum, so that it is included also in the EU provisions on asylum. All the Member States of the EU are members of the Geneva Convention and its Protocol; since the Convention can be signed only by States⁸⁵, the EU cannot be a party to it. Nonetheless, the Geneva Convention has a prominent role in the asylum system of the EU. During the Tampere European Council of 1999, that set out the first programme for the Area of Freedom, Security and Justice, the need for the EU to develop common policies on asylum and immigration was expressed⁸⁶. In particular, manifesting the aim to create an open and secure EU, it was also declared that the latter is committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments. The EU decided to work towards the establishment of a Common European Asylum System based on the full application of the Geneva Convention. Thus, article 78(1) TFEU states that the common policy on asylum, subsidiary protection and temporary protection must be in accordance with the Geneva Convention and its Protocol. Article 18 of the EU Charter of Fundamental Rights (EUCFR) then, based on article 78 TFEU, affirms that “*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*

⁸³ TEU, article 47.

⁸⁴ The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol

⁸⁵ Convention Relating to the Status of Refugees, 1951; article 39.

⁸⁶ Council of the European Union, *Presidency Conclusions, Tampere European Council*, 15 October 1999.

Community”⁸⁷.

The UNFCCC, conversely, has allowed the EU to be a member to it: the EU is considered, by the Convention, a ‘regional economic integration organisation’ and, according to article 22 of the UNFCCC, may be a Party to the Convention itself. Both the EU and its Member States have also ratified the Kyoto Protocol⁸⁸, that implemented and specified the objectives of the UNFCCC.

3. The participation of the EU in a new legal framework for the protection of climate migrants

One of the possible solutions to protect environmentally displaced people is the creation, by the EU and other parties, of a legal regime for the protection of cross-border environmentally displaced people⁸⁹. The tool to provide such legal support could be a Convention drafted in the event of a Conference regarding environmental protection, as it happened for the UNFCCC, the Convention on Biological Diversity and the UN Convention to Combat Desertification, all created during the United Nations Conference on Environment and Development.

As it was explained before, the competence on immigration is shared between the EU and its Member States. In the case of shared competence, the practice of mixed agreements was developed in order to avoid conflicts of competence between the EU and the Member States. Basically, the EU and the Member States will each conclude the agreement following their own procedures; as long as the EU is concerned, the agreement will be negotiated and concluded following the procedures set out in article 218 TFEU.

⁸⁷ Charter of Fundamental Rights of the European Union, 2000.

⁸⁸ Kyoto Protocol to the UNFCCC, 11 December 1997.

⁸⁹ Mayer B., *The International Legal Challenges of Climate-induced Migration: Proposal for an International Legal Framework*, Colorado Journal of International Environmental Law and Policy, Vol. 22, No. 3, 2011; see also Biermann F. and Boas I., *Protecting Climate Refugees: The Case for a Global Protocol*, Environment Science and Policy for Sustainable Development, 2008.

3.1. Characteristics of a new legal framework on the protection of environmentally displaced people

An international legal framework on climate-induced migration, according to several scholars, should be built on five pillars⁹⁰.

Firstly, although it is impossible to accurately predict when a certain environmental disaster will hit a country, the probabilities that such an event will happen are known in the middle term. The international community should use the information available in order to, first of all, mitigate the effects of the upcoming disaster by facilitate the displacement of the communities in other areas and, then, to organise resettlement and reintegration of the affected population. For this reason, the new regime must place emphasis on the financial assistance and support to local governments by the States Parties.

Secondly, some climate migrants will not be able to return to their homes; thus, they must be considered by the host countries as permanent immigrants rather than temporary ones. It may necessitate some forms of integration within the host country through language education and job-finding assistance. There is a risk that climate migrants, like economic migrants, would be exploited workwise by the host countries. A way to avoid this consequence is suggested especially by Mayer: the naturalisation as a way to promote political justice towards climate migrants⁹¹. Of course, the naturalisation of all climate migrants in a country seems to be pretty implausible and utopist.

⁹⁰ Biermann F., Boas I., *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, Global environmental politics, volume 10(1), 2010; see also Biermann F., Boas I., *Protecting Climate Refugees: the case for a global protocol*, Environment: science and policy for sustainable development vol. 50, 2011; see also Mayer B., *The international legal challenges of climate-induced migration: proposal for an international legal framework*, Colorado Journal of International Environmental Law and Policy vol. 22, 2011.

⁹¹ Mayer B., *The international legal challenges of climate-induced migration, proposal for an international legal framework*, Colorado Environmental Law and Policy, 2011.

Thirdly, the protection regime of climate migrants must have its focus both on the needs of individuals and on the ones of communities. A characteristic of the traditional regime of refugees is the fact that it is given emphasis more on individual rights: the Geneva Convention deals with collective rights only when entire religious or ethnic groups are persecuted. Collective resettlements, in this case, are suggested in order to protect social networks and collective identity: in the case of low-lying island States, one option would be the assignment of a territory elsewhere to the affected State to ensure its continued existence⁹². Such an option has been suggested in the cases of Tuvalu and the Maldives, whose population should be transferred in lands donated by New Zealand and Australia; the latter, however, opposed to the idea. At the same time, the protection of individual rights is essential, because different people have different needs: e.g. educational ones, job-related, health issues.

Fourthly, the protection of environmental migrants must be seen a global issue tackled following the principle of common but differentiated responsibility. The principle establishes the responsibilities of all states for environmental change; however, the responsibility is not equal among them. There are two alternative interpretations of the principle of common but differentiated responsibility: the responsibility may be based either on the emissions produced by the State or on the richness of it. The first interpretation is based on the principle of polluter-pays, as established by Principle 16 of the 1992 Rio Declaration on environment and development: *“National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution...”*⁹³. An example is the statement of the former Prime Minister of Ethiopia Meles Zenawi who, predicting that some parts of Africa will become uninhabitable, affirmed that *“those who did the damage will*

⁹² UNHCR, *Climate Change and Statelessness: An Overview*, 2009.

⁹³ Rio Declaration on Environment and Development, 14 June 1992.

have to pay”⁹⁴.

Concerning the second interpretation, it affirms that are the more prosperous countries that should pay more to combat climate change, irrespective of how much harm they have caused: there is the presumption that, since they are rich countries, they produce more and, as a consequence, pollute more.

Lastly, decisions should be taken according to the principle of subsidiarity, as applied in the EU partition on competences: “*in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level*”⁹⁵. In the context of environmentally displaced people, it means that individuals affected by climate change should be first of all be protected by their local government; if the State cannot adequately protect its population, jeopardising their human rights, the international community have the responsibility to intervene. A question may arise: who is responsible for assessing the failure of the parties concerned? In the EU, the European Court of Justice (ECJ) was created to, *inter alia*, settle legal disputes between national governments and EU institutions. The constitution of a similar body to arbitrate between the local governments and the international community may be essential for the functioning of a legal framework based on the principle of subsidiarity.

Dana Zartner Falstrom⁹⁶ proposes to take inspiration, in order to create the new framework, by the Convention Against Torture and Other Cruel, Inhuman and

⁹⁴ Cited in: *Migration and Climate Change: A New (Under) Class of Travellers*, The Economist, 2009, available at < <https://www.economist.com/international/2009/06/25/a-new-under-class-of-travellers>>.

⁹⁵ TEU, article 5, 2007.

⁹⁶ Dana Zartner Falstrom is an Associate Professor in the International Studies Department at the University of San Francisco.

Degrading Treatment or Punishment⁹⁷. A new convention on the Protection of Environmentally Displaced Persons, according to the author, should deal not only with the immediate protection of those who are forced to leave their home because of environmental events, but also with the root causes of environmental displacement. Article 3 of the Convention Against Torture affirms that the Parties shall not return an individual to another State where he or she risks being subject to torture. A difference may be noticed as compared to the *non-refoulement* provision contained in the 1951 Convention Relating to the Status of Refugees: it requires the contracting states not to expel a refugee to states where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. According to the Convention Against Torture, a person has only to prove that he would risk being torture if he was returned to his country, without specifying the grounds on which they risk such treatment. Similarly, a Convention for the protection of environmental migrants should state that the States Parties shall not expel an environmentally displaced person to a State where he or she would be in danger to environmental problems. Like the Convention Against Torture, the new framework should not always grant permanent residency to the beneficiaries of the Convention: if and when the country of origin of the environmental displaced is deemed to be safe, the person may be returned there. The reason for temporary protection rather than a permanent one is also political: States Parties to the Convention would be more favourable to assist persons affected by environmental events when they know it is only temporary.

4. Human Rights in the context of cross-border displacement: hypothesis of protection of environmental migrants by the ECtHR and the ECJ

In recent years, the link between the effects of climate change and the enjoyment of human rights has become more and more evident; hence, migration for environmental reasons may raise issues of protection of human rights in the event

⁹⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 26 June 1984.

of the return, by the host State, of people to areas affected by natural disasters or environmental degradation.

In its Resolution 7/23 the UN Human Rights Council recognised for the first time to be “*concerned that climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights*”⁹⁸. In fact, natural events may cause several damages that may result in the loss of fundamental socio-economic rights internationally protected such as the right to health, the right to water, the right to food, the right to adequate housing and, most importantly, the right to life. As the Australian Human Rights and Equal Opportunity Commission has stated, the major human rights treaties were created before the harmful effects of climate change were truly understood; therefore, “*the precise connection between climate change and the international human rights law system is as yet undeveloped*”⁹⁹. A rich body of international human rights norms has matured since the adoption of the Universal Declaration of Human Rights and it may provide an effective framework for the protection of human needs in the context of environmental degradation and natural disasters. As it was explained before, one of the consequences of climate change is the cross-border displacement of people. For this reason, it is important that existing international human rights obligations are applicable also to non-nationals.

One could question if the destination country has the right to return climate migrants to their countries of origin. Under international human rights law, the principle of *non-refoulement* means that no one should be returned to a country where he would face torture, inhuman or degrading treatment or punishment and other irreparable harm. In the case of environmental displacement, torture is not included in the hazards that a migrant could face if sent back home¹⁰⁰; however, inhumane or

⁹⁸ Human Rights Council, *Resolution 7/23: human rights and climate change*, 28 March 2008.

⁹⁹ Human Rights and Equal Opportunity Commission (HREOC), *Human rights and climate change; human rights: everyone, everywhere, everyday*, 2008, available at <<https://humanrights.gov.au/our-work/commission-general/publications/human-rights-climate-change-2008>>.

¹⁰⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; article 2: “*For the purposes of this Convention, the term "torture" means any act by which*

degrading treatment can be considered harms that a climate migrant may encounter if returned to his country, as they involve deprivation the socio-economic rights listed before. *Non-refoulement* is present both in international and regional treaties and customary law¹⁰¹.

In particular, the provisions of the ECHR that are relevant for the purposes of the *non-refoulement*'s principle are article 2 (“Everyone’s *right to life shall be protected by law...*”) and article 3 (“*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*”), that are generally read in conjunction¹⁰². Concerning deportation cases, the responsibility of the State is triggered under the Convention, “*where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the destination country*”. The Court stated that, in such circumstances, “*Article 3 implies an obligation not to deport the person in question to that country*”¹⁰³.

4.1. The relation between the ECHR and the EU

Article 2 TEU affirms that the EU is founded on “*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...*”. Then, article 6 TEU

severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.

¹⁰¹ UN Human Rights Office of the High Commissioner, *The principle of non-refoulement under international human rights law*, available at: <<https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>>.

¹⁰² Rosenow-Williams K. and Gemenne F., *Organizational Perspectives on Environmental Migration*, Routledge, 2016.

¹⁰³ F.G. v Sweden, no 43611/11, ECtHR, 23 March 2016.

maps out the contours of EU fundamental rights law, referring to three sources of law: the European Union Charter of Fundamental Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles as guaranteed by the ECHR and constitutional traditions common to the Member States.

The case-law of the ECtHR, in particular, is relevant in the present discussion on environmental migration and it could influence, as it will be explained, the future case-law of the ECJ. The EU is not a party to the ECHR, although in theory it could be. While article 6(2) TEU allows the EU to “*accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms*”, article 59(2) ECHR affirms that “*the European Union may accede to this Convention*”. A first draft of an ‘agreement on the accession of the EU to the ECHR’ was even elaborated and presented by an informal working group of the Committee of Ministers. It was the ECJ that presented objections pursuant to article 218(11) TFEU¹⁰⁴. The ECJ’s main concerns were the autonomy of EU law and the exclusive competence of the ECJ¹⁰⁵. In fact, the EU, like any other Contracting Party to the Convention, would be subject to external control to ensure its observation of the rights and freedoms set out in the Convention; thus, the EU and its institutions, including the Court of Justice, would be subject to the control mechanisms provided for by the ECHR and to the decisions and the judgments of the ECtHR. Moreover, accession to the ECHR would require the Member States of the EU to check that the other Member States are respecting the fundamental rights as set out in the Convention: according to the ECJ, it would be contrary to the obligation of mutual trust between the Member States.

Despite the fact that the EU is not a member of the ECHR, the latter influences EU law: the ECHR and the case-law of the ECtHR are indirectly binding for the EU.

¹⁰⁴ TFEU, article 218(11): “*A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised*”

¹⁰⁵ ECJ, *Opinion 2/13 pursuant to Article 218(11) TFEU*, 18 December 2014.

First of all, as seen, article 6(3) TEU affirms that the fundamental rights that are guaranteed in the ECHR shall be general principles of the EU's law. Then, in its preamble, the Charter of Fundamental Rights, which has the same legal value as the Treaties for the organs of the EU¹⁰⁶, “*reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular from [...] the European Convention for the Protection of Human Rights and Fundamental Freedoms [...] and the case-law [...] of the European Court of Human Rights*”. In addition, article 52 of the Charter of Fundamental Rights declares that whenever the rights enshrined in the Charter correspond to the ones contained in the ECHR, the meaning and scope of those rights shall be the same as those laid by the Convention. For example, 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. The ECJ regarded article 4 of the Charter as imposing the same level of protection as article 3 ECHR¹⁰⁷.

For what concerns the relation between the ECtHR and the ECJ, both courts have so far interpreted the Convention consistently; the ECJ also refers to the case-law of the ECtHR and vice versa¹⁰⁸. Francis G. Jacobs noted that the ECJ has treated the ECHR as it were binding and has followed consistently the case-law of the ECtHR¹⁰⁹. In 2009, the ECJ affirmed that article 15 of the Qualification Directive¹¹⁰

¹⁰⁶ TEU, article 6(1): “*The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties*”; see also European Union, Charter of Fundamental Rights, 2007; article 51(1): “*The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law*”.

¹⁰⁷ C-411/10, N.S. and others v. Home Department, ECJ, 21 December 2011.

¹⁰⁸ Satzger H., *International and European Criminal Law*, C.H. Beck, Hart Nomos, 2017, citing Pellegrin v. France, n. 2854/95, ECtHR, 8 December 1999 and Dieter Krombach v André Bamberski, C-7/98, ECJ, 28 March 2000.

¹⁰⁹ Jacobs F.G., *The Sovereignty of Law: the European Way*, Cambridge University Press, 2006.

¹¹⁰ European Parliament and Council, *Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a*

- which will be analysed in details in the next Chapter – “*corresponds, in essence*” to article 3 ECHR¹¹¹; the ECtHR, a few years later, confirmed that “*based on the ECJ’s interpretation in Elgafaji, the Court is not persuaded that article 3 of the Convention [...] does not offer comparable protection to that afforded under the Directive*”¹¹².

4.2. The guidance of the ECtHR on the subject of purely naturally occurring harm

The ECJ has not discussed yet a case on migration caused by environmental conditions or similar natural occurring harms; the ECtHR, however, has dealt with cases on naturally occurring harm and, given the link between the EU and the ECHR and the role of the ECtHR within the EU order, it is important to assess whether the principles expressed by the ECtHR could guide the ECJ on the issue. The cases discussed by the ECtHR on the matter of purely naturally occurring harms are not specifically about environmental events. Nonetheless, these cases are considered 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.

The particularity of the cases that will be presented is that article 3 ECHR was for the first time applied to cover also harms resulting from natural causes; the provision was until then applied by the Court in contexts in which the risk to the individual of being subjected to ill-treatments emanates from intentionally inflicted acts of the public authorities in the receiving country.

uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, 2011.

¹¹¹ C-465/07, Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie, ECJ, 17 February 2009.

¹¹² Sufi and Elmi v. the United Kingdom, nos. 8319/07 and 11449/07, ECtHR, 28 June 2011.

4.2.1. D. v. the United Kingdom: article 3 ECHR is deemed to be enforceable also when harm is naturally occurring, but only in ‘very exceptional’ circumstances

*D. v. the United Kingdom*¹¹³ is a case in which the UK was prevented from returning the applicant to his country, St. Kitts, where he would risk his life from harm naturally occurring, i.e. AIDS. The applicant in 1993 was charged and imprisoned for the importation of drugs in the UK. While in prison, he started to be sick and he was diagnosed with an advanced stage of HIV infection and severe immunosuppression. In 1996, immediately before his release on license, the immigration authorities decided for the applicant’s removal to St. Kitts. The applicant’s solicitors requested the Secretary of State to allow the applicant to remain on compassionate grounds since his expulsion to St. Kitts would cause the loss of the medical treatment which he was currently receiving, thereby shortening his life expectancy. The applicant in St. Kitts would have suffered not only poor medical conditions, but also lack of any prospect of income or a social network. The Chief Immigration Officer refused this request. After having unsuccessfully applied to the High Court and the Court of Appeal, the applicant appealed to the ECtHR.

The ECtHR decided that the return of the applicant would amount to inhuman and degrading treatment as it would constitute a breach of article 3 ECHR; in fact, the applicant was in the advanced stages of a terminal and incurable illness and there was a serious danger that the conditions he would encounter in St. Kitts would further reduce his already limited life expectancy and subject him to severe mental and physical suffering. The Court specified that article 3 ECHR is enforceable also where the source of the risk of the proscribed treatment originate from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country. Limiting the extent of article 3 ECHR, according to the Court, would undermine its absolute character of protection. Making this point, however, the Court highlighted the very exceptional circumstances and compelling humanitarian considerations at stake in the case. Therefore, the Court set very high

¹¹³ *D. v. the United Kingdom*, no 30240/96, ECtHR, 2 May 1997

standards for triggering article 3 ECHR in the sense of prohibiting the return of an individual to his country of origin where he could suffer naturally occurring harm.

4.2.2. N. v. the United Kingdom: the limits of the high threshold set in D. v. UK

In *N. vs UK*¹¹⁴ the applicant, a Ugandan citizen living in London, was seriously ill because of HIV and Kaposi's sarcoma, with considerable immunosuppression. The medication she needed was available in limited supply in her hometown and they were considerably expensive. The solicitors lodged an asylum application on behalf of the applicant, saying that she feared for her life and safety if she were returned to Uganda since there she was ill-treated by the National Resistance Movement because of the association with the Lord's Resistance Army. Her application was rejected because it was not accepted that Ugandan authorities were interested in her and it was also noticed that the drugs she needed were available in Uganda at subsidised prices.

After a series of judgements appealed by both parties¹¹⁵, the applicant eventually appealed to the ECtHR for violation of Articles 3 and 8 under the Convention.

The Court maintained that, in order to fall within the scope of Article 3 ECHR, ill-treatment must attain a minimum level of severity. The Court applied the principles that could be drawn from *D. v. UK*. As in the case of *D. v. UK*, the claim of *N.* was based only on her medical condition and the lack of an adequate treatment available in her country. However, the case of the applicant does not disclose very exceptional circumstances such as in *D. v. UK* since the applicant was not critically ill and the extent to which she would be able to receive medical treatment, support

¹¹⁴ *N. v. the United Kingdom*, no. 26565/05, ECtHR, 27 May 2008.

¹¹⁵ After the applicant's application was rejected, the applicant appealed on the asylum claim – that was rejected – and also on the ground of Article 3 ECHR – that was permitted: the adjudicator declared that exceptional leave to remain had to be given to the applicant. The Secretary of State appealed to the Immigration Appeal Tribunal stating that the medical treatment was available in Uganda. The case then moved to the Court of Appeal where the Court affirmed that the UK did not have an obligation to permit continued residence in the United Kingdom to the applicant. The latter then appealed to the House of Lords, that unanimously dismissed the applicant's appeal.

and help from relatives, involved a certain degree of speculation. Therefore, a decision to remove the applicant to Uganda would not give rise to a violation of Article 3 ECHR. For what concerned article 8 ECHR, the Court considered that any separate issue arose under that article. A room for maneuver was left, as the Court did not “*exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling*”.

Three judges of N. v. UK disagreed with the decision: Judges Tulkens, Bonello, and Spielmann affirmed that the reasoning offended the absolute nature of Article 3 ECHR.

Requests to revise the ruling in N. v. the UK came from six of the seven judges in *Yoh-Ekale Mwanje v. Belgium*¹¹⁶ that affirmed that they felt bound to follow the previous case-law only to preserve legal certainty; they lamented the fact that, in order to find a violation of article 3 ECHR for naturally occurring harm, it was required an extreme factual scenario where the person is at the final stage of a disease and near death and that type of analysis was not compatible with the letter and spirit of Article 3 ECHR given the fundamental and absolute nature of the provision. They concluded that applying the D. v. UK test did not adequately respect the integrity and dignity of the person. More recent cases indeed revised the high threshold.

4.2.3. Poposhvili v. Belgium: the ECtHR defines ‘exceptional circumstances’

In *Poposhvili v. Belgium*¹¹⁷ the applicant was suffering from a number of life-threatening diseases: chronic lymphocytic leukemia, active pulmonary tuberculosis, chronic obstructive pulmonary disease and hepatitis C. He arrived in Belgium in 1998 and the day after his arrival he lodged an asylum application that was however refused. He then applied for a residence permit in Belgium, that was rejected because of his criminal record.

¹¹⁶ *Yoh-Ekale Mwanje v. Belgium*, No. 10486/10, ECtHR, 20 December 2011.

¹¹⁷ *Paposhvili v. Belgium*, Application no. 41738/10, ECtHR, 13 December 2016

Before the ECtHR he claimed that his return to Georgia would be a breach of article 3 ECHR as he would face inhuman and degrading treatment. The Court observed that his case was not ‘very exceptional’ and the humanitarian grounds against the removal were not compelling. At the same time, the ECtHR noted that ‘other very exceptional cases’ cited in *N. v. UK* had never been assessed in subsequent case-law, and decided to define them: *“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”*. Even if the threshold is still high, it was lowered from the one applied in *D. vs the UK* and *N. vs the UK*.

4.2.4. Savran v. Denmark: the ECtHR keeps lowering the D. v. UK threshold

In *Savran v. Denmark*¹¹⁸, the applicant, a Turkish national, after being convicted for assault under highly aggravating circumstances resulting in the death of the victim, was found to be severely mentally impaired. After the trial, it was ordered his expulsion to Turkey but, considering the results of his psychological evaluations, the applicant’s guardian requested a review of his expulsion order. The High Court rejected the request on the basis that the applicant could access medical treatment for free in his country. The applicant then appealed to the ECtHR complaining that the order to return him to Turkey consisted of a violation of article 3 ECHR.

The Court held that, in order to return the applicant, the host state has to demonstrate that in his country the applicant would receive adequate care; therefore, in that case,

¹¹⁸ *Savran v. Denmark*, no. 57467/15, ECtHR, 27 January 2020.

Denmark had to receive sufficient assurances from the applicant's country that adequate treatment is available and accessible to him.

4.3. How the ECtHR case-law could apply in cross-border environmental displacement

The first similarity between the applicants of the cases just examined and the situation of cross-border climate migrants is that both of them could suffer, if returned to their country of origin, purely naturally occurring harms, not caused by authorities of the receiving State. Thus, also environmentally displaced people could rely on article 3 ECHR claiming that their expulsion would result in them suffering ill-treatment as a consequence of deprivation of their rights. Climate migrants, however, would not impose on the host State the same kind of resource burden as would medical immigrants¹¹⁹.

The considerations made by the Court in *Paposhvili v. Belgium* and *Savran v. Denmark* points at the fact that, even if the medical condition of the applicant at the time of removal is stable, it does not mean that removal is permissible: the medical condition of the applicant could worsen because of the lack of adequate support in his country. The two cases just mentioned indicate a development in the interpretation of article 3 ECHR. The Court, examining a possible violation of article 3 ECHR, did not only look at the access, by the applicant, to medical treatment but also his social support and economic condition; this could imply that lack of other socio-economic rights than medical treatment could result in inhuman or degrading treatment if removed¹²⁰. Thus, climate change adverse effects of socio-economic rights such as the right to food, water and housing, could give rise to inhuman or degrading treatment.

¹¹⁹ Scott M., *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*, volume 26(3), 2014.

¹²⁰ Cederberg E., *The Protection of Human Rights in the Context of Climate Change: Non-refoulement Obligations under Article 3 ECHR to Protect Environmental Migrants?*, Master's Thesis in Human Rights Law, Uppsala Universitet, 2020.

Given the necessity to interpret article 3 ECHR and article 4 of the Charter of Fundamental Rights of the EU consistently, there is the possibility that the ECJ, when it will find itself dealing with an environmental migration case, will look at the ECtHR jurisprudence on article 3 ECHR and naturally occurring harms.

5. The UN Security Council as the organ that could tackle environmental migration: the marginal role of the EU

After having examined the legal instruments provided for in the EU legal order, it is important to analyze the tools offered by international law to deal with climate migration and the possible adhesion or involvement of the EU to them. One of the possible solutions emerged at the international level is to let the UN Security Council address the environmental migratory phenomenon.

In 2006 representatives of governments, environmental and humanitarian organisations and United Nations agencies participated in a meeting organised by the government of the Maldives. One of the matters discussed was the role of the UN Security Council in dealing with climate migration. The UN Security Council is the organ of the UN entrusted with the maintenance of international peace and security.

As it was explained before, although the EU is not a Member of the UN Security Council, its interests are upheld by the Member States of the EU. However, now that the UK – a permanent member of the UN Security Council – is not obliged to coordinate its positions with the other Member States to support the EU's interests, the EU has lost a powerful influence within the Security Council¹²¹. A proposal that several actors have made, in order to give the EU representation within the UN, is to create a permanent seat for the EU in the UN Security

¹²¹ Pindják P., *Time for the European Union to reassert itself in the UN Security Council, the Atlantic Council*, 2020, available at: < <https://www.atlanticcouncil.org/blogs/new-atlanticist/time-for-the-european-union-to-reassert-itself-in-the-un-security-council/>>.

Council¹²²: it is believed that “*as the world’s second biggest economy, as the contributor of the most aids for developing countries, the EU deserves a greater weight in the United Nations*”¹²³. The creation of a permanent seat for the EU entails several political and legal difficulties: the main one is probably the necessity of an amendment of the UN Charter to include regional organisation such as the EU; moreover, France appears reluctant to give in its privileges as permanent member¹²⁴. Therefore, at the moment, a greater participation of the EU in the UN Security Council does not seem feasible.

5.1. Does the UN Security Council have the competences?

Before discussing the suitability of the UN Security Council to deal with climate migration, it is necessary to assess whether it has the competence to do so.

The UN Charter authorises the Security Council to “*determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken [...] to maintain or restore international peace and security*”¹²⁵.

During the 5663rd meeting of the UN Security Council about the impact of climate change on peace and security, it was recognised that a consequence of climate change might be migratory pressures¹²⁶. Moreover, as it was explained in Chapter I, one of the ways in which climate migrants are perceived is as security threats: some describe the phenomenon of environmental displacement as “*abrupt flows of climate refugees across national borders*” that will “*ignite far-reaching domino*

¹²² Italy urges permanent UN Security Council seat for UN, Adnkronos, 2019, available at: < https://www.adnkronos.com/aki-en/politics/2019/12/18/italy-urges-permanent-security-council-seat-for_QtQuw7K6T7ldHgLPz9RMmI.html>.

¹²³ The Union of European Federalists, *On a single seat for the European Union in UN Security Council*, 2004, available at: < <https://www.federalists.eu/news-uef/view/on-a-single-seat-for-the-european-union-in-un-security-council/>>.

¹²⁴ Pirozzi N., *The EU’s contribution to the effectiveness of the UN Security Council: Representation, Coordination and Outreach*, Istituto Affari Internazionali, 2010.

¹²⁵ Charter of the United Nations, 1945, article 39.

¹²⁶ UN Department of Public Information, *Security Council SC/9000*, Security Council 5663rd Meeting, 2007.

effects that risk destabilising whole regions and may escalate into violent conflicts”¹²⁷. Therefore, following the narrative of environmentally displaced people as security threats, a role for the UN Security Council in tackling the issue could be found.

5.2. Criticalities related to the control of the UN Security Council of environmental migration

There are some critical issues regarding the role of the UN Security Council in dealing with climate migration. Some of them arose during the 5663rd meeting of the UN Security Council about the impact of climate change on peace and security¹²⁸.

During the meeting, as said, the fact the migratory pressure resulting from the effects of climate change is concerning from a security standpoint was reiterated. Some least developed countries argued that the UN Security Council is not the right institution to deal with climate policy. It was claimed that, for what concerns environmental issues, the Security Council lacks expertise and is not the right place to make decisions on climate change policies: all the initiatives that the Security Council could take can also be done by competent institutions such as the UNFCCC or the UNEP. As Germany specified in the meeting, the “*Council usually deals with more imminent threats to international peace and security than those caused by climate change*”.

Bierman and Boas notice that the Security Council exercise its primary function - the preservation of international peace - mainly through mandating UN members to take forceful action against countries whose governments pose a threat to international security and do not comply with international law and requests from the Security Council itself. Since the climate migrants’ situation is very different in

¹²⁷ Bettini G., *Climate Barbarians at the gate? A critique of apocalyptic narratives on ‘climate refugees’*, Elsevier, volume 45, 2013.

¹²⁸ UN Security Council, 5663rd meeting, 17 April 2007.

character, it remains unclear whether a more substantial role of the Council is needed¹²⁹.

Developing countries, in particular, are concerned on the risk that the UN Security Council, if allowed to address the issue of environmentally displaced people, would excessively look into their internal affairs.

Lastly, as it was mentioned before, the EU has not a real role within the UN Security Council and it could be problematic for what concerns the effective expression of its interests and values: a potential role of the UN Security Council in dealing with environmental migration would cause a partial set aside of the EU.

6. Modifying the Convention relating to the Status of Refugees so that it can include climate migrant

The Convention relating to the status of refugees (CRSR) is the multilateral treaty of the UN, signed in 1951, that defines who can be considered a refugee, the rights of the latter and the responsibilities of the States to protect him. The UNHCR has the role of guardian of both the Convention and its 1967 Protocol.

All the Member States of the EU are members of the Geneva Convention and its Protocol, but the EU is excluded, since the Convention can only be ratified by States. However, as it was mentioned before, the EU is closely committed to the obligations arising from the Geneva Convention.

Anyway, since immigration and asylum are topics of shared competence between the EU and its Member States, one could argue that, even if only the Member States are parties to the Convention, the EU can still exercise its competence. The ECJ expressly affirmed, talking about the Convention on the International Labour Organization concerning safety in the use of chemicals at work – of which the EU cannot be a party – that “*when it appears that the subject-matter of an international convention falls partly within the competence of the Community and partly within that of the Member States, the requirement of unity in the international representation of the Community makes it necessary to ensure close cooperation*

¹²⁹ Biermann F., Boas I., *Protecting climate refugees: the case for a global protocol*, Environment: science and policy for sustainable development vol. 50 number 6, 2011.

*between the Community institutions and the Member States both in the process of negotiation and conclusion and in the fulfilment of the obligations entered to”*¹³⁰. The principle expressed could be easily used in the present discussion about a possible review of the Geneva Convention to highlight the need for a participation of the EU in a future amendment of the Convention.

6.1. Can the UNHCR deal with the issue now?

In the present moment, the UNHCR has the possibility to protect environmentally displaced people only in few situations, namely the ones in which people fleeing environmental disasters meet the Geneva Convention’s definition of ‘refugee’¹³¹: a victim of natural disasters may seek refuge in another country because his government has denied or hindered assistance in order to discriminate him on one of the grounds of the Convention; people may also flee from their countries because their government has not put in place adequate measures to prevent natural disasters or did not accept aid from other States to deal with environmental events; individuals may be considered refugees within the meaning of the Geneva Convention also when the reason why they have migrated is an interaction between climate events and conflicts¹³².

In order to always include environmental migrants in the protection regime of the Geneva Convention, a resolution by the UN General Assembly may be sufficient: a resolution is considered approved if it obtains the consent of the majority of the members present and voting. As article 45 of the CRSR affirms: “*Any Contracting State may request revision of this Convention at any time by a notification addressed to the Secretary-General of the United Nations*”. It is doubtful that the Parties of the Convention would accept to extend the current regime to cover a twenty-times bigger group of refugees. On the one hand, national Governments,

¹³⁰ ECJ, Opinion 2/91, 19 March 1993.

¹³¹ UNHCR, *Climate change, natural disasters and human displacement: a UNHCR perspective*, 2009; see also McAdam J., *Climate Change and Displacement: Multidisciplinary Perspectives*, Hart Pub Ltd, 2010.

¹³² UNHCR, *Annual consultations with NGOs: 2018 Report, Putting People First*, 2018.

being the ones that have to provide for new refugees in their country, will probably resist an expansion of the refugee definition. On the other hand, the growing nationalism in the Global North lead to a robust anti-migrant sentiment among the populations of receiving countries: they fear that foreign people may wrongfully claim refugee status, having them nothing to lose; they also may suspiciously look at the integration in their country of different cultures and living habits.

6.2. The protection accorded to refugees by the Geneva Convention

Refugees are granted with a series of rights that reflect several obligations of Contracting States, such as according to refugees the same treatment as is accorded to aliens in the same circumstances for what concerns the acquisition of movable and immovable property (article 13), non-political and non-profit making associations and trade unions (article 15), the right to engage in wage-earning employment (article 17) or self-employment (article 18), housing (article 21), access to education (article 22) and the right to move freely within the territory (article 26). Refugees shall also have free access to the courts of law on the territory of the hosting State (article 16) and shall receive, by the Contracting States, identity papers (article 27) and travel documents (article 28).

The most relevant provisions on the protection of refugees are those regarding their expulsion. In fact, as a general rule, the Contracting States shall not expel a refugee lawfully in their territory, unless for reasons of national security and public order, by due process of law (article 32). However, an obligation of *non-refoulement* is provided when the Contracting State wants to expel a refugee to the frontiers of territories where his life or freedom would be threatened because of his race, religion, nationality, membership of a particular social group or political opinion. Whenever the refugee is deemed to be a danger to the security of the country in which he is and to the community of that country, the *non-refoulement* obligation is not applicable.

6.3. Proposed modifications to the Geneva Convention

6.3.1. Extension of the definition

As it was mentioned in the previous Chapter, the UNHCR is opposed to using the term ‘refugee’ to identify environmental migrants. It has also advised against an extensive interpretation of the refugee definition or a renegotiation of the Convention Relating to the Status of Refugees (CRSR) that could lower, in the current global political situation, the current level of protection of refugees¹³³. Some scholars, however, think that the definition given by the Convention must be expanded because it “*embodies an outdated understanding of the worldwide refugee situation*”¹³⁴. Therefore, they propose to modify the current refugee definition in order to include environmental degradation and natural disasters.

In 2006, the Belgium Senate adopted a resolution in which, noticing the lack of protection for “*réfugiés environnementaux*” and the entity of the issue in terms of the number of people that are displaced for environmental reasons, asked the Belgium Government to promote within the UN the recognition of the status of refugee also for environmentally displaced people¹³⁵. The proposal was then reiterated in 2008 in a resolution of the Chamber of Representatives¹³⁶

¹³³ Weber C., *Climate refugees and climate migration*, Green European Foundation asbl, 2019.

¹³⁴ Harvard B., *Seeking protection: recognition of environmentally displaced persons under international Human Rights Law*, Villanova Environmental Law Journal, volume 18(1), 2007

¹³⁵ Sénat de Belgique, *Proposition de résolution visant à la reconnaissance dans les conventions internationales du statut de réfugié environnemental*, 21 March 2006.

¹³⁶ Chambre des représentants de Belgique, *Proposition de résolution relative à la prise en considération et à la création d’un statut de réfugié environnemental par les Nations-Unies et l’Union européenne*, 3 October 2008.

6.3.2. Addition of a new Protocol to the CRSR

The Greens suggested adding a Protocol to the CRSR so that a clear distinction between traditional refugees and climate migrants is drawn¹³⁷. Also the Government of Maldives, during the meeting of 2006 mentioned in the previous paragraph, proposed the adoption of a new Protocol to the Geneva Convention, namely the “Protocol on environmental refugees: recognition of environmental refugees in the 1951 Convention and in the 1967 Protocol regarding the Status of Refugees”. The scope of the Protocol would be the protection of people displaced internally or externally of their land because of natural disasters, deterioration or man-made disasters¹³⁸. In the proposal, however, it is specified that not every natural hazard would grant a person the status of environmental refugee, but only those particularly severe.

7. A new Protocol to the UNFCCC for the protection of environmental migrants

The UNFCCC is an international environmental treaty elaborated during the United Nations Conference on Environment and Development in 1992. Its objective is the “*stabilisation of greenhouse gas concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system*”¹³⁹. The EU and its Member States are both parties to the UNFCCC. The EU, within the Convention, does not have a separate vote from its Member States, that, during sessions and negotiations, meet privately in order to agree to a common negotiating

¹³⁷ Flautre H., Lambert J., Keller S. and Lochbihler B., *Climate Change, Refugees and Migration*, The Greens/EFA in the European Parliament, 2013.

¹³⁸ Republic of Maldives (Ministry of Environment, Energy and Water), *First Meeting on Protocol on Environmental Refugees: recognition of Environmental Refugees in the 1951 Convention and 1967 Protocol relating to the Status of Refugees*, 2006, as cited by Pires Ramon E., *Refugiados ambientais: em busca de reconhecimento pelo direito internacional*, Tese de Doutorado, Universidade de São Paulo Faculdade de direito 2011.

¹³⁹ United Nations Framework Convention on Climate Change, 1992

position, which is then exposed by the Member State that holds the Presidency of the Council of the EU.

7.1. Can the UNFCCC deal with the issue of climate migration now?

Although the UNFCCC is engaged in fighting the adverse effects of climate change, it is unlikely its involvement also in the climate migrants issue: it regards state-to-state relations, not the ones between states and individuals; it also has a preventive nature and it is less centered on remedial actions such as the protection of environmentally displaced persons.

However, 'adverse effects of climate change' refer, *inter alia*, in article 1 of the Convention, to "*deleterious effects [...] on human health and welfare*": arguably the protection of environmentally displaced people could be included among the aims of the UNFCCC¹⁴⁰. An article, in particular, can be used as a basis for the involvement of the UNFCCC in the matter. Article 4 first affirms that the parties to the Convention shall "*cooperate in preparing for adaptation to the impacts of climate change*" and "*take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods... to minimise adverse effects*" and then states that "*the developed country Parties . . . shall . . . assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects*"¹⁴¹. Until now, the provision was only interpreted as a way to provide funding in order to help adaptation within the country, also because when the UNFCC was drafted climate migration was not considered an adaptation strategy. However, as specified previously, migration is now seen as an adaptation strategy; thus, the provision could be extensively interpreted as to include support by developed states party to cross-border environmentally displaced persons.

¹⁴⁰ Bodansky D., Brunnée J., Rajamani L., *International Climate Change Law*, OUP Oxford, 2017, at 325.

¹⁴¹ United Nations Framework Convention on Climate Change, 1992

7.2. Proposal for a new Protocol to the UNFCCC dealing with environmental migration

One of the proposals for handling cross border environmental displacement is to create an independent legal regime under a new Protocol to the UNFCCC¹⁴². According to article 17 of the UNFCCC, “*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...*”.

The Protocol could rely upon agreed principles within the Framework such as the common but differentiated responsibility’s principle and could include the protection on climate migrants in the general climate regime. The principle of common but differentiated responsibility is mentioned both in article 3¹⁴³ and in article 4¹⁴⁴ of the Convention. It could be used, in the context of the support of individuals displaced for environmental reasons, for what regards the entity of the support that should be provided by the States Parties to the Protocol.

According to Biermann and Boas, a Protocol to the UNFCCC regarding climate refugees should have a list of the communities that need to be relocated due to the effects of climate change, such as villages or islands. An *ad hoc* committee, composed by an equal number of affected countries and donor countries, would have the task to assess the proposal of the member states to include new populations

¹⁴² United Nations Framework Convention on Climate Change, 1992; see also Biermann F. and Boas I., *Protecting Climate Refugees: the case for a Global Protocol*, Environment: science and policy for sustainable development vol. 50 number 6, 2011.

¹⁴³ United Nations Framework Convention on Climate Change; Article 3 paragraph 1: “*...The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities...*”

¹⁴⁴ United Nations Framework Convention on Climate Change; Article 4 paragraph 1: “*All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall...*”

in the list and the appropriate measures to support them, after consulting scientific and technical bodies of the UNFCCC and other UN agencies. Once a community is embedded in the list of people that need support, they would benefit from mechanisms such as financial aid to foster adaptation or programs on resettlement and integration in new lands. Since wealthier countries will be able to protect their own affected populations, the rights under the Protocol should be restricted to populations of developing countries.

8. Considerations on the participation of the EU in international legal instruments usable for the protection of environmentally displaced people

Several legal instruments are in theory suitable for protecting climate migrants. Some of them, however, appear, on the one hand, to be more capable of granting adequate support to this category of people and, on the other, to ensure an effective participation of the EU.

A new Protocol to the UNFCCC appears to be a good solution, as it would be based on the solid legal framework of the Convention, that already contains principles and provisions useful for supporting the needs of environmental migrants. The fact that the UNFCCC was created to provide a legal framework to the issue of climate change and its effect makes the development of a Protocol attached to it a better tool than resolutions by the UN Security Council, that does not have the expertise to deal with such matter. Besides, the EU could not express its position adequately or protect its interests within the UN Security Council.

The creation of a new legal instrument could also allow the participation of the EU. A new legal instrument, as well as a Protocol to the UNFCCC, moreover, could efficiently separate the needs and issues of climate migrants from the ones of other types of migrants or refugees. This is why an extension of the definition of refugee contained in the Geneva Convention or a modification of the Convention itself would be highly disadvantageous as the needs of climate migrants and the harm they escape from are very different from those of traditional refugees: climate migrants tend to seek

support for finding an alternative livelihood and earning a living rather than seeking refugee-type protection. Moreover, requesting the parties of the Convention to modify it could result in watering down the protection currently accorded to refugees.

The role of Courts is crucial in this context of legal uncertainty because they, interpreting the law in a way that is consistent with the evolution of society, may protect the rights and interests of groups of people, such as climate migrants, that were almost unknown just a few decades ago. It was shown that, in dealing with natural harms such as diseases, the Court lowered the high threshold required to grant protection to the applicants under article 3 ECHR: now the deprivation of socio-economic rights in the country of origin of the applicant could constitute ill-treatment and, therefore, trigger the application of article 3 ECHR. Given that the rulings of the ECtHR are taken into consideration within the EU, the developments in the case-law of the ECtHR could be taken into account by the ECJ if, in the future, it will find itself discussing questions on environmental migrants. The EU, through article 78 TFEU, has the competence to cope with the issue of environmental migration partially: it can happen not only in the international arena, but also within the EU itself. The way in which the EU could grant protection to climate migrants will be shown in-depth in the next Chapter.

CHAPTER III

EU LEGAL INSTRUMENTS FOR THE PROTECTION OF CLIMATE MIGRANTS

1. The increasing interest of the EU towards environmental migration

After having analyzed the EU as an international actor regarding the phenomenon of climate migration and the principles emerged by the judgements of the ECtHR, it is crucial to examine the internal solutions of the EU, i.e. the EU legislation concerning the phenomenon of migration and the other relevant actions carried out by EU institutions in this field.

Although the EU, over time, has started to be interested in the phenomenon of environmental migration, it has not found yet legal instruments explicitly allowing environmental migrants to stay temporarily or permanently in the Member States. The European Parliament was the first institution to address the topic of climate migration in its report on “*The Environment, Security and Foreign Policy*”¹⁴⁵. Within the European Parliament, several seminars were organised on the subject: in 2008 a seminar on ‘climate refugees’ invited European and international institutions to provide protection to the victims of natural disasters and displaced persons; at the Agora on climate change held by the European Parliament, concerns over environmental migration were expressed; the workshop ‘Solidarity’ invited the EU institutions to develop a European strategy on climate forced migration and to create a Protocol to the UNFCCC on the protection of climate migrants¹⁴⁶. The Green Party has proved to be particularly interested in the matter, through the

¹⁴⁵ European Parliament, *Report on the environment, security and foreign policy*, 1999, available at: <<https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FTEXT+REPORT+A4-1999-0005+0+DOC+XML+V0%2F%2FEN>>.

¹⁴⁶ European Commission, *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”*, 2013, footnote 15 at 6.

publication of papers addressing the issue of environmental migration and suggesting solutions¹⁴⁷.

The European Council, then, in the 2009 Stockholm Programme, requested the European Commission “*to present an analysis of the effects of climate change on international migration, including its potential effects on immigration to the European Union*”¹⁴⁸. The result of such request was the Commission Staff working document “*Climate change, environmental degradation and migration*” that analyses the link between climate change and migration and, examining the policy responses available at the EU and international level, makes recommendations for future action.

There are, indeed, legal options to fill the protection gap for climate migrants coming in the EU. The instruments available are *ex-ante* and *ex-post* protection measures. The *ex-ante* protection – Seasonal Workers Directive - aims at preventing further displacement through remittances in the form of money, skills and know-how brought by seasonal migrants from Europe to their country of origin. *Ex-post* measures – Qualification Directive and Temporary Protection Directive – are tools capable of giving protection to environmentally displaced people that cross European borders. Even if the instruments mentioned are not tailored to the specific needs of climate migrants, they may nonetheless remedy the current protection gap, thanks also to the indications given by the ECJ on their interpretation.

Some EU Member States – Finland, Sweden and Italy – filled this gap by creating legislation regulating the entry and stay in their country of people fleeing from natural disasters.

The EU approach on asylum and migration has evolved, from the exclusive competence of the Member States on the matter to the shared competence between the EU and its Member States as provided for in article 4 TFEU.

¹⁴⁷ Flautre H., Lambert J, Keller S. Lochbihler B, *Climate change, refugees and migration*, The Greens, 2013; see also Weber C., *Climate Refugeed and Climate Migration*, Green European Foundation asbl, 2019.

¹⁴⁸ Council of the European Union, *The Stockholm Programme – An open and secure Europe serving and protecting the citizens*, 2 December 2009, at 63.

2. The evolution of the EU migration and asylum policy

The migration and asylum policy became of interest, for the EU, with the Maastricht Treaty. Under the Treaty, the cooperation in the field of justice and home affair was established as the third pillar of the so-called ‘three-pillars structure’. Article K.1 of Title VI of the Treaty affirmed that “*the Member States shall regard the following areas as matters of common interest:*

(1) asylum policy;

(2) rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon;

(3) immigration policy and policy regarding nationals of third countries:

(a) conditions of entry and movement by nationals of third countries on the territory of Member States;

(b) conditions of residence by nationals of third countries on the territory of Member States, including family reunion and access to employment;

(c) combating unauthorised immigration, residence and work by nationals of third countries on the territory of Member States;”

The Treaty of Amsterdam represents a turning point in migration policy at EU level as the sections of the third pillar relating to immigration, asylum and rights on non-EU nationals were ‘communitarised’¹⁴⁹: they were brought within the first pillar by article 73(k) that affirmed that the Council had to establish, within five years after the entry into force of the Treaty: “*(1) measures on asylum [...] within the following areas:*(a) *criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States,*

(b) minimum standards on the reception of asylum seekers in Member States, (c) minimum standards with respect to the qualification of nationals of third countries as refugees, (d) minimum standards on procedures in Member States for granting or withdrawing refugee status;

¹⁴⁹ Talani L.S., *European Political Economy: Issues and Theories*, Ashgate, 2014, at 253.

(2) 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;

(3) measures on immigration policy within the following areas: (a) conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion, (b) illegal immigration and illegal residence, including repatriation of illegal residents;

(4) measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States". However, the extent of the competence of the EU was limited, since the Commission and the Member States shared competence in proposing to the Council measures on refugees or immigration policy, while the Parliament had consultative powers and the Council had to vote unanimously.

The European Council met in Tampere Summit in 1999, in order to start creating the common EU asylum and migration policy: it was expressed the need for an agreement on the issue of temporary protection for displaced persons, for the approximation of rules on the recognition of refugees and the content of refugee status and for providing subsidiary forms of protection.

The Treaty of Lisbon abolished the three-pillar structure and distributed the competences between the EU and its Member States. As it was described in the previous Chapter, migration and asylum are policies of shared competence, regulated under Title V, Chapter 2 of the TFEU, by articles 77-79 TFEU.

The evolution examined included the development of several instruments, by the EU, useful to regulate different aspects of the migratory phenomenon. For the purposes of the current analysis three, in particular, will be explored: the Qualification Directive, the Temporary Protection Directive and the Seasonal Workers Directive.

3. Qualification Directive and subsidiary protection for supporting environmental migrants

The Qualification Directive¹⁵⁰ is legally based on points (a) and (b) of Article 78(2) TFEU¹⁵¹ and it has its origin in the Tampere Summit of 1999: the Summit provided that rules regarding refugee status should be complemented by measures on subsidiary forms of protection, offering an appropriate status to any person in need of such protection. It represents a type of complementary form of protection for the individuals that do not meet the requirements of the Geneva Convention and its Protocol for being considered refugees. Complementary protection is a very generic term not defined in any international instrument, that may decline in different ways: the expression emerged to describe the arising phenomenon in industrialised countries not to deport asylum seekers whose application for refugee status was rejected and who, nonetheless, have solid reasons for not wanting to return to their home country¹⁵².

The purpose of the Qualification Directive is to establish standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection and for a uniform status for refugees and persons eligible for subsidiary protection. One of the aims of the Directive was to harmonise the disparate criteria in the EU Member States that lead to discretionary national

¹⁵⁰ The European Parliament and the Council of the European Union, *Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted*, 2011

¹⁵¹ TFEU; article 78(2) points (a) and (b): “*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*”.

¹⁵² Mandal R., *Protection mechanisms outside of the 1951 Convention (“Complementary Protection”)*, UNHCR, 2005, at viii.

practices, by codifying existing international and EU practices¹⁵³. In any case, Member States may introduce or retain more favourable standards for determining who qualifies as a person eligible for subsidiary protection. Article 2 of the Directive defines a ‘person eligible for subsidiary protection’ 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, to suffer serious harm. The definition of ‘serious harm’ appears to be crucial to determine whether the protection accorded by the Qualification Directive could benefit environmental migrants.

3.1. Article 15 and its evolution

Serious harm is, according to article 15 of the Directive, (a) the death penalty or execution, (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin (c) serious and individual threat to a civilian’s life or person because of indiscriminate violence in situations of international or internal armed conflict. While death penalty or executions are not applicable in the case of environmental migrants because they cannot derive from climate change, it is specified that the existence of an armed conflict is the sole criterion for assessing the presence of a ‘serious and individual threat’. In *Meki Elgafaji, Noor Elgafaji v Staatssecretaris van Justitie*, the ECJ stated that article 15(b) - relating to torture, inhuman or degrading treatment or punishment - “*corresponds, in essence*” to article 3 ECHR¹⁵⁴. The Commission, also, noticed that, when establishing whether an applicant qualifies according to paragraph (b) of article 15, Member States should not apply a higher threshold of severity than is required by the ECHR¹⁵⁵. As

¹⁵³ Kraler Albert, Cernei Tatiana and Noack Marion, ‘*Climate Refugees*’; *legal and policy responses to environmentally induced migration*, European Parliament – Directorate General for internal policies, 2011, at 51.

¹⁵⁴ *Meki Elgafaji, Noor Elgafaji v Staatssecretaris van Justitie*, C-465/07, ECJ, 17 February 2009, para. 28.

¹⁵⁵ 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*, 2001, at 26.

it was shown in the previous Chapter, the case-law of the ECtHR is developing as considering the deprivation of socio-economic rights, that may happen in the occasion of natural disasters or environmental degradation, ill-treatment. Therefore, article 15(b) of the Qualification Directive could be read in conjunction with article 3 ECHR to provide protection to environmentally displaced people.

Interestingly, the first draft of the Directive described the grounds for obtaining protection as follows: “*an applicant for international protection who is outside his or her country of origin, and cannot return there owing to a well-founded fear of being subjected to the following serious and unjustified harm: (a) torture or inhuman or degrading treatment or punishment; or (b) violation of a human right, sufficiently severe to engage the Member State’s international obligations; or (c) a threat to his or her life, safety or freedom as a result of indiscriminate violence arising in situations of armed conflict, or as a result of systematic or generalised violations of their human rights*”. The original draft of the provision was way broader and inclusive than the final text adopted, with human rights as its leitmotif: it left room for the inclusion of environmentally displaced people among the protected categories. Some Member States were not convinced by the width of the provision: some of them requested to specify more which violation of human rights would give grounds for subsidiary protection, lamenting that the wording was too general¹⁵⁶.

Later on, another proposal was the inclusion of a letter (d) regarding “*acts or treatment outside the scope of subparagraph a to c*” which “*entitle the applicant to protection against refoulement in accordance with the international obligations of Member States*”¹⁵⁷. The intention of including a letter (d) was to take into account other violations of human rights. Again, some Member States were displeased with the vagueness of the provisions; it led the Council to specify that “*only man-made*

¹⁵⁶ Council of the EU, *Council Doc. No. 9038/02, Outcome of proceedings from Asylum Working Party on 4-5 June 2002*, 2002, at 23.

¹⁵⁷ Council of the EU, *Presidency note to the Strategic Committee on immigration, frontiers and asylum on the proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*, 2002, at 11.

situations, and not for instance situations arising from natural disasters or situation of famine, will lead to the granting of subsidiary protection". Isabel M. Borges argues that, given that evidence that climate change is caused by humans, people that flee because of the effects of climate change, could benefit from subsidiary protection¹⁵⁸: she cites the statement of the U.N.'s International Strategy for Disaster Reduction of 2008, according to which *"the increase in storms, droughts and other hazards expected to arise from the accumulation of greenhouse gases in the atmosphere as a result of industrialisation and deforestation is clearly not natural"*. Eventually, the Council eliminated paragraph (d) in article 15. The European Parliament, commenting on the proposal for the Qualification Directive, pinpointed that the growing number of people forced to leave their homes due to environmental degradation was ignored. It noticed that those people also need protection and appropriate instruments and policies of prevention should be established; the Parliament concluded by saying that *"that should provide step 2 of a Common European Asylum Policy"*¹⁵⁹.

3.2. Obligations of the Member States towards persons enjoying subsidiary protection in the EU

It is relevant to examine which could be the rights enjoyable by environmental migrants granted with subsidiary protection under the Qualification Directive.

The Member States, first of all, receive from the applicant all the elements needed to substantiate the application for subsidiary protection, that are the applicant's age, background, identity, nationality, places of previous residence, previous asylum applications, travel documents and the reasons for applying for international protection. The documentation presented by the applicant, the relevant facts relating to his country of origin at the time of taking the decision on the application and the

¹⁵⁸ Borges Isabel M., *Environmental change, forced displacement and international law: from legal protection gaps to protection solutions*, Routledge, 2019, at 182.

¹⁵⁹ European Parliament, *Report on the proposal for a Council directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*, 2002, at 55.

personal circumstances of the applicant are taken into account by the Member States in assessing the application. An individual cannot be granted subsidiary protection if he can safely find protection in another part of his country: it is the 'internal flight alternative' provided in article 8 of the Directive. In practical terms, environmental displaced people could be granted subsidiary protection only in the case their countries are entirely devastated by environmental disasters or degradation and if their states disappeared over time, as it happens for low-lying islands. The Member States shall also exclude from being eligible for subsidiary protection an individual towards who there are serious reasons for considering that he has committed a serious crime, a crime against peace, a war crime, a crime against humanity, acts contrary to the purposes and principles of the UN, or if he constitutes a danger to the security of the Member State, if he committed, prior to his admission to the Member State, one or more crimes which would be punishable by imprisonment, had they been committed in the Member State concerned, or if he left his country of origin solely in order to avoid sanctions resulting from those crimes. These are also the grounds on which the Member States may revoke or refuse to renew the subsidiary protection status.

Member States shall issue to the beneficiary of subsidiary protection a residence permit, which must be valid for at least 1 year and, in case of renewal, for at least 2 years, as well as documents which permit him to move outside their territory. Great importance is given to family unit, to the extent that family members of the beneficiary of subsidiary protection and other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were wholly or mainly dependent on the beneficiary of international protection at that time, who do not qualify for such protection, are entitled to be granted a residence permit and travel documents.

The person that benefits from subsidiary protection shall be authorised, by the Member State to in which he stays, to engage in employed or self-employed activities and educational opportunities, vocational training and workplace experiences. In any case, Member States shall grant full access to the education system to all minors granted protection. If the minors are unaccompanied, the Member State shall take the necessary measures to ensure their representation by a

legal guardian, an organisation responsible for the care of minors or by any other adequate representation; moreover, Member States shall try to trace the unaccompanied minor's family members.

Beneficiaries of subsidiary protection shall receive the necessary social assistance and healthcare as provided to nationals of the host Member State.

A third-country national shall cease to be eligible to subsidiary protection when the circumstances which led to the granting of subsidiary protection status no longer exist or have significantly and permanently changed to such a degree that protection is no longer required.

4. Temporary Protection Directive

Temporary protection is an instrument used worldwide as a provisional exceptional measure to deal with mass influx of people fleeing to another country.

The EU in 2001 published the Directive on Temporary Protection¹⁶⁰ to provide protection to displaced people from non-EU countries unable to return to their countries of origin. The Directive had as a legal basis points (a) and (b) of article 63(2) TEC¹⁶¹. The main reason why the Temporary Protection was created was to support all the people fleeing because of the conflicts, during the 1990s, in the former Yugoslavia and in Kosovo. As the Member States were receiving displaced people disproportionately, the Temporary Protection Directive aimed at harmonising the policies of EU States on the reception and treatment of displaced

¹⁶⁰ Council of the European Union, *Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*, 2001.

¹⁶¹ 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;*”

people in situations of mass influx: it fosters solidarity and burden-sharing among the Member States. The Directive explains what mass influx means in a very general way in article 2(d): it is defined as “*the arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area*”. The UNHCR gives a more detailed description of mass influx as a situation that has “*some or all of the following characteristics: (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 of such large numbers*”¹⁶².

A definition of the people protected by the Directive is given in article 2(c): “*‘displaced persons’ means 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, under the Temporary Protection Directive, the list of cases in which a person may be granted protection is non-exhaustive.

In the case of cross-border environmentally displaced people the temporary protection status may be useful in situations of rapid-onset disasters, when entire communities have to move from their lands, eventually wanting to return after the restoration of the areas affected. In addition, ‘generalised violations’ of human rights often occur in the occasion of natural disasters, as it was shown in the previous Chapter.

¹⁶² 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.

The official minutes of the negotiations show that the Finnish delegation at three consecutive meetings insisted for the specific inclusion of people displaced by natural disasters¹⁶³. Belgium and Spain opposed to this request, stating that such situations were not considered in any international instrument on refugees¹⁶⁴.

In 2004 the UK Home Office Minister Des Browne affirmed that the Directive “*will ensure that each European Member State plays its part in providing humanitarian assistance to people forced from their homes by war and natural disasters*” so that human suffering is prevented as quickly as possible¹⁶⁵.

4.1. Obligations of the Member States towards persons enjoying temporary protection

For what concerns the procedure that leads to the grant of temporary protection, it is the Council that, by means of a Decision adopted by a qualified majority, on a proposal from the Commission, acknowledges the existence of a mass influx of displaced people; the fact that the Council decides by a qualified majority, put the grant of temporary protection under a high political threshold¹⁶⁶. The Council Decision establishes temporary protection for the displaced people and it shall also specify the reception capacity of the Member States.

The duration of the temporary protection is of one year, that can be extended by six-monthly periods for a maximum of one year; anyway, if the reasons for temporary protection persist and a safe and durable return of the persons affected is

¹⁶³ Kolmannskog V. and Myrstad F., *Environmental Displacement in European Asylum Law*, European Journal of Migration and Law, volume 11, 2009, at 316.

¹⁶⁴ Council of the European Union, *Doc. No. 6128/01, Outcome of proceedings on Proposal for a Council Directive 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* 6128/01, 2001, at 4.

¹⁶⁵ UK Home Office, *UK plans in place to protect victims of humanitarian disasters*, 2004, as cited in Kolmannskog V. and Myrstad F., *Environmental Displacement in European Asylum Law*, 2009, at 317-318.

¹⁶⁶ C. Van Duren, *The legal obligations for the European Union to protect climate-induced migrants crossing European borders*, Master thesis, Tilburg Law School, 2018, at 30.

not possible, the Council, on a proposal from the Commission, may decide to extend the temporary protection by up to one year. The Member States have the possibility to make requests to the Commission in this regard. The temporary nature of the protection accorded balances the interests of state control and humanitarian needs¹⁶⁷. Member States, according to article 28 of the Directive, may exclude a person from temporary protection if there are serious reasons for considering that he has committed a crime against peace, a war crime, a crime against humanity, severe non-political crime or acts contrary to the purposes and principles of the UN, or if there are reasonable grounds for considering him a danger to the security of the host Member State.

The Member States shall issue residence permits for the entire duration of the stay to the people enjoying temporary protection. The latter shall have access to accommodation or to the means necessary to obtain housing.

In the case where families were separated to enjoy temporary protection in different Member States, they may be reunified: in the case of the spouse of the sponsor or his unmarried partner in a stable relationship, the minor unmarried children of the sponsor or of his spouse, the reunification shall take place taking into account the wish of these family members; in the case of other close relatives who lived together as part of the family unit at the time of the event leading to the displacement, reunification may be allowed taking into account, on a case by case basis, the adversities they would face if the reunification did not take place.

Regarding unaccompanied minors, the Member States shall as soon as possible take the necessary measures to ensure his representation by legal guardianships, organisations responsible for the care of minors or by any other appropriate representation.

The Member States authorise people enjoying temporary protection to engage not only in employed or self-employed activities, but also in educational opportunities, vocational training or practical work experience. Minors shall, in any case, obtain access to the educational system under the same conditions as nationals of the host country.

¹⁶⁷ Gibney M. J., *Between control and humanitarianism: temporary protection in contemporary Europe*, Georgetown Immigration Law Journal, volume 14, 2000, at 690.

For what concern other support measures in terms of social welfare, means of subsistence and medical care, it is up to the Member States to make provisions in this regard; however, the assistance necessary for medical care shall include at least emergency care and essential treatment of illness.

When the temporary protection ends, the Member States shall take the measures necessary to make possible the voluntary return of the persons that enjoyed the temporary protection; otherwise, the Member States shall carry out an enforced return of persons whose temporary protection has ended, after considering any compelling humanitarian reasons which may make the return impossible or unreasonable. In either case, the Member States shall protect human dignity.

5. Seasonal Workers Directive

Seasonal cross-border migration refers to “*people who work abroad during a given period, or international circular labour migration, which is organised through international agreements*”¹⁶⁸. ‘Seasonal worker’, for the purposes of the Seasonal Workers Directive¹⁶⁹, is “*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*”.

Circular migration may offer climate migrants the possibility to come and go between their country of work and their country of origin; thus, it allows people to maintain a link with their home country and to develop new forms of livelihood. Some environmental hazards, such as floods or droughts, are linked with the passing of the seasons: migrating when the environmental conditions make it difficult for the land to sustain livelihood is a very advantageous adaptation strategy

¹⁶⁸ Ionesco D., Mokhnacheva D., Gemenne F., *The Atlas of Environmental Migration*, Routledge, 2017, at 74.

¹⁶⁹ The European Parliament and the Council of the European Union, *Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers*, 2014.

It may also help to build resilience to future environmental events by allowing migrants to send remittances and return home with new knowledge and technology¹⁷⁰. Moreover, when both the country of origin and destination are aware of the connection between environmental degradation and migration and are putting in place policies to anticipate this kind of mobility, circular migration appears to be more successful¹⁷¹.

The Seasonal Workers Directive seems to be a useful instrument currently available for people living in areas affected by the effects of climate change, because it determines the conditions of entry and stay of nationals of non-Member States of the European Union for the purpose of employment as seasonal workers. It poses its legal basis on points (a) and (b) of article 79(2) TFEU¹⁷².

5.1. Obligations of the Member States towards seasonal workers

As article 79 TFEU states, it is up to the Member States to determine volumes of admission of third-country nationals coming in order to seek work; this area of competence of the Member States is reiterated in article 7 of the Directive¹⁷³.

¹⁷⁰ The Nansen Initiative, *Agenda for the Protection of cross-border displaced persons in the context of disasters and climate change*, 2015, at 37.

¹⁷¹ Weber C., *Climate Refugees and Climate Migration*, Green European Foundation asbl, 2019, at 12.

¹⁷² TFEU; article 78(2) points (a) and (b): “*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”.

¹⁷³ The European Union and the Council of the European Union, *Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers*, 2014 ; article 7: “*This Directive shall not affect the right of a Member State to determine the volumes of admission of third-country nationals entering its territory for the purpose of seasonal work. On this basis, an application for an authorisation for the purpose of seasonal work may be either considered inadmissible or be rejected.*”

Seasonal workers, depending on whether they will stay in a Member State for more or less than 90 days, have to present, in their application for admission to a Member State, different documents. In any case, the application shall contain a valid work contract or a binding job offer to work as a seasonal worker in the host country, specifying the place and type of work, its duration, the remuneration and other relevant working conditions; evidence of having applied for sickness insurance for the risks typically covered for national of the Member State concerned; proof that the seasonal worker will have adequate accommodation. If the vacancy in question could be filled by nationals any Member States or by third-country nationals residing in the Member State concerned, the latter may reject the application.

Third-country nationals who were admitted as seasonal workers at least once within the previous five years in a Member State, may have their re-entry facilitated by that Member State, that could issue the following measures: an exemption from the requirement to submit one or more of the documents mentioned before; multiple seasonal worker permit in a single administrative act; an accelerated procedure and priority in examining the worker's application.

The maximum period of stay for seasonal worker shall be not less than five months and not more than nine months in any 12-month period; however, after the expiry of that period, the Member State concerned has the possibility to issue a residence permit. Within the maximum period of stay, the Member States shall allow extensions of the seasonal worker's stay, where the latter has extended his contract with the same employer or another employer.

Seasonal workers shall enjoy equal treatment in comparison with nationals of the host Member State for what concerns the terms of employment, the right to strike and take industrial action, the freedom of association and membership of an organisation representing workers, tax benefits, recognition of diplomas, certificates and other professional qualifications, access to goods and services made available to the public and statutory pensions.

5.2. A virtuous example of protection of climate migrants through temporary work permit: the temporary and circular labour migration between Spain and Colombia

In 2001 Spain and Colombia established a temporary circular migration programme through a bilateral agreement¹⁷⁴. The project started considering the peculiar job-related characteristics of Catalonia: it is the province of Spain with the highest rate of migration workers. Since agriculture is the most important economic sector in Catalonia and Spanish citizens tend to be reluctant to work in the agricultural field, 74,1% of those employed in the latter are migrants¹⁷⁵.

The Unió de Pagesos de Catalunya (UP), the main agricultural union of Catalonia, decided to organise a project for recruiting potential seasonal workers from areas of Colombia affected by environmental disruption and facilitating their stay. Indeed, several areas of Colombia are affected by severe environmental risks, exacerbated by poverty, crime and conflicts.

The Spanish authorities, together with the employers, selected workers from pools of candidates chosen by the Colombian authorities. One of the criteria for selecting communities of origin was their vulnerability to natural disasters.

Since the programme was quite successful, the Temporary and Circular Labour Migration (TLCM) was implemented from 2006 and 2009 between Spain and Colombia by the IOM, founded under the AENEAS programme of the EU. The TLCM emphasises the role of workers as agents of development in their countries, through remittances; to this end the worker was invited, prior to his return in hometown, to detail how he wanted to spend the money earned in Spain. The project also took care of the travel arrangement for the migrant, as well as of helping him find a place to stay and providing him with useful information.

The European Commission praised the Temporary and Circular Labour Migration programme because it had a “*strong migration and development component and*

¹⁷⁴ Ministerio de asuntos exteriores, *Acuerdo entre España y Colombia relativo a la regulación y ordenación de los flujos migratorios laborales*, Official State Bulletin n. 159, 4 July 2001.

¹⁷⁵ Rinke T., *Temporary and Circular Labor Migration: Experiences, Challenges and Opportunities* in *The State of Environmental Migration*, 2011, at 27.

targeted communities affected by recurring environmental disruptions (such as volcanic eruptions, drought and floods)”¹⁷⁶.

The TCLM is described as a triple-win situation. Firstly, migrants increase their income and are able to send remittances to their hometown; they learn skills abroad that may be useful to them once returned to their country to create or expand some kind of small businesses. Secondly, the state of origin of the migrant benefits from the investments made by the migrant once returned home; this will promote the local economy, as well as encourage reconstruction and recovery projects for areas affected by the effects of climate change. Lastly, the receiving country is able to fill the void in a job sector.

6. Legislation in the Member States that protect environmental migrants

Because of the lack of an explicit EU legislation on the phenomenon of environmental migration, some Member States have decided to address the matter at their national level. Only a few Member States, however, have decided to legislate on the matter, filling the legal gap at the EU level and regulating at the national level the entry and stay of people fleeing from environmental disruption. Some Member States’ legislation might be interpreted as potentially applicable also in regard to environmentally displaced individuals. For example, article 9 of the Bulgarian Law on asylum and refugees¹⁷⁷ declares that humanitarian status may be granted to aliens not eligible for refugee status but who, nonetheless, have reasons of humanitarian nature for requesting such protection. This provision may be applicable in the case of environmental displaced individuals¹⁷⁸.

¹⁷⁶ European Commission, *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”, 2013, at 28.

¹⁷⁷ Law on asylum and refugees, State Gazette n. 54/31.05.2001 amended and supplemented SG n. 80/16.10.2015.

¹⁷⁸ Information provided by ICMPD local representative in Bulgaria, as cited in Kraler A., Cernei T. and Noack M., ‘Climate Refugees’: legal and policy responses to environmentally induced migration, European Parliament – Directorate General for internal policies, 2011, at 57

Only a very small number of EU Member States have introduced express provisions specifically addressing the protection needs of environmental displaced individuals.

6.1. Finland: the Aliens Act

The Finnish Aliens Act 301/2004¹⁷⁹ provides, under Chapter 6, not only asylum for refugees and, alternatively, subsidiary protection, but also, in Section 88a, a residence permit on the basis of humanitarian protection to individuals that cannot return to their country of origin or country of former habitual residence as a result of, *inter alia*, an environmental catastrophe.

The request to a residence permit on the basis of humanitarian protection can be rejected if there are reasonable grounds to suspect that the applicant has committed a crime against peace, war crime or crime against humanity as defined by international agreements concerning such crimes, an aggravated crime, or an act which violates the aims and principles of the United Nations.

Then, in chapter 6 section 109, it is said that temporary protection may be given to aliens who cannot return safely to their countries, because there has been a massive displacement of people in the country or its neighbouring areas as a result of, among others, environmental disaster. Temporary protection is, by definition, of short duration and can last for a maximum of three years. Aliens who enjoy temporary protection and his family members – not considered dangers to public order, security or health - can be issued with a residence permit.

6.2. Sweden: the Aliens Act

As the Finnish Aliens Act, also the Swedish Aliens Act¹⁸⁰ provides for both asylum and subsidiary protection.

Before 2014, people fleeing from natural disasters should have applied for subsidiary protection; it was then created a separate category for people ‘otherwise in need of protection’. After the migratory crisis erupted in Europe, however, the

¹⁷⁹ Ministry of the Interior, *Aliens Act (301/2004, amendments up to 1152/2010 included)*, 2010.

¹⁸⁰ Sweden: Aliens Act (2005:716), 29 September 2005.

protection category ‘otherwise in need of protection’ was temporally repealed from 20 July 2016 to 19 July 2019 through the Act Temporarily Restricting the Possibility to Obtain Residence Permits in Sweden; the Act was then extended to 19 July 2021: at the moment the status of ‘otherwise in need of protection’ cannot be used.

Under Chapter 4 Section 4, a ‘person otherwise in need of protection’ is an alien who is outside of his country because he, among others, is unable to return to the country of origin because of an environmental disaster. The provision, however, had two limitations: only sudden-onset hazards were considered environmental disasters, leaving out slow-onset disasters such as desertification¹⁸¹; a person could receive support by Sweden only if he could not migrate and find protection within his country¹⁸². A person otherwise in need of protection who was in Sweden was entitled to a residence permit, that could be refused on specific grounds: in view of his previous activities or regard to national security; in view of his criminal record; if he entered in Sweden from a country other than the country for origin and he is protected there; if he came in Sweden from Denmark, Finland, Iceland or Norway and can be returned to any of these countries on account of an agreement between Sweden and that country, unless the alien will not be granted a residence permit there. The residence permit was also accorded to members of the family of the third-country national.

¹⁸¹ Glahn B., ‘*Climate Refugees?*’ *Addressing the international legal gaps*, International Bar Association, 2009, available at: <<https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=B51C02C1-3C27-4AE3-B4C4-7E350EB0F442>>.

¹⁸² McAdam J., *Climate Change Displacement and International Law: complementary protection standard*, UNHCR 2011, at 40.

6.3. Italy: the Testo Unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero

The 'Testo Unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero'¹⁸³ provides, in article 20, that temporary protection measures shall be adopted in the occasion of essential humanitarian needs caused by conflicts, natural disasters or events of particular gravity in third countries non-Members of the EU. In 2018, article 20-bis was included in the Consolidated text: it states that a residence permit of six months shall be given to those that cannot return and stay safely in their countries because of contingent and exceptional calamities. The residence permit may be renewed for other six months if the exceptional circumstances persist in the country of origin.

7. The legal answers of the EU to the issue of environmental migration

Several EU legal instruments are potentially capable of giving protection and support to environmental migrants. The various legal tools examined seem to complement each other, as they grant different types of support to the migrants.

The Seasonal Workers Directive appears to be an effective *ex-ante* measure, for the prevention of further climate migration; in situations of slow-onset environmental degradation, remittances, in terms of money and knowledge, may help the country of origin of the seasonal worker to build resilience to adapt and contrast such deterioration of the environmental conditions. In the current political situation, characterised by nationalisms spread all over Europe, moreover, circular migration could be seen more favourably than other types of protection, since it offers the possibility to migrate for short periods and only when there is a necessity to fill gaps in a working field. The positive Spanish experience with seasonal workers coming from Colombian areas affected by environmental disasters demonstrated that it could be a useful instrument. Though, it does not provide protection in

¹⁸³ D.lgs. 25/07/1998: Testo Unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, as modified by the D.L. 4 October 2018, n.133 converted by law 1 December 2018 n. 132.

situation of communities already displaced for environmental reasons that cannot return home temporarily or permanently due to the extent of damages their land suffered.

In cases such the one just described, the Temporary Protection Directive could offer immediate protection to the people affected. Nevertheless, the high political threshold and the exceptional situation in which temporary protection (e.g. only in cases of a mass influx of people) can be granted makes the Directive not an effective mechanism to address the issue of climate-induced migration. Moreover, the Temporary Protection Directive does not cover situations of people suffering from slow-onset environmental degradation.

The Qualification Directive could protect people both affected by natural disasters and environmental degradation, through the link, recognised by the ECJ and the Commission, between article 15(b) of the Directive and article 3 ECHR. Climate events, being situations that could deprive people of their social-economic rights, may constitute, as explained in the previous Chapter, inhuman or degrading treatment. The Qualification Directive, among the various instruments examined, appears to be the best-suited tool to address multiple issues and needs of environmental migration. Yet, environmental displaced people could be granted subsidiary protection only if they cannot receive support within their country.

The legal instruments of the Member States that offer protection to people fleeing from environmental disasters signal an opening, of these countries, to the topic of climate migration and they could offer inspirations to future legal actions.

As said, it can happen that people do not migrate after an environmental disaster or decide not to migrate even if their country is environmentally declining. The EU has in place policies to support those communities: directly, financially supporting adaptation; indirectly, through the development of strategies for combating climate change. One of the reasons of environmental migration is indeed climate change: therefore, putting in place effective environmental policies, under articles 191-193 TFEU, the EU could partially tackle the root causes of such migration.

CHAPTER IV

THE EU'S RESPONSES TO CLIMATE CHANGE: POLICIES TO COMBAT CLIMATE CHANGE AND SUPPORT DEVELOPING COUNTRIES

1. Tackling the root causes of environmental migration: climate change and adaptation capacities

The core reasons for environmental migration are the adverse effects of climate change, in the form of natural disasters and environmental degradation.

Sometimes, migration is not a choice, as life in the country of origin becomes impossible for the communities affected, that are obliged to move. Besides developing adequate migration policies that could protect and support climate migrants, as saw in the previous Chapters, a twofold solution could be possible: addressing the root causes of natural disasters and environmental degradation – e.g. global warming – and enhance the adaptative capacities of affected populations vis-à-vis the adverse effects of climate change.

Both the EU actions to fight climate change and to financially support adaptation measures in vulnerable countries affected by natural disasters and environmental degradation have positive outcomes for what concerns environmental migration as they can, to some extent in the future, prevent the migration to take place. The EU is active on both fronts.

The EU has strived to play a leadership role in in the battle against climate change since the early days of international cooperation around the matter: in the negotiations for the UNFCCC and, later, for the Kyoto Protocol, for example, the EU and its Member States pressed for stringent international action, such as imposing a limit to developed countries' emissions¹⁸⁴. At the same time, it also leads by example, putting in place ambitious targets and policies for greenhouse gas

¹⁸⁴ 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

emission reduction, renewable energy and energy efficiency to be achieved by the EU Member States¹⁸⁵. The latest goals of the EU in the environmental fields are included in the 2020 climate & energy package and in the 2030 climate & energy framework – for what concerns short and medium-term objectives – and in the European Green Deal – for what concern long-term objectives. These targets and measures cover various sectors of the EU’s economy, providing cost-effective ways to reduce emissions and improve energy efficiency. The EU, as said, is also a Party in relevant international environmental agreements such as the UNFCCC, the Kyoto Protocol and the Paris Agreement, the policies of which are coherent with the overall EU climate action.

The EU and its Member States are large contributors of projects and programmes created to help developing countries, which are the countries most affected by the effects of climate change, to develop adaptive strategies to deal with the specific natural hazards that affect their lands.

The IPCC describes climate change adaptation as “*the process of adjustment to actual or expected climate and its effects. In human systems, adaptation seeks to moderate or avoid harm or exploit beneficial opportunities. In some natural systems, human intervention may facilitate adjustment to expected climate and its effects*”¹⁸⁶. Adaptive measures may take different forms: e.g. using scarce water resources more efficiently, raising streets’ level to prevent flooding, choosing tree species and forestry practices less vulnerable to fire, developing crop varieties with higher drought tolerance.

The EU and its Member States, being Parties to the UNFCCC, have agreed to provide financial resources to developing countries to achieve the obligations under the Convention itself and to adapt to the adverse effects of climate change adequately. The Parties also committed to promote, facilitate and finance the transfer of, or access to, environmentally sound technologies and know-how to developing country Parties. Under the Paris Agreement, ratified by the EU and its

¹⁸⁵ Morgera E., Kuloesi K., *The Role of the EU in Promoting International Standards in the Area of Climate Change*, in Govaere I., Poli S. (eds.), *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises*, Martinus Nijhoff, 2014, at 312.

¹⁸⁶ IPCC, *Annex II: Glossary*, 2014.

Member States, it is pinpointed that the Parties recognise the importance of international cooperation for what concerns adaptation, especially in those developing countries particularly vulnerable to the effects of climate change.

The EU has created two funds specifically dedicated to improving the adaptation capacities of vulnerable countries: the Global Climate Change Alliance Plus Initiative and the joint Pacific Initiative on Biodiversity, Climate Change and Resilience. It also participates in the Adaptation Fund, the Green Climate Fund, the Least Developed Countries Fund and the Special Climate Change Fund.

Before analysing the policies of the EU for what concerns climate action and support to countries affected by the negative effects of climate change, it is relevant to explore what is the legal bases for the EU actions in the environmental sector and to examine the competences it and the Member States enjoy.

2. Evolution of the EU's environmental policy

When the European Economic Community was created, the Member States did not confer any competence relating to the environment to the Community. The lack of any reference to environmental issues can be explained by the fact that the EEC had a mandate of a purely economic nature. The first EU environmental measures had as a basis article 100 of the EEC Treaty (now article 115 TFEU) according to which the Council could, unanimously, “*issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market*”¹⁸⁷; the EEC could also rely on article 235 EEC, according to which the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, could take measures “*if action by the Community should prove necessary to attain, in the course of the operation of the common market one of the objectives of the Community, and this Treaty has not provided the necessary powers*”. An example of legislation containing environmental provisions is Directive 70/156/EEC on the approximation of the laws of the Member States relating to the type approval of

¹⁸⁷ Orlando E., *The Evolution of EU Policy and Law in the Environmental Field: achievements and current challenges*, Transworld volume 21, 2013, at 3.

motor vehicles and their trailer, based on article 100 EEC: it provided that certain levels of environmental protection had to be respected¹⁸⁸. Nevertheless, during the 1960s and early 1970s, there was nothing that resembled a coherent set of EU environmental rules.

The growing public concern about environmental issues and parallel developments on the international level resulted in a more explicit role of the EU in the environmental sector. In 1972, during a summit of the heads of States and Government of the Member States of the EEC, it was declared that the European integration had the aim, besides economic growth, to decrease disparities in living conditions by also protecting non-materials values, such as environmental protection¹⁸⁹. In that arena it was decided to draw up an action programme for environmental protection, that was adopted in 1973: it provided a broad framework of principles - such as the 'polluter pays' principles - and objectives. The wideness of the environmental goals allowed the Commission to propose legislation in areas where it had been reluctant to take action, such as the protection of wildlife habitats¹⁹⁰.

The Single European Act introduced a legal basis for environmental action at an EU level¹⁹¹. The competences conferred upon the Union were wide-ranging,

¹⁸⁸ Munari F. and Schiano Di Pepe L., *Tutela transnazionale dell'ambiente*, 2012, at 70.

¹⁸⁹ Morgera E., *Environmental Law*, in Barnard C. and Peers S., *European Union Law*, Oxford University Press, 2014, at 652-658.

¹⁹⁰ Farmer A.M., *Manual of European Environmental Policy*, Routledge, 2014.

¹⁹¹ Single European Act, 1986; Articles 130r: "1. *Action by the Community relating to the environment shall have the following objectives: - to preserve, protect and improve the quality of the environment, - to contribute towards protecting human health, - to ensure a prudent and rational utilization of natural resources.*
2. *Action by the Community relating to the environment shall be based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay. Environmental protection requirements shall be component of the Community's other policies.*
3. *In preparing its action relating to the environment, the Community shall take account of: - available scientific and technical data, - environmental conditions in the various regions of the Community, - the potential benefits and costs of action or of lack of action, - the economic and social development of the Community as a whole and the balanced development of its regions.*

implicating not only the goal of the protection of the environment, but also the one of the preservation of human health.

The Maastricht Treaty and the Amsterdam Treaty did not introduce substantial changes to the environmental legislative layout created under the Single European Act. The Maastricht Treaty specified, in its article 2, that the Community had, among its tasks, the “*sustainable and non-inflationary growth respecting the environment*”; moreover, it was stated the so-called integration principle, according to which the requirement of environmental protection must be integrated into the definition and implementation of other policies of the Union. With the Maastricht Treaty, it was established the co-decision procedure, strengthening the role the European Parliament, which had traditionally been ‘greener’ than the Council, in the decision-making process; only for a few specific areas of the environmental sectors – e.g. provisions primarily of a fiscal nature – acts were adopted by the Council unanimously, in derogation with the co-decision procedure. With the Amsterdam Treaty, the basis for the competence of the EU in the field of environmental protection became broader as it was specified that “*the Community shall have as its task [...] a high level of protection and improvement of the quality of the environment*”. Environmental policy emerged as a transversal topic that all the other European policies had to take into account.

4. *The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member States. Without prejudice to certain measures of a Community nature, the Member States shall finance and implement the other measures.*

5. *Within their respective spheres of competence the Community and the Member States shall co-operate with third countries and with the relevant international organizations...*”

Article 130s: “*The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, shall decide what action is to be taken by the Community. The Council shall, under the conditions laid down in the preceding subparagraph, define those matters on which decisions are to be taken by a qualified majority*”.

Article 130t: “*The protective measures adopted in common pursuant to Article 130s shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Treaty*”.

The Lisbon Treaty categorises environmental policy as an area of shared competence between the EU and its Member States¹⁹². The Treaty left the core treaty provisions on environmental policy substantively unchanged: they are now articles 191-193 TFEU. Article 3 TEU, then, strengthens the EU's responsibilities towards the global environment by stating not only that "*The Union [...] shall work for the sustainable development of Europe*" but also that "*...the Union shall [...] contribute to [...] the sustainable development of the Earth*": the Treaty has, in this way, expressly linked sustainable development with the EU external relations¹⁹³.

Article 37 of the Charter of Fundamental Rights of the European Union, also, 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*".

Having examined the competences of the EU for what regards environmental policy, it appears useful to analyse how the EU used such competencies in its climate action.

3. The EU fight to climate change: goals and policies

As said, the area of environment is of shared competence between the EU and the Member States. One of the main objectives of the EU is "*in particular*" combating climate change, as affirmed in article 191(1) TFEU; the fight against climate change results, among other virtuous outcomes, in tackling one of the causes of environmental migration: the adverse effects of climate change or the exacerbation of existing vulnerabilities by natural hazards may force people to move. For this reason, it is crucial, at this point, to analyse better the environmental policies of the EU with regard to climate change as they are actively contributing to the reduction of environmental hazards caused by global warming.

¹⁹² TFEU, article 4: "*Shared competence between the Union and the Member States applies in the following principal areas: (e) environment*".

¹⁹³ Morgera E., *Introduction to European Environmental Law from an International Environmental Law Perspective*, University of Edinburgh School of Law, Working Paper Series vol. 2010(37), 2010, at 12.

The EU has set ambitious goals to reduce its greenhouse gas emissions, as well as to increase the share of renewable energy and improve its energy efficiency. The following paragraphs are therefore dedicated to the study of the relevant measures of the EU in the environmental area and, in particular for what concerns the 2020 climate & energy package, the results achieved by the EU Member States. The examination has the dual purpose of presenting a picture of the measures taken by the EU that have an impact for what regards climate change and its negative effects and of assessing the breadth and the effectiveness of the environmental policies of the EU compared to the migratory ones examined in the Chapters II and III.

Two cornerstone measures to achieve these objectives are the EU emission trading system and the effort sharing policy covering all the sectors not included in the EU emission trading system: they set binding annual greenhouse gas emission targets for the Member States, to be achieved in cost-effective ways. In addition to the EU emission trading system and the effort sharing policy, several legislative measures targeting specific sectors were created to set distinctive goals and rules.

For example, Regulation 2019/631 establishes CO₂ emissions performance requirements for passenger cars and light commercial vehicles¹⁹⁴, as light-duty vehicles produced around 15% of the 2016 EU emissions of CO₂. The Commission imposes an excess emissions premium on manufacturers that have exceeded their emissions target; at the same time, it takes into consideration the use, by manufacturers, of innovative technologies that contribute to the savings of CO₂. Regulation 2019/1242, conversely, deals with heavy-duty vehicles setting CO₂ emission performance requirements for these types of vehicles¹⁹⁵.

¹⁹⁴ The European Parliament and the Council, *Regulation (EU) 2019/631 setting CO₂ emission performance standards for new passenger cars and for new light commercial vehicles, and repealing Regulations (EC) No 443/2009 and (EU) No 510/2011*, 2019.

¹⁹⁵ The European Parliament and The Council, *Regulation (EU) 2019/1242 setting CO₂ emission performance standards for new heavy-duty vehicles and amending Regulations (EC) No 595/2009 and (EU) 2018/956 of the European parliament and of the Council and Council Directive 96/53/EC*, 2019.

Then, Regulation 2018/841 (LULUCF Regulation) set out the commitments of the Member States for what concerns land use, land use change and forestry¹⁹⁶. The general objective of the Regulation is ensuring that the emissions of each Member State for land use do not exceed removals, calculated as the sum of total emissions and total removals on its territory in all the lands considered by the Regulation¹⁹⁷: it is known as the ‘no-debit’ rule.

The EU has recently published the European Green Deal, a package of policy initiatives that have the overarching aim of making the EU climate neutral by 2050. The sectors covered by the European Green Deal are various: from circular economy to buildings’ construction, use and renovation, to sustainable mobility, sustainable food chain and protection of ecosystems.

3.1. The EU climate goals

3.1.1. 2020 climate & energy package: objectives and achievements

In 2007 the EU Council set targets to be met by 2020, underlining the “*vital importance*” of limiting the global average temperature increase to not more than 2°C above pre-industrial levels¹⁹⁸.

The objective set by the European Council for the EU for what concerns greenhouse gas emissions is a 20% reduction by 2020 compared to 1990. The European Council also established the target of a 20% share of renewable energies in overall EU energy consumption by 2020 and a 10% minimum target to be achieved by all Member States for the share of biofuels in overall EU transport petrol and diesel consumption by 2020. Regarding energy efficiency, the goal is to achieve the

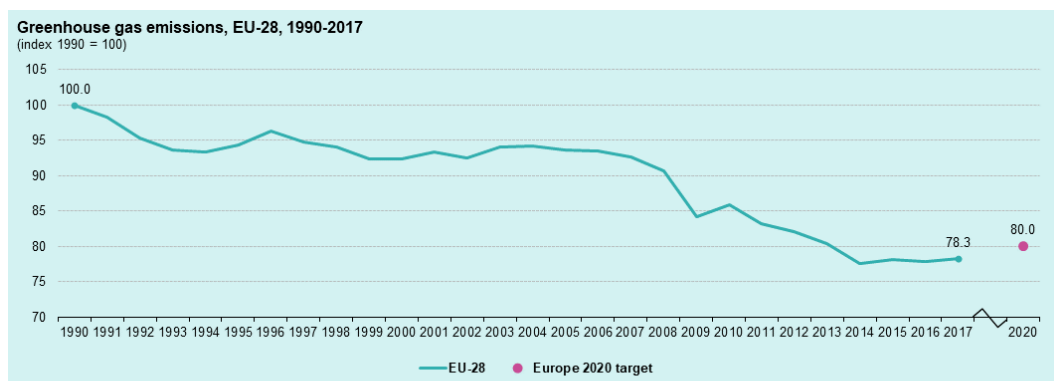
¹⁹⁶ The European Parliament and the Council, *Regulation (EU) 2018/841 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision 529/2013/EU*, 2018.

¹⁹⁷ Afforested land, deforested land, managed cropland, managed forest land.

¹⁹⁸ Council of the European Union, *Presidency conclusions Doc. 7224/1/07*, 2007, para. 27.

objective of saving 20% of the EU's energy consumption compared to the projection for 2020.

As the charts below show, by 2017, the EU as a whole had cut greenhouse gas emissions by 21.7 % compared with 1990 levels¹⁹⁹. A large portion of the reduction occurred between 1990 and 1994, where a drop of 6,7% happened, mostly due to the modernisation in the industrial sector and the switch from coal to gas. The second decline in greenhouse gas emission of 7,2% occurred between 2008 and 2009 when, because of the economic crisis, industrial production, transport volumes and energy demand were reduced. The further decline in greenhouse gas emissions can be attributed to an improvement in the energy intensity of the EU economy and the development of renewable energy sources. Since 2014, the emissions' reduction slowed down and in 2017 emissions were 1,1% above 2014 levels.

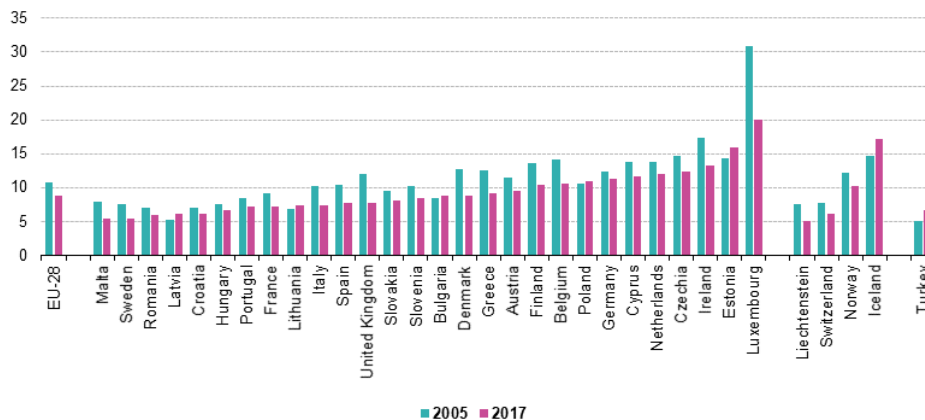


Note: Total emissions, including international aviation and indirect CO₂, but excluding emissions from land use, land use change, and forestry (LULUCF).
Source: EEA, Eurostat (online data code: t2020_30)

eurostat 

¹⁹⁹ Eurostat, *Europe 2020 indicators – climate change and energy*, 2019.

Greenhouse gas emissions per capita, by country, 2005 and 2017
(tonnes of CO2 equivalent)

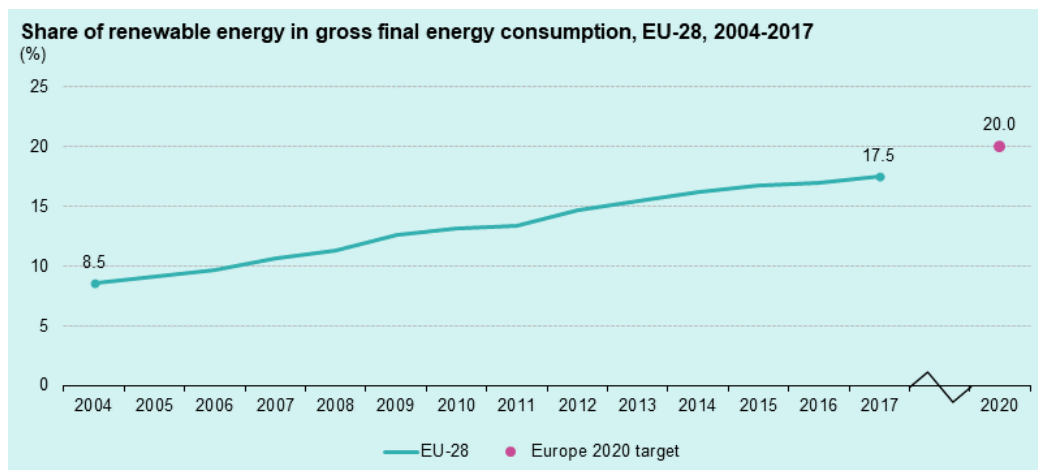


Note: Total emissions, including international aviation and indirect CO2, but excluding emissions from land use, land use change, and forestry (LULUCF).
Source: EEA, Eurostat (online data code: sdg_13_10)

eurostat 

The transport and international aviation sectors did not reduce their emissions from fuel combustion. On the contrary, the emissions produced by the former were 19.2% higher in 2017 than in 1990, while the emissions from the latter were 128.8% higher in 2017 than in 1990.

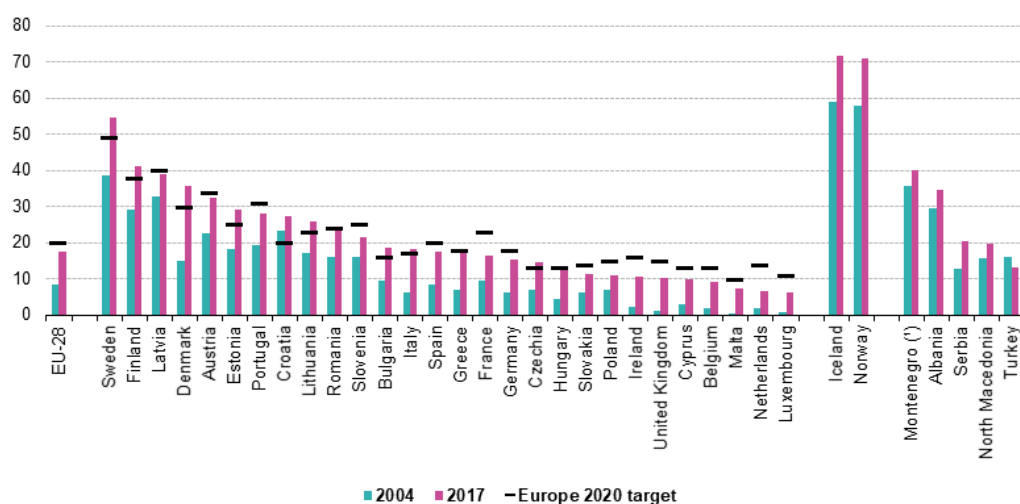
As said, another EU's goal was renewable energy reaching a 20% share of gross final energy consumption by 2020. Starting with 2004 as the base year, as the figures below show, between 2004 and 2017, the share of renewable energy sources more than doubled up to 17.5% of gross final energy consumption in 2017. Renewable energy contributed to almost a third of gross final electricity consumption in 2017 and provided nearly one-fifth of Europe's final energy consumption for heating and cooling in 2017. The main reason for this growth is the rapid developments in technology, that lead, for example, the photovoltaic power stations build in 2017 to produce electricity for a third of the costs required in 2009. However, also in the sector of renewable energy, progress has slowed since 2014.



Source: Eurostat (online data code: t2020_31)

eurostat

Share of renewable energy in gross final energy consumption, by country, 2004 and 2017
(%)



(*) 2005 data (instead of 2004)

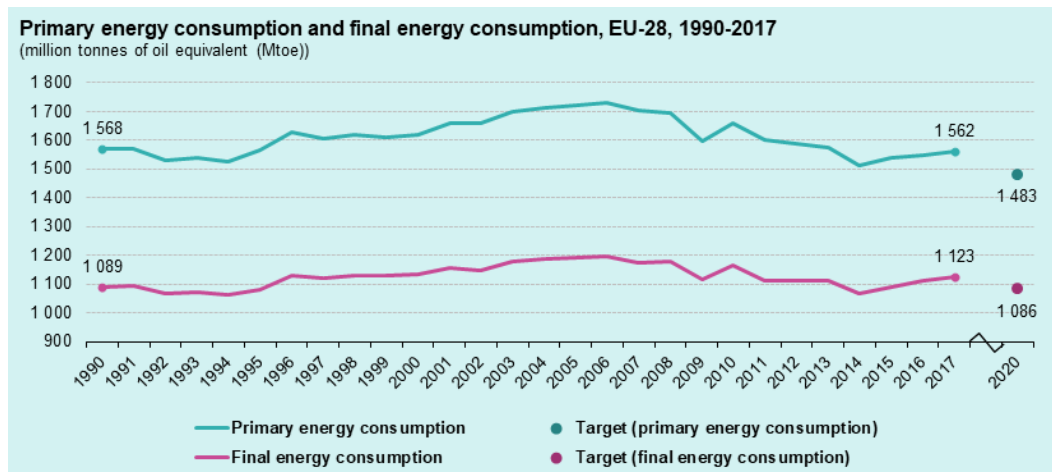
Source: Eurostat (online data code: t2020_31)

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The third objective of the EU for 2020 was saving 20% of the EU's energy consumption compared with projected primary energy consumption (PEC)²⁰⁰ in

²⁰⁰ Eurostat glossary: "Primary energy consumption measures the total energy demand of a country. It covers consumption of the energy sector itself, losses during transformation (for example, from oil or gas into electricity) and distribution of energy, and the final consumption by end users" available at: https://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Primary_energy_consumption.

2020. The PEC, as illustrated by the chart below, from 1990 until 2006 had an upward trend and then started to fall, except for an increase in 2010. Since 2014, however, PEC has seen a continuous growth and in 2017 the EU consumed 0,4% less primary energy than it did in 1990 and 9,2% less than in 2005.



Source: Eurostat (online data codes: t2020_33 and t2020_34)

eurostat 

In conclusion, with the exception of energy efficiency, the EU appears to be on track to achieving its targets for 2020. In 2014, a new policy framework for climate and energy in the period from 2020 to 2030 was created, in which, *inter alia*, the European Commission recognised the improvements and achievements regarding the 2020 goals.

3.1.2. 2030 climate & energy framework

In the new climate and energy framework, it is, first of all, expressed the need to continue to progress toward a low-carbon economy²⁰¹. The 2013 Commission's Green Paper asked for opinions about the most appropriate range of climate and

²⁰¹ European Council, *Conclusions on 2030 climate and energy policy framework*, 2014; see also European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and social committee and the committee of the regions: A policy framework for climate and energy in the period from 2020 to 2030*, 2014, at 3.

energy targets for 2030²⁰². While there was a broad consensus among stakeholders for setting a new goal for greenhouse gas emissions reduction, there were mixed views on whether new targets for renewable energy and energy efficiency were necessary.

The new target for the reduction of greenhouse gas emission is 40% in 2030 in comparison with 1990. This goal is closely interlinked and complementary with the one of increasing renewable energy sources. A target of at least 27% was set for the share of renewable energy consumed in the EU in 2030; in 2018, however, the Directive on the promotion of the use of energy from renewable sources decided that the share of energy from renewable sources in the Union's gross final consumption of energy in 2030 has to be at least 32%²⁰³. An indicative target of at least 27% was set for improving energy efficiency in 2030 compared to projections of future energy consumption in the EU; this target, also, was revised upwards in 2018, putting in of at least 32.5% for 2030²⁰⁴.

The achievement of the targets just exposed require the put in place of a sound framework of policies regulating several sectors. The following analysis will focus on the two foundations of the EU's policy to combat climate change and on the recent European Green Deal, which proposes overarching measures in several areas with the aim of a climate-neutral EU by 2050.

²⁰² European Commission, *Green Paper: a 2030 framework for climate and energy policies*, 2013, at 13.

²⁰³ The European Parliament and the Council, *Directive 2018/2001 on the promotion of the use of energy from renewable sources*, 2018, para. 8.

²⁰⁴ The European Council and the Council, *Directive 2018/2002 amending 2012/27/EU on energy efficiency*, 2018, para. 6.

3.2. EU climate action policies

3.2.1. The EU emission trading system (EU ETS)

The EU ETS²⁰⁵ is one of the bases for the EU's policy to fight climate change: it creates a market mechanism that defines a price for CO₂ emissions and establishes incentives to reduce emissions²⁰⁶. It is the world's first major carbon market and it operates in all EU countries plus Iceland, Liechtenstein and Norway. The EU ETS Directive applies to a series of activities and greenhouse gases listed in Annex I and II of the Directive itself²⁰⁷. The EU ETS limits emissions from nearly 11000 power plants and manufacturing installations as well as over 500 aircraft operators flying between EEA's airports.

The EU ETS works on the 'cap and trade' principle. A 'cap' is set as the maximum amount of greenhouse gas pollution that can be emitted each year: it assures those total emissions are kept to a pre-defined level and does not rise above it. To the installations covered by the system, a number of emission allowances are allocated and they have to surrender, each year, enough allowances to cover all their emissions. 'Allowance' means an allowance to emit one tonne of carbon dioxide equivalent during a specified period. From 2019, Member States auction the allowances that are not allocated free of charge and from 2021 onwards, the share of allowances to be auctioned will be 57%. The 2 % of the total quantity of

²⁰⁵ 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*, 2018.

²⁰⁶ Appunn K. and Sherman L., *Understanding the European Union's Emissions Trading System*, Clean Energy Wire, 2018, available at: <
<https://www.cleanenergywire.org/factsheets/understanding-european-unions-emissions-trading-system>>.

²⁰⁷ The categories of activities covered by the Directive are the following: energy activities, production and processing of ferrous metals, mineral industry, other activities (e.g. industrial plants for the production of pulp from timber or other fibrous materials and paper and board with a production capacity exceeding 20 tonnes per day). Greenhouse gases covered by the Directive: Carbon dioxide (CO₂), Methane (CH₄), Nitrous Oxide (N₂O), Hydrofluorocarbons (HFCs), Perfluorocarbons (PFCs), Sulphur Hexafluoride (SF₆).

allowances between 2021 and 2030 shall be auctioned to establish a fund to improve energy efficiency and modernise the energy systems of certain Member States. The companies that have reduced their emissions can keep the spare allowances to cover their future needs, or they can sell them. Conversely, if the allowances they have do not cover all their emissions, companies need to purchase additional allowances. Therefore, those facing difficulties in remaining within their allowance limit may choose between taking measures to reduce their emissions – e.g. investing in more efficient technology – or buying extra allowances.

As said, the 2030 climate and energy policy framework set a target for the EU to reduce greenhouse gas emissions of at least 40% by 2030; in particular, it was specified that the reduction in the ETS sector will amount to 43% compared to 2005. The EU ETS 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. However, emissions from aviation were 3.9% higher compared to 2017. The compliance rate for both stationary installations and aircraft operators exceeded 99%²⁰⁸.

3.2.2. Effort sharing policy

For most sectors of the economy that fall outside the scope of the EU ETS – e.g. transport, building, agriculture, waste – a 2009 Decision imposed to each Member State targets for limiting their greenhouse gas emissions for the period between 2013 and 2020²⁰⁹. Then, a 2018 Regulation set national greenhouse gas emission targets for the Member States for the period between 2021 and 2030²¹⁰; Iceland and Norway have decided to implement the Effort Sharing Regulation.

²⁰⁸ European Commission, *Report from the Commission to the European Parliament and the Council: report on the functioning of the European carbon market*, 2020, at 27, 40 and 41.

²⁰⁹ The European Parliament and the Council, *Decision 406/2009/EC on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020*, 2009.

²¹⁰ The European Parliament and the Council, *Regulation 2018/842 on binding annual greenhouse gas emission reduction by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) n 525/2013*, 2018.

The emissions produced by non-EU ETS sectors amount to about 60% of the EU total emissions.

Within the goal of reduction of EU greenhouse gas emissions of 40% by 2030, the target for the non-ETS sectors amount to a reduction of 30% compared to the levels of 2005.

National emission targets are influenced by the Gross Domestic Product (GDP) per capita of each Member State. While for the period between 2013 and 2020 the wealthiest Member States had to reduce their emissions by 20% below 2005 levels and the poorest were allowed to increase their emissions by 20%, the 2018 Regulations targets range from 0% for the poorest countries to minus 40% for the richest ones compared to 2005.

Next to national emission targets, the Effort Sharing framework uses the so-called 'annual emission allocations', that are the maximum allowed greenhouse gas emissions for each year between 2021 and 2030.

To make it less costly to comply with their climate targets, Member States are allowed to make use of different flexibilities: borrowing, banking, transferring, accessing allowances from the EU ETS and access credits from the land use sector. Borrow means that a Member State wishing to exceed its annual emission allocation for a given year can carry forward some emission allocation from the following year²¹¹. In respect of the years 2021 to 2025, a Member State may borrow a quantity up to 10% from its annual emission allocation for the next year, while in respect of the year 2026 to 2029, a Member State may borrow a quantity up to 5% from its annual emission allocation for the following year.

Bank means that Member States whose greenhouse gas emissions for a given year are below its annual emission allocation for that year, can carry over the surplus to subsequent years. In respect of the year 2021, the Member States may bank that excess part of their annual emission allocation to following years until 2030; in respect of the years 2022 to 2029 the Member States may bank the excess part of their yearly emission allocation up to a level of 30% of their annual emission allocations up to that year to subsequent years until 2030.

²¹¹ Woerdman E., Roggenkamp M., Holwerda M., *Essential EU Climate Law*, Edward Elgar Pub, 2015, at 99-100.

Transfer means that a Member States can give another Member State a part of its annual emission allocation, up to a maximum of 5% in respect of the years 2021 to 2025, and up to 10% in respect of the years 2026 to 2030.

Some Member States, listed in Annex II of the Effort Sharing Regulation²¹², may, in order to achieve their national targets, cover some emissions with EU ETS allowances which would normally have been auctioned.

When a Member State's greenhouse gas emissions exceed its annual emission allocations for a given year, a quantity up to the sum of total net removals and total net emission from certain land categories may be taken into account for its compliance for that year. However, the cumulative quantity taken into account for all the Member States for all the years of the period from 2021 to 2030 cannot exceed the total amount of 280 million tonnes CO₂, set in Annex III of the Regulation.

3.2.3. European Green Deal: 360-degree sustainability in the EU's economy

The European Green Deal has the goal to transform the EU into a prosperous society in which there are no net emissions of greenhouse gases by 2050²¹³.

The instruments that will be used to achieve this objective will be various: regulation, standardisation, investments, innovation, national reforms, dialogue with social partners and international cooperation. A variety of tools is also needed because, to deliver the European Green Deal, there is a necessity to reconsider policies for clean energy supply across the economy, industry, production, large-scale infrastructure, transport, agriculture, taxation and social benefits. To achieve this, reviews of the relevant climate-related policy instruments – the emission trading system, the Member States' targets to reduce emissions in sectors outside the emission trading system and the regulation on land use, land use change and forestry - will be necessary.

²¹² Belgium, Denmark, Ireland, Luxembourg, Malta, Netherlands, Austria, Finland and Sweden.

²¹³ 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*, 2019.

Importance is given to EU strategy on adaptation to climate change and the need to strengthening the efforts on climate-proofing, resilience building, prevention and preparedness. Public and private investments will be crucial to develop the EU's adaptation capacities.

Further decarbonisation of the energy system is considered essential to reach the EU' climate objectives: a power sector mainly based on renewable sources and complemented by a rapid phasing out of coal will be developed. The Commission notices how the decrease in the cost of renewables has already reduced the impact on households' energy bills of renewables deployment; it is crucial that the EU's energy supply remains secure and affordable for consumers and businesses. On the line of affordability, the construction, use and renovation of buildings require a substantial amount of energy and mineral resources; the Commission has committed to enforcing the legislation on the energy performance of buildings. One proposal is to include emissions from buildings in the European emission trading. Focus is put on the necessity to develop circular economy further: a new circular economy action plan will help modernise the EU's economy, through the inclusion, among others, of a 'sustainable products' policy. Measures tackling intentionally added microplastics and unintentional releases of plastics, as well as requirements to ensure that all packaging in the EU market will be reusable or recyclable in an economically viable manner will also be implemented.

Transport represents almost a quarter of the Europe's greenhouse gas emissions and, to achieve climate neutrality, a 90% reduction in transport emissions is needed by 2050. Firstly, the fact that the price of transport must reflect the impact it has on the environment and on health is highlighted, as well as the fact that fossil-fuel subsidies should end. Secondly, the Commission proposes to extend the EU ETS to the maritime sector and to reduce the EU ETS allowances allocated for free to airlines. Thirdly, the EU should increment the production and utilisation of sustainable alternative transport fuels (e.g. by 2025, about 1 million public recharging and refueling stations will be needed for the 13 million zero- and low-emission vehicles expected on European roads). Lastly, the pollution by transport in cities, urban congestion and ways to improve public transport must also be addressed.

Food production results in air, water and soil pollution, contributing to climate change. The Commission's proposal for the common agricultural policy for the period between 2021 and 2027 stipulates that at least 40% of the common agricultural policy's budget and at least 30% of the Maritime Fisheries Fund would contribute to climate action. Taking action on transport, storage, packaging and food waste are ways through which the environmental impact of the food processing and retail sectors can be reduced.

The forest ecosystems are under growing pressure because of climate change; to tackle the problem, the EU's forested area need to improve both in quality and quantity. In fact, afforestation and forest preservation and restoration can increase the absorption of CO₂ and reduce the incidence and extent of forest fires.

The transition towards a more sustainable economy and a climate-neutral EU can only be successful if nobody is left behind: a crucial part of the EU Green Deal is thus what is called the 'Just Transition Mechanism', that will provide targeted support to regions and sectors for which the transition towards the green economy is the most difficult.

4. The EU as a Party of international environmental agreements

Because most of the environmental challenges have a transboundary nature, they can be addressed adequately through international cooperation. The need for the Union to participate in the global effort to protect the environment is reiterated. Article 192 TFEU affirms that *"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"*.

The Union, over time, has signed a large number of multilateral environmental agreements and politically binding environmental commitments²¹⁴. The topics

²¹⁴ European Parliament and the Council, *Decision n. 1386/2013/EU on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet'*, 2013, para. 13.

addressed by these agreements are vast: biodiversity and nature protection, climate change, protection of the ozone layer, desertification, management of chemicals and waste, transboundary water and air pollution, industrial accidents, maritime and river protection. The most relevant agreements regarding the fight to climate change, ratified by the EU, will be analysed below.

4.1. The UNFCCC

By a Council Decision of 1993, the EU ratified the UNFCCC²¹⁵. As explained in the previous Chapters, the UNFCCC is the main international treaty on fighting climate change. The top priority of the Convention, set out in article 2, is to achieve a stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. The EU and its Member States are bound by a series of obligations set out in the Convention.

The Parties have to adopt policies for the anticipation, prevention and mitigation of the adverse effects climate change, through the reduction of emissions of greenhouse gases; those policies and related measures have to be communicated periodically, as well as their resulting projected emissions, with the aim of returning the emissions of greenhouse gases to their 1990 levels. They have to develop, publish and regularly update national and regional programmes containing measures to mitigate climate change and measures to facilitate adequate adaptation to climate change. The development and elaboration of plans for coastal zone management, water resources and agriculture and the protection of areas affected by drought or floods are ways, indicated in the Convention, through which the Parties may adapt to climate change.

The importance of cooperation is stressed, as the Parties need to cooperate and exchange scientific, technical and socio-economic researches for the development of data related to climate system, in order to understand further the causes, the effects and the magnitude of climate change; cooperation is considered important

²¹⁵ European Council, *Decision 94/69/EC concerning the conclusion of the United Nations Framework Convention on Climate Change*, 1993.

for what concerns the education related to climate change, to enhance public awareness on the matter. The Conference of the Parties, established by the Convention, has the duty, among others, to periodically examine the obligations of the Parties in the light of the objectives of the Convention and make recommendations on any matters necessary for the implementation of the Convention.

4.2. The Kyoto Protocol

The EU and its Member States are members of the Kyoto Protocol to the UNFCCC since 2002²¹⁶, whose goal was to reduce the Parties' overall emissions of greenhouse gases by at least 5% below 1990 levels in the period from 2008 to 2012. Policies and measures to achieve the quantified emission limitations are specified: among them, the enhancement of energy efficiency in relevant sectors of the national economy, the promotion of sustainable forms of agriculture, the research on and development of new and renewable forms of energy, the progressive reduction of tax duty exemptions and subsidies in all greenhouse gas emitting sectors. It is established a rigorous monitoring of the compliance, by the Parties, of the emission targets.

The Protocol was amended in 2012²¹⁷ and new emission reduction targets were added for the period from 2013 to 2010; however, the amendment will enter into force when 144 Parties – or three-quarters of Parties to the Kyoto Protocol - have submitted their instruments of ratification. Since as of 18 February 2020, 137 Parties have deposited their instrument of acceptance and the amendment will expire in 2020, the latter will not likely enter into force.

²¹⁶ European Council, *Decision 2002/358/EC concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder*, 2002.

²¹⁷ CMP, *Decision 1/CMP.8 Amendment to the Kyoto Protocol pursuant to its Article 3 paragraph 9 (the Doha Amendment)*, 2013.

4.3. The Paris Agreement

Both the EU and its Member States have ratified the Paris Agreement, that aims at strengthening the global response to climate change²¹⁸. It set the goal of keeping the global average temperature to well below 2°C above pre-industrial levels while limiting the temperature increase to 1,5°C above pre-industrial levels. In order to achieve this long-term goal, it is expressed the need for global emissions to peak as soon as possible.

The Parties to the Agreement shall prepare, communicate and maintain nationally determined contributions (NDCs) that they expect to achieve, reflecting the principle of common but differentiated responsibilities. The NDCs represent the Parties' intended reductions in greenhouse gas emissions: each Party's successive NDC shall represent a progression beyond the previous NDC. The EU submitted its NDC in 2015²¹⁹. It was the EU, together with many small islands, that insisted in giving the NDCs legal effect, in order to make them assume higher credibility and, consequently, obtain a great level of implementation and commitments²²⁰.

The Parties to the Agreement commit themselves to take action in order to conserve sinks and reservoirs of greenhouse gases; thus, the Parties are encouraged to implement policies for the conservation and sustainable management of forests. Education, again, is considered fundamental in the fight against climate change and it is highlighted that the Parties shall cooperate in taking measure to enhance climate change education, public awareness and public access to information. The Agreement relies on transparency to provide a clear understanding of climate change action: the transparency framework includes national communications, biennial reports, international assessment and analysis. The information provided by the Parties comprises national inventory report of anthropogenic emissions by

²¹⁸ Paris Agreement, 2015.

²¹⁹ Paris Agreement - EU's role, available at: https://ec.europa.eu/clima/policies/international/negotiations/paris_en.

²²⁰ Bodansky D., *The Paris Climate Change Agreement: a new hope?*, The American Journal of International Law vol. 110(2), 2016, at 297.

sources and removals by sinks of greenhouse gases and data necessary to track progress made in achieving the nationally determined contributions.

5. The EU financially supports developing countries that are vulnerable to the adverse effects of climate change

The EU and its Member States are the largest contributor of public climate finance to developing countries, in particular those that are especially vulnerable to the adverse effects of climate change²²¹. For example, during COP24 in Katowice, from 2 to 14 December 2018, the EU, its Member States and the other Parties to the UNFCCC committed themselves to mobilise US\$ 100 billion a year for mitigation actions, adaptation enhancement and promotion of low-carbon development in low- and middle-income countries (LMICs) by 2020²²². Their decision appears coherent with the commitment of article 9, paragraph 3 of the Paris Agreement, according to which the “...developed country Parties should continue to take the lead in mobilising climate finance from a wide variety of sources, instruments and channels, noting the significant role of public funds, through a variety of actions, including supporting country-driven strategies, and taking into account the needs and priorities of developing country Parties. Such mobilisation of climate finance should represent a progression beyond previous efforts”. The EU and its Member States committed to engage in these deliberations from November 2020 and to continue this to 2025: the EU underlined the importance of supporting the implementation of long-term climate strategies in developing countries. The EU has created instruments of financial support for countries vulnerable to the effects of climate change – The Global Climate Change Alliance Plus Initiative and The joint Pacific Initiative on Biodiversity, Climate Change and Resilience – and it also participates in relevant international funds, all created under the UNFCCC – the Adaptation Fund, the Green Climate Fund, Least Developed Countries Fund

²²¹ General Secretariat of the Council, *Outcome of proceedings, Climate Finance – Council Conclusions on Climate Finance*, 8 November 2019, para. 5.

²²² General Secretariat of the Council, *Climate Finance – Council Conclusions on Climate Finance*, 2019; see also WHO, *CO24 Special Report Health&Climate Change*, 2018, at 56.

and Special Climate Change Fund. The participation of the EU in adaptation funds contributes towards the achieving of the overall target of at least 20% of the EU budget spent on climate action by 2020; moreover, the EU decided to spend 25% of the EU budget for the period from 2021 to 2021 on climate objectives²²³.

5.1. The Global Climate Change Alliance Plus Initiative (GCCA+)

The GCCA+ is an EU initiative, helping vulnerable countries to increase their capacities to adapt to the effects of climate change: so far it founded over 80 projects, with a particular focus to small island developing states (SIDS) and least developed countries (LDCs). It was launched in 2007, with the scope of providing technical and financial support for adaptation and mitigation measures²²⁴. It sets five priorities areas.

Firstly, adaptation to climate change, to help developing countries improve their knowledge base on the effects of climate change in order to develop and implement adaptation strategies.

Secondly, the reduction of CO₂ emissions from deforestation in developing countries by creating incentives for forest protection.

Thirdly, enhancing the participation in the Clean Development Mechanism (CDM), in order to allow developing countries to benefit from the global carbon market. The CDM is one of the mechanisms of the Kyoto Protocol created to lower the overall costs of achieving its emissions target: it permits companies and countries that have to reduce emissions under the Kyoto Protocol to invest in emission reduction projects in developing countries. The countries that invest in emission-reductions programmes in developing countries can earn certified emission

²²³ 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: A Modern Budget for a Union that Protects, Empowers and Defends The Multiannual Financial Framework for 2021-2027*, 2018, at 13.

²²⁴ 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*, 2007.

reduction (CER) credits, that can be sold and traded within the emission trading scheme.

Fourthly, promoting disaster risk reduction through the improvement of climate monitoring and translation of the data collected in preparedness measure, in order to improve the awareness of developing countries for natural disasters and limit the impact of the latter.

Lastly, integrating the measures to combat climate change with the ones aimed at reducing poverty and vice versa: if the effects of climate change are not taken into account when promoting development investments, the latter could potentially contribute to global warming.

One of the projects funded by the GCCA+ lasted from 2012 to 2016 and its objective was building capacity and knowledge on climate change resilient actions in Ethiopia, that has suffered, in recent years, from changes in temperature and precipitation patterns. The project aimed, in particular, at increasing the awareness and capacity of the government and the population at large to deal with climate change. The project achieved very positive outcomes: among others, farmers started testing combinations of agronomic practices to reduce soil loss and prevent land degradation; training has been delivered to thousands of people on climate-smart and energy-saving technologies that can help in adaptation, reducing deforestation; 37496 fruit trees were provided to be planted; 138 hand dug wells and 47 household water harvesting ponds have been constructed for public water supply and irrigation purposes.

5.2. The joint Pacific Initiative on Biodiversity, Climate Change and Resilience

On the occasion of the One Planet Summit of 2017, the former President of France Emmanuel Macron committed to launching a new international initiative aimed at increasing the capacities of vulnerable territories in the Pacific to adapt to the impacts of climate change. Then, at the One Planet Summit of 2018, France and the European Commission, New Zealand and Australia announced the launch of the Pacific Initiative on biodiversity, climate change and resilience, with a collective grant of EUR 21 million; when Canada joined the Initiative in November 2018, it

added a further EUR 6.6 million²²⁵. The initiative takes action on two complementary themes: the conservation and restoration of marine and terrestrial biodiversity and the reduction of vulnerabilities and anticipation of the effects of climate change²²⁶.

The EU is also a party to climate-relevant projects implemented by multilateral institutions and they will be analysed in the following sub-paragraphs.

5.3. The Adaptation Fund

The Adaptation Fund was established under the Kyoto Protocol of the UNFCCC in 2001 to finance adaptation projects and programmes²²⁷. The fund was officially launched in 2007²²⁸. The countries eligible for funding from the Adaptation Fund are the countries Parties to the Kyoto Protocol that are particularly vulnerable to the effects of climate change.

The operating entity of the Adaptation Fund is the Adaptation Fund Board, composed by 16 members; the role of the Board is to supervise and manage the Adaptation Fund, under the authority and guidance of the COP. More specifically, the Board develops strategic priorities and policies whose adoption it recommends to the COP; it decides on the projects and the allocation of funds, in line with the Adaptation Fund principles and criteria; it monitors the implementations of the operations of the Adaptation Fund, ensuring the evaluation and auditing of activities supported by the Adaptation Fund. The meetings of the Adaptation Fund Board are

²²⁵ Secretariat of the Pacific Regional Environment Programme, *Agenda Item 8.5: Pacific Biodiversity and Climate Change Adaptation Initiative*, 2019, at 2, available at: <<https://www.sprep.org/sites/default/files/29-SPREP-Meeting/New/Eng/WP%208.5%20-%20AFD%20Initiative.pdf>>.

²²⁶ Launch of the joint Pacific Initiative for Biodiversity, Climate Change and Resilience, 2018, available at: <https://ec.europa.eu/international-partnerships/news/launch-joint-pacific-initiative-biodiversity-climate-change-and-resilience_en>.

²²⁷ COP7, *Decision 10/CP.7: Funding under the Kyoto Protocol*, 21 January 2002.

²²⁸ CMP3, *Decisions adopted by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol: decision 1/CMP.3*, 15 December 2007.

open to being observed by the UNFCCC Parties and by the UNFCCC accredited observers.

The Adaptation Fund has a trustee that has the administrative competence to manage the fund. Secretariat services are provided in order to support and facilitate the activities of the Board.

The Adaptation Fund is financed through the CDM. The Adaptation Fund also receives voluntary contributions from donor countries. In 2018 the EU pledged to donate €10 million to the Adaptation Fund for 2019: the contribution was an addition to the pledges already made by the EU Member States²²⁹.

One of the recent projects funded by the Adaptation Fund is the ‘integrated approach to physical adaptation and community resilience in Antigua and Barbuda’s northwest McKinnon’s watershed’²³⁰. Antigua and Barbuda is an island state in the Caribbean Sea: the State consists of the two large islands – Antigua and Barbuda – and a few smaller inhabited and uninhabited islands. The country has been experiencing severe and extended droughts over the last century; moreover, the country is experiencing sea-level rise, that brought to the abandonment of wells in coastal areas due to salt-water intrusion.

Since water supply originated from rainfall was not sufficient, five desalination plants have been installed on the islands: in recent years as much as 100% of the national water supply was sourced from reverse osmosis. To produce this water, electricity is needed, and the country relies on imported fuel. However, the adverse climate events, such as storms, may interrupt the electricity grid. The country is made vulnerable by both weather events and fuel price volatility and, in addition, the government is unable to meet the needs for climate change adaptation measures. The project funded by the Adaptation Fund has 3 objectives. Firstly, implement

²²⁹ EU steps up support to the Adaptation Fund. Available at: <https://ec.europa.eu/clima/news/eu-steps-support-adaptation-fund_en>.

²³⁰ Department of Environment Government of Antigua and Barbuda, *An intergrated approach to physical adaptation and community resilience in Antigua and Barbuda’s northwest McKinnon’s watershed*, available at: <<https://www.adaptation-fund.org/wp-content/uploads/2017/01/5192AFFullDocAntiguaIntegratedApproachtoAdaptationRevised2Feb2017-4.pdf>>.

concrete adaptation measures in the watershed and waterways, such as drainage systems. Secondly, grant concessional loans to vulnerable households and businesses to meet new adaptation standards to build infrastructures capable of resisting extreme climate variability. Thirdly, support the adaptive social capacity through grants to NGOs and community groups for adaptation activities in buildings such as schools, churches or clinics, among others.

5.4. The Green Climate Fund

The Green Climate Fund is a fund set up by the UNFCCC under the Cancun Agreement in 2010²³¹. Its scope is helping developing countries reduce their greenhouse gas emissions and improve their capacity to respond to climate change; the fund invests in adaptation and mitigation activities in developing countries.

The fund is governed by a Board of 24 members, divided in equal numbers from developing and developed country Parties; the Board has the duty to balance the allocation of the resources of the fund between adaptation and mitigation activities. The Green Climate Fund has a trustee that has the administrative competence to manage the financial assets of the fund in accordance with the decisions of the Board, to maintain financial records and to prepare financial statements and reports required by the Board.

The Secretariat of the fund is responsible for the day-to-day operations of the fund, organising and executing all the administrative duties. It also prepares performance reports on the implementation of the activities under the fund and fulfils monitoring and evaluation functions²³². The fund receives financial inputs from the developed countries Parties to the UNFCCC, as well as countries non-Parties to the UNFCCC, entities and foundations. As of 3 February 2020, the Green Climate Fund has raised USD 10.3 billion equivalent in pledges from 49 countries/regions/cities: the EU Member States have donated nearly half of these, namely USD 4,7 billion.

²³¹ COP16, *the Cancun Agreements: Outcome of the work of the Ad Hoc working group on long-term cooperative action under the Convention*, 15 March 2011, para. 102-112.

²³² COP17, *Decision 3/CP.17: Launching the Green Climate Fund*, 11 December 2011.

One of the most recent projects was approved in March 2020 and took place in Zimbabwe²³³. Since the 1950s Southern Zimbabwe has experienced increasing temperatures, with a decrease of annual precipitations and an increase of weather events such as droughts and floods. These changes in the climate conditions resulted in reduced water availability and increased aridity of the soil: it caused a decline of agricultural yields, that impacted the livelihoods of small farmers in the region negatively. It is predicted a decrease of 15% of the rainfall, leading to food scarcity and higher food prices. The goal of the project is to address these climate impacts and build the resilience and adaptive capacities of farmers in three provinces – Manicaland, Masvingo and Matabeleland South – affected by these events. It is intended to do so by financially helping the Government of Zimbabwe to enable the community to access sufficient and reliable sources of water, to adopt climate-resilient agricultural practices and to access and to improve access to weather, climate and hydrological information to use in resilient water management and agricultural planning.

5.5. Global Environment Facility (GEF): Least Developed Countries Fund and Special Climate Change Fund

The GEF was established in 1992 as a pilot program in the World Bank in order to promote sustainable development in four main areas: climate change, biodiversity, ozone depletion and international waters. At the Rio Earth Summit, the GEF moved out of the World Bank system to become a permanent and separate institution. Since then the GEF has supported more than 4700 projects in 170 countries.

The EU and its Member States contribute about half of the founding of the GEF²³⁴. The areas of work of the GEF have expanded over time: from food security to illegal wildlife trade, sustainable cities, indigenous people, the amazon and much more.

²³³ Funding proposal FP127: Building Climate Resilience of Vulnerable Agricultural Livelihoods in Southern Zimbabwe, 2020, available at: <https://www.greenclimate.fund/sites/default/files/document/funding-proposal-fp127.pdf>.

²³⁴ Adelle C., Biedenkopf K., Torney D., *European Union external environmental policy: rules, regulation and governance beyond borders*, Palgrave Macmillan, 2018, at 21.

Within the GEF, there are two funds that deal with adaptation to the adverse effects of climate change: the Least Developed Countries Fund and the Special Climate Change Fund.

The Least Developed Countries Fund was created under the UNFCCC during COP7²³⁵: its scope is to support the world's most vulnerable countries in adapting to the effects of climate change. One of the aims of the fund is to help countries prepare and implement National Adaptation Programmes of Action (NAPAs): they consist in a process through which the LDCs can identify their most urgent needs regarding adaptation to climate change. First, the LDC's governments assess what the vulnerabilities of their countries vis-à-vis weather events are; then, a list of projects that would help the country coping with climate change is developed. Then, thanks to the resources of the fund, the countries try achieving their goals in enhancing adaptation strategies. By 2017, the Fund has financed the formulation of NAPAs in 51 LDCs and has invested in financing more than 280 projects on the implementation of adaptations strategies laid down in NAPAs.

The Special Climate Change Fund was established during the Conference of the Parties of Marrakesh of 2001²³⁶ and it complements the Least Developed Countries Fund. In comparison with the latter, the Special Climate Change Fund is open to all vulnerable developing countries and funds a wider variety of activities. Adaptation is, however, the top priority and both long-term and short-term adaptation activities are supported. The adaptation measures financed through the fund concerns, among others, water resources management, land management, infrastructure development and disaster prevention. The Special Climate Change Fund also finances the transfer of climate-resilient technology in the energy, transport, agriculture and forestry sectors.

²³⁵ The Marrakesh accords & The Marrakesh declaration, 2001: "*The Conference of the Parties [...] decides also that a least developed countries fund shall be established.*"

²³⁶ The Marrakesh accords & The Marrakesh declaration, 2001: "*The special climate change fund to be established...*"

6. The efforts of the EU in supporting countries affected by natural disasters and environmental degradation

As said, the poorest countries, being in the hotter parts of the world and not having enough money to invest in tools, infrastructures, and programs to address climate hazards, are the ones suffering the most for climate change. Moreover, in those countries, communities often depend heavily on their natural environment. Some people may decide to migrate in order to adapt to climate change immediately. However, sometimes it is not a feasible solution because people do not have resources or capacities to migrate; moreover, at the present moment, the EU does not have in place a legal framework addressing specifically environmental migrants, and the majority of the Member States do not seem interested in legislating on the matter. Thus, another way to tackle environmental migration is to, at least partially, avoid it by dealing with the core reasons of it: the EU seems to put a great deal of effort in addressing climate change at a global level and its effects in the countries affected.

The EU not only participates in international fora specifically created to address global warming and climate change, but it has set for itself very ambitious goals. The latter and the measures adopted to achieve them are periodically updated and, so far, they are proving to be effective.

In addition, as it was shown, the effects of climate change can sometimes be mitigated in the countries affected. The EU has created two funds – the GCCA+ and the joint Pacific Initiative on Biodiversity, Climate Change and Resilience – and participates to others – e.g. the Adaptation Fund, the Green Climate Fund, the Least Developed Countries Fund and the Special Climate Change Fund – that finance projects and programmes aimed at building concrete adaptation measures or transferring climate-resilient technology.

While from the standpoint of migratory policies regarding environmental migrants, the EU has a long way to go, it appears to be well advanced – especially compared to other countries in the world – for what concerns the importance it gives to sustainability and the planetary climate emergency and, consequently, the well-being of the communities affected by the effects of climate change.

7. Combating climate change and financially supporting the enhancement of adaptation strategies in vulnerable countries are pre-emptive measures with regard to environmental migration

The EU actions to combat climate change and the financial support to developing countries affected by natural disasters and environmental degradation are part of the solution for what concerns environmental migration as they can, to some extent in the future, prevent the migration to take place.

The efforts towards a low-carbon economy represent ways to reduce the climate impact of the EU and, eventually, to keep the global temperature rise this century well below 2°C above pre-industrial levels. The actions of the EU and the other countries in the world willing to concretely fight climate change will have an impact on the environmental effects of global warming in the distant future. The EU environmental policies are very extensive, covering various sectors of the economy. The EU *“has strived during recent decades to position itself as a leader in environmental policy and promote the concept of sustainable development on the global scene”*²³⁷ and has developed a comprehensive independent legal framework, well integrated with its obligation at the international level. Therefore, we can affirm that there is a precise Union action in the environmental field, even though international cooperation is necessary to tackle a global issue such as climate change.

By adopting mitigation measures aimed at reducing greenhouse carbon emissions, the EU is limiting or avoiding some negative effects of climate change. These environmental effects, as shown, constitute, at least partially, the reason why some people are forced or decide to move to other countries. Limiting or eliminating the adverse consequences of climate change will make some countries more suitable to

²³⁷ Afionis S., Dupont C., Sokolowski M. M., Kalantzakos S., Martinuzzi A., Sedlacko M., *EU Environmental Policy*, Routledge.

sustain life. However, since the long-term positive outcomes of the reduction of greenhouse gas emissions in several more decades, if not centuries²³⁸.

In the meantime, actions taken to enhance the adaptation strategies in countries vulnerable to natural disasters and environmental decline are useful to give the people affected the option to remain in their country. The adoption of measures to anticipate the adverse effects of climate change and take action to prevent or minimize them may reduce the vulnerability of regions to environmental hazards. In this sector, the existing funds, even those created by the EU, see the involvement of countries other than the Member States. The climate finance to developing countries is characterized by multilateralism: in fact, the most relevant funds are created under the UNFCCC.

Of course, in situations in which environmental degradation and natural disasters have severely or irreversibly damaged the territory, neither the fight against climate change nor adaptation measures can adequately support the population affected. For this reason, it is nevertheless crucial to put in place legal instruments capable of providing support to migrants fleeing from environmental disruption.

²³⁸ Is it too late to prevent climate change?, NASA, available at: <<https://climate.nasa.gov/faq/16/is-it-too-late-to-prevent-climate-change/>>.

CONCLUSIONS

The objective of this thesis was to find a legal framework, already existing or to be created within the EU system, to protect and support environmentally displaced people. The EU, for what concerns immigration policy and environmental policy, has shared competence with the Member States as specified in article 4 TEU. The EU can legislate on migratory issues having as a legal basis articles 67,77,78,79 TFEU, while articles 191,192,193 TFEU are the ones that permit actions by the EU in the environmental field.

Climate change and migration are two topics particularly relevant in today's world and, in some situations, they are interconnected. Climate change affects all regions around the world, causing more damages in those areas particularly prone to environmental hazards, densely populated or with weak institutions and governments. It is a global threat, taken very seriously by the EU, as explored in Chapter IV. Migration, on the other hand, is a very discussed topic mainly because of political reasons, related to the economic, social and economic implications in the host countries.

Natural disasters and environmental degradation are both a direct and indirect cause of internal and international displacement. Climate change, in particular, is responsible for several natural hazards: two examples are sea-level rising, producing flooding, destructive erosions, soil contamination with soil and threatening coastal environments and weather phenomena that result in drought, desertification, wildfires and tornados. These events may bring people to move from their countries when the latter cannot sustain livelihood adequately. Climate change may have the function of multiply and exacerbate existing difficulties, such as poverty, unemployment, political conflicts or food insecurity, that already are reasons for migration.

The phenomenon of climate migration is not new, and it is going to become more and more frequent as the global environmental conditions worsen, as they are already doing. In order to effectively regulate the phenomenon, it is first of all important to define who are the people that move from their countries because of natural hazards. Terms such as 'climate refugees' or 'environmental refugees' do

not appear to be appropriate, as the word ‘refugee’ is strictly linked with the meaning expressed in the 1951 Convention relating to the status of refugee, that has very few elements in common with the characteristics of environmentally displaced people. Among others, the UNHCR itself has harshly criticized such linguistic choice. The expression ‘environmental migrant’, as defined by the IOM and further specified by Fabrice Renaud, seems to be more appropriate.

The various legal solutions to deal with environmental migration are connected with the visions that legislators, media or international organizations have of people fleeing their country for environmental reasons. While picturing environmental migrants as victims is likely to lead to the development of policies of asylum and global solidarity on the part of the Global North, seeing environmental migrants as adaptive agents strips them of a passive appearance that generally characterizes victims, by making them active subjects that through the adaptive strategy of migration can support their household and their country. Then, the vision of environmental migrants as security threats makes the States raise walls to protect the country from feared floods of refugees, while envisioning environmental migrants as political subjects makes them parts to the policy-making process in their home country when it comes to, for example, efficient relocation of resources to support mitigation and adaptation measures.

In today’s discussions on climate migration in European and international arenas, the focus is mainly put on enhancing the adaptation and resilience capacities in the communities affected by the adverse effects of climate change: migration as a consequence of environmental hazards is recognized, but the priority seems mainly to be reducing vulnerabilities in the countries affected. Nonetheless, the issue of migration as a response and as an adaptive solution to environmental degradation and natural disasters must be tackled because, as said, it is already occurring without regulation in most parts of the world.

Since the phenomenon of climate migration is global, international cooperation between the EU and other international actors can be an effective way to address it. Since at the international level there is not any entity to which the task of dealing with environmental displacement is allocated, the EU could use its external competences in the field of migration to develop new international legal

instruments or participate in existing ones. One of the most suitable options seems to be the creation, by the EU and other parties, of a new legal framework for the protection of climate migrants or the addition of a new Protocol to the UNFCCC.

For what concerns the creation of a new legal instrument, a so-called mixed agreement could be concluded by the EU and the Member States as the competence on immigration is shared between the EU and its Member States: the EU and the Member States will ratify the agreement following their own procedures; as long as the EU is concerned, the agreement will be negotiated and concluded following the procedures set out in article 218 TFEU. The new legal framework should be built on the principles of cooperation in the international community, common but differentiated responsibility and subsidiarity. It would have the advantage of being created appositely for the category of climate migrants, without stretching other existing legal tools to fit their needs and interests.

The addition of a new Protocol to the UNFCCC would have, besides being explicitly constructed for environmentally displaced people, the benefit of rest on a solid basis agreed by the Parties to the Convention. The extension of the refugee's definition in the Geneva Convention or the addition of a Protocol to the latter are not considered adequate solutions for several reasons, beginning with the fact that the EU is not a party of it, although the Convention has a significant role in the EU asylum law. In addition, as it was explained, traditional refugees and environmental migrants are two categories with very different needs and treating them the same could be detrimental: on the one hand, a modification of the Convention could result in lower rights and protection than the ones granted now; on the other hand, it risks of not responding adequately to the particular exigencies of climate migrants.

Letting the Security Council of the UN deal with the issue of environmental migration appears to be the weakest solution. Besides the fact that the EU is not a member of it and therefore, it could not participate adequately in the decision-making process, the UN Security Council does not seem suitable fora to discuss environmental migration. Even though the latter may constitute, in some situation,

a security issue, the Security Council has not the expertise to deal with a phenomenon of this kind, linked with environmental issues.

The European Courts may play an important role in cases regarding environmental migrants through interpreting relevant provisions – such as article 3 ECHR, article 4 of the Charter of Fundamental Rights and article 15 of the Qualification Directive – as to provide protection to this category of people. It was examined how the case-law of the ECtHR on purely natural occurring harms evolved: now the Court may consider the deprivation of socio-economic rights in the country of origin of the applicant to constitute ill-treatment and, therefore, to trigger the application of article 3 ECHR to the extent that the applicant cannot be expelled. This type of interpretation of the relevant articles mentioned can be suitable also for cases related to climate migration, caused by environmental disasters that are, by definition, naturally occurring harms and that can deprive the persons affected of fundamental socio-economic rights such as the right to adequate housing, food, water or health. In a moment, such as the present one, of legal uncertainty whether the right of environmental migrants has to be supported and protected in the host countries and how to do it, judgements of the courts could indicate the need for a legislative evolution.

After having analysed the best options of the EU as an international actor regarding international policies on climate migrations and of the ECJ as a court potentially capable of interpreting existing EU provisions consistently with the current interpretations given by the ECtHR, it appeared important to assess what are the most adequate EU legal instruments that can regulate the phenomenon of climate migration.

The EU, in its own legal system, has legislative acts potentially suitable for protecting environmental migrants. In addition, some of its Member States – Finland, Sweden and Italy – have addressed at a national level the matter, granting residence permits or temporary protection to those people who have fled from their countries because of natural hazards.

The Qualification Directive grants protection to individuals that do not meet the requirements of the Geneva Convention and its Protocol but risk, if returned home, to suffer serious harm, as defined by article 15 of the Directive. Article 15(b), in particular, describes serious harm as “*torture or inhuman or degrading treatment or punishment of an applicant in the country of origin*”. Since article 15(b) has to be interpreted consistently with article 3 ECHR and, as it was shown, the case-law of the ECtHR relating to that article is developing as considering the deprivation of socio-economic rights, that may happen in the occasion of natural disasters or environmental degradation, ill-treatment, article 15(b) could be interpreted in this sense to give protection to environmentally displaced people.

The Temporary Protection Directive, compared to the Qualification Directive, does not provide an exhaustive list of cases in which an individual may receive protection. However, the Directive applies only in cases of displacement, in the EU, of a mass influx of people; this characteristic makes the Temporary Protection Directive enforceable, for what concerns climate migration, only when severe natural disasters cause the displacement of entire communities. Thus, it does not give protection to individuals that migrate, for example, from countries that are facing environmental degradation and slow-onset phenomenon such as desertification or rise of the level of the sea.

Seasonal cross-border migration offers, to people affected by environmental hazards, a solid adaptation strategy to sustain themselves and their household in given periods of the year. The Seasonal Worker Directive, in particular, defines the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers in the EU States. Seasonal workers are seen by the host States as less of a burden from an economic point of view, especially when they fill vacant job positions: they are not considered exploiters of the host state’s resources as they work and invest there. This aspect could make the EU Member States see more favourably seasonal migration compared to other types of migration.

The TLMCM project between Spain and Colombia, that offered seasonal jobs in the region of Catalonia to Colombian nationals that lived in regions affected by

environmental hazards, proved to be an effective instrument, confirming the beneficial effects of seasonal work for people affected by the adverse effects of climate change. The Seasonal Worker Directive, however, cannot help people displaced for environmental reasons that cannot return home temporarily or permanently due to the extent of damages their land suffered.

It is apparent that, although several instruments are potentially suitable to protect environmental migrants, none of them was appositely created or used for such scope by the EU.

Besides the use of legal tools designed to regulate the migratory phenomenon, addressing the root causes of such migration - global warming and the lack of adaptive strategies – appears to be fundamental to support the communities affected and to, at least partially, avoid migration. The EU is very committed in the fight against climate change and global warming, tackling these issues both through internal tools and participating in international agreements. It not only sets for itself and its Member States ambitious goals and targets – e.g. 2020 climate & energy package and in the 2030 climate & energy framework - but also develops rules specifically addressed to sectors of the economy to reduce the latter's greenhouse gas emissions. The European Green Deal, for example, lays down a series of policy initiatives covering various areas to accomplish, by 2050, zero net emissions from greenhouse gases: from circular economy to buildings' construction, use and renovation, sustainable mobility, sustainable food chain and protection of ecosystems.

Furthermore, the EU and its Member States largely finance projects in countries vulnerable to the adverse effects of climate change, in order to help them develop effective adaptation and mitigation strategies, as in particular the Paris Agreement prescribes. The adaptation measures range from planting trees to using water resources efficiently, raising streets' level, developing crop varieties with higher drought tolerance or adopt agronomic practices to reduce soil loss. The EU has created two funds specifically dedicated to improving the adaptation capacities of vulnerable countries: the Global Climate Change Alliance Plus Initiative and the

joint Pacific Initiative on Biodiversity, Climate Change and Resilience. It also participates in funds created under international entities: they are the Adaptation Fund, the Green Climate Fund, the Least Developed Countries Fund and the Special Climate Change Fund.

In conclusion, environmental migration, because of its strict connection to the phenomenon of global warming, has to be dealt with from two sides: the migratory one – through the development of legal tools that can specifically address the needs and interests of climate migrants – and the environmental one – through the creation of goals and rules aimed at fighting climate change and its detrimental effects. Today the EU migratory framework, in the absence of a specific legal instrument, appears to be suitable to grant protection to people seeking refuge from environmental disruption; the obstacle, more than legal, seems to be political, as the current political situation in the Member States does not seem to be welcoming to further migrants. From an environmental perspective, both the EU and the Member States are parts of international environmental agreements and have committed to taking far-reaching measures to fight climate change and financially support the enhancement of adaptive measure in developing countries. Thus, the actions of the EU to protect environmental migrants in the environmental field are, at the present moment, more effective than the ones taken by a migratory point of view.

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