


Judicial Trajectories in the Recognition of Environmental Migrants

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ABSTRACT

This article aims to trace the recent judicial trajectories in the promotion and recognition of environmental migration. It will first show the general background in which the phenomenon is placed, thus underlying its main characteristics and problems. Subsequently, it will offer an overview of some noteworthy examples of the so-called "climate change litigation". Indeed, notwithstanding the lack of binding instruments and the inapplicability or inadequacy of the existing legal instruments for the protection of environmental migrants, noteworthy examples of increasing awareness about the relationship between environmental degradation and human rights can be found in several cases decided by international human rights judicial or quasi-judicial bodies. In particular, two recent decisions of the United Nations Human Rights Committee (U.N.H.R.C.) will be assessed. The article will also assess the increasing sensibility of the European Court of Human Rights (E.Ct.H.R.) in deciding environmental cases through a human-rights-based approach. By moving from the supranational context to the national one, the paper will focus on two recent decisions adopted by the French Bordeaux Administrative Court and the Italian Court of Cassation. Indeed, they both represent relevant examples of the role played by national courts in broadening the interpretation and application of the existing instruments of protection for environmental migrants. The analysis of the mentioned decisions will then be framed in the wider context of the legal order of the European Union (E.U.), highlighting how E.U. instruments of secondary law at disposal do not appear adequate for guaranteeing a sort of protection for environmental migrants.



KEYWORDS

Environmental migration; European Union; Migration; Jurisprudence; Human Rights

EDITORIAL NOTE

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INTRODUCTION

With gradually worsening climate patterns and severe weather events, the climate crisis is remodeling our world. Climate change is described by variations in average weather conditions, and includes modifications in temperature, precipitation patterns, the frequency and severity of certain weather events.¹ Indeed, the increasing rise of global temperatures has contributed to more frequent and extreme weather hazards around the world,² including sudden-onset events, such as heat waves, droughts, heavy precipitation, floods, and storms, along with slow-onset events, such as the continuous sea-level rise, the ocean warming and acidification, and glacial loss.³ When such severe

¹ See ALEXA JAY ET AL., *FOURTH NATIONAL CLIMATE ASSESSMENT, VOLUME II: IMPACTS, RISK, AND ADAPTATION IN THE UNITED STATES* 33 (Reidmiller et al. eds, 2018).

² According to Copernicus 2021, globally, the years 2016, 2019 and 2020 have been the warmest on record, and 2011–2020, the warmest decade ever. See Copernicus Press Release, Copernicus: 2020 Warmest Year on Record for Europe; globally, 2020 Ties with 2016 for Warmest Year Recorded (Jan. 8, 2020).

³ World Meteorological Organisation [WMO], *State of the Global Climate 2020*, WMO-No.1264 (2021) <https://public.wmo.int/en/our-mandate/climate/wmo-statement-state-of-global-> [last visited 6 December 2022].

events are merged with social, political, and economic vulnerabilities, environmental degradation and climate change can also produce adverse effects on the availability of primary resources, such as food and water in rural, coastal, and urban systems across regions.⁴

Thus, climate change and environmental degradation are expected to increase the frequency and intensity of such hazards, bringing further damage and conflicts,⁵ especially to vulnerable areas with high dependence on natural resources and low capacity to adapt.⁶ Indeed, many countries are witnessing shifts in population distribution and alterations in the human mobility dynamics,⁷ eventually leading to a large-scale human movement across continents or trapping people without resources to flee, thus preventing them from escaping their countries of origin due to the adverse effects of climate change and environmental degradation.⁸

In particular, statistics have shown the increasing role of extreme sudden weather-related events in changing mobility patterns and emphasizing pre-existing vulnerabilities.⁹ After all, such scenarios are consistent with the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [hereinafter I.P.C.C.]¹⁰ registering that, since 2008, an annual average of over twenty million people have been internally displaced by weather-related extreme events, with storms and floods being the most common. Only in 2021, according to the 2022 Internal Displacement Monitoring Centre report, thirty-eight million people were displaced and, among them, 23.7 million were displaced due to disasters in 137 countries and territories.¹¹ In addition, the World Bank's Groundswell Report recognized that climate change and environmental degradation are potent drivers of migration, and they could force 216 million people across six world regions to move within their countries by 2050.¹²

⁴ VIVIANE CLEMENT ET AL., *GROUNDSWELL PART 2: ACTING ON INTERNATIONAL CLIMATE MIGRATION* 304 (The World Bank, 2021), <https://openknowledge.worldbank.org/handle/10986/36248>.

⁵ *Id.*

⁶ See Jonathan S. Blake et al., *Addressing Climate Migration. A Review of National Policy Approaches*, RAND Corporation (2021), <https://www.rand.org/pubs/perspectives/PEA1085-1.html>.

⁷ See CLEMENT ET AL., *supra* note 4.

⁸ See Alex Randall (@AlexRandall), LINKEDIN (July 18, 2022), <https://www.linkedin.com/pulse/caught-trap-why-climate-change-might-actually-lead-some-alex-randall/> [last visited 6 December 2022].

⁹ See CLEMENT ET AL., *supra* note 4, at 230.

¹⁰ H.-O. Pötner et al., *Climate Change 2022: Impacts, Adaptation and Vulnerability, Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* 52 (IPCC Working Group II Contribution, 2022).

¹¹ International Displacement Monitoring Centre [IDMC], *Global Report on Internal Displacement* [hereinafter GRID], 11 (2022).

¹² See CLEMENT ET AL., *supra* note 4.

In light of the increasing alarming data, the nexus between environmental degradation and migration has been acquiring a growing space in political and societal debates.¹³ The urgency to provide a definition was particularly felt by the International Organization for Migration [hereinafter I.O.M.],¹⁴ which has been the actor at the forefront in the attempt to define “environmental migrants”.¹⁵ The 2007 Council Session defined the latter as “persons or groups of persons who, for 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 choose to do so, either temporarily or permanently, and who move either within their territory or abroad”.¹⁶ This definition by being conceptualized in this manner acknowledges that environmental migrants do

¹³ In particular, on the different phenomena that may cause environmental migration see Diane C. Bates, *Environmental Refugees? Classifying Human Migrations Caused by Environmental Change*, in 23(5) POPULATION & ENV'T 456, 465 (2002); see Frank Biermann & Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, in GLOB. ENV'T POL., 60 (2010); see also Bruno Venditto, *Il futuro del Mediterraneo. Studio preliminare sui rifugiati ambientali*, in IL MEDITERRANEO: UNO STUDIO E UNA PASSIONE. SCRITTI IN ONORE DI LUIGI DI COMITE 251-269 (M. A. Valleri et al. eds. 2012). See Alison Heslin et al., *Displacement and Resettlement: Understanding the Role of Climate Change in Contemporary Migration*, in LOSS AND DAMAGE FROM CLIMATE CHANGE: CONCEPTS, METHODS AND POLICY OPTIONS 237 (R. Mechler, et al., eds, 2019).

¹⁴ I.O.M.'s defining effort - as well as the above-mentioned inclusion of the environmental causes of migration in soft law documents by other international actors - is placed in a global backdrop in which the issues of the protection of the environment, climate change and sustainable development have fully moved to the center of the political debates. Indeed, it is possible to cite the above-mentioned United Nations Framework Convention on Climate Change [hereinafter, U.N.F.C.C.C.] and its Paris Climate Conferences [hereinafter, C.O.P.s], the U.N. General Assembly Resolution stating the right to a healthy environment, the Sendai Framework for Disaster Risk Reduction 2015-2030 under the U.N. Office for Disaster Risk Reduction (U.N.D.R.R.), the 2030 Sustainable Agenda, as well as the E.U. Green Deal. It is due to note that also the United Nations University's Institute for Environment and Human Security in 2011 tried to define “environmental migrants”. In particular, it distinguished among “environmental emergency migrants”, “environmentally forced migrants” and “environmentally motivated migrants”. “Environmental emergency migrants” are “people who have to flee because of the swiftness of an environmental event and who have to take refuge to save their lives”. “Environmentally forced migrants”, on the contrary, are “who have to leave in order to avoid the worst of environmental deterioration. The urgency for flight is less than for the environmental emergency migrant since the pace with which the environment is changing and or deteriorating is slower”. Whereas “environmentally forced migrants” are those “who may leave a steadily deteriorating environment in order to preempt the worst. Here, there is no emergency nor is it a last resort action to move, but rather it is a situation in which individuals or communities who foresee a continuously deteriorating environment may decide to move in order to avoid further deterioration of their livelihoods” (for a detailed analysis also on the evolving legal scholars' attempts to draw a definition of this phenomenon; see Fabrice G. Renaud et al., *A Decision Framework for Environmentally Induced Migration*, in INT'L MIGRATION, 5, 14 (2011); Resolution on Women, Gender Equality and Climate Justice, EUR. PARL. DOC. PV 15/01 (2018), para. 20 called:
on the Commission and the Member States to contribute to the Global Compact for Safe, Orderly and Regular Migration, with a view to safeguarding climate justice by acknowledging climate change as a driver of migration, providing human rights-based input, and mainstreaming gender equality throughout the compact, consistently with the needs of climate- displaced people.

¹⁵ On a methodological level, it is due to note that in the present paper the terms “environmental migrants”, “environmental displaced persons” or “environmental induced displacement” will be used within the same meaning. See Geddes & William Somerville, *Migration, and environmental change in international governance: the case of the European Union*, in 30 ENV'T AND PLANNING C, 1015, 1018 (2012).

¹⁶ International Organization for Migration [IOM], *Discussion note: migration and the environment*, 1-2, Doc. MC/INF/288 (November 1, 2007).

not only move due to climate change alone, but also due to broader environmental reasons, such as sudden and slow-onset events; that movement of people could occur both within and outside national borders; that migration could be both short-term and long-term and, finally, that such movements could be either forced or voluntarily.¹⁷

Over time, harsh criticisms have not spared this definition, mainly underlining its broad character and the difficulty to disentangle the effects of environmental change from other drivers of migration. Indeed, environmental migrations have a so-called “multi-causal nature”,¹⁸ due to the difficulty, and in some cases the impossibility, in reconstructing a cause-and-effect relationship between a particular environmental event and the specific movement of individuals.¹⁹ It is believed that the environmental conditions act as amplifiers, exacerbating already existing vulnerabilities,²⁰ in a way that those who experience the most adverse effects of climate change and environmental degradation already tend to be in a state of poverty, sickness, discrimination.²¹ In this sense, climate change would interact with other overlapping non-environmental factors, such as economic, social, and political factors,²² which evolve and change over time.

The lack of a generally accepted definition of environmental migrants, which results in the use of different (and sometimes not adequate) expressions (e.g., *environmental* or *climate migrant*, *environmental* or *climate refugee*, *eco-migrant*),²³ inevitably hinders the assignment of an actual legal status to those moving due to environmental reasons. Actually, some attempts to raise awareness of this gap have been made by certain international actors, such as the U.N.F.C.C.C. Secretariat, the I.O.M. and the U.N. High Commissioner for Refugees [hereinafter U.N.H.C.R.]. They have firstly begun to address the causes and consequences of environmental migration, thus raising the phenomenon as an emerging global priority through the development of frameworks,

¹⁷ On the identified characteristics of environmental migration; see Renaud et al., *supra* note 14.

¹⁸ See Blake et al., *supra* note 6.

¹⁹ See Jane McAdam, *Managing Displacement in the Era of Climate Change*, GEO. J. INT'L AFF., Nov. 2019, at 1.

²⁰ See JANE McADAM, CLIMATE CHANGE, FORCED MIGRATION AND INTERNATIONAL LAW 5 (2012).

²¹ See Etienne Piguet, *Climate Change and Forced Migration* (United Nations High Commissioner for Refugees, Research Paper No. 153, 2008), <http://www.unhcr.org/research/working/47a316182/climate-change-forced-migration-etienne-piguet.html>; see VALERIO CALZOLAIO, ECOPROFUGHI. MIGRAZIONI FORZATE DI IERI, DI OGGI, DI DOMANI (Nda Press, 2010).

²² See Norman Myers, *Environmental refugees: A Growing Phenomenon of the 21st century*, in 357(1420) PHIL. TRANSACTIONS ROYAL SOC'Y B: BIOLOGICAL SCI., 609 (2002).

²³ Due to such complexity, the terminology used to define who moves because of climate or environmental changes is various: climate or environmental refugees, eco-migrants or climate-induced migration, environmental migration, or environmental displaced persons. See in particular *id.* see also Graeme Hugo et al., *Migration, Development and Environment*, in 35 Migration Research Series, 42-61 (2008), https://publications.iom.int/system/files/pdf/mrs_35_1.pdf. See *Study on Climate Change and Migration. Legal and Policy Challenges and Responses to Environmentally Induced Migration*, EUR. PARL. STUDY PE 655.591 (July, 2020), [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655591/IPOL_STU\(2020\)655591_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655591/IPOL_STU(2020)655591_EN.pdf).

guidelines, and recommendations.²⁴ Significantly, reference to environmental migration can also be found in the 2010 Cancún Agreement on Adaptation to Climate Change,²⁵ adopted by the Conference of the Parties to the U.N.F.C.C.C., which called for a commitment by States to develop “measures to enhance understanding, coordination, and cooperation” on the issue.²⁶ More recently, the United Nations Global Compact for Safe, Orderly and Regular Migration,²⁷ drawing from the New York Declaration on refugees and migrants,²⁸ has explicitly acknowledged that climate change, natural disasters, environmental degradation, and other environmental factors are drivers of migration.²⁹

²⁴ See, e.g., under the I.O.M., the creation in 2015 of the Migration, Environment and Climate Change Division which was intended to spearhead work on the subject of environmental migration. Such involvement can be seen in the participation of global processes, such as the Global Compact for Safe, Orderly and Regular Migration [hereinafter G.C.M.], U.N.F.C.C.C., United Nations Convention to Combat Desertification, Sendai Framework for Disaster Risk Reduction, 2030 Agenda for Sustainable Development and Global Forum on Migration and Development, as well as regional dialogues.

²⁵ See United Nations Framework Convention on Climate Change, ¶14 (f), Mar. 15, 2011, U.N. Doc FCCC/CP/2010/7/Add.1.

²⁶ The necessity to develop and implement a comprehensive approach to migration in the context of disasters, climate change and environmental degradation can be found also in the objectives of the 2030 U.N. Agenda on Sustainable Development, in the 2015 Paris Agreement on Climate Change, in the Sendai Framework for Disaster Risk Reduction and in the Nansen Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change.

²⁷ As part of the General Assembly’s effort, the New York Declaration on Refugees and Migrants sets out a comprehensive refugee response framework and two global compacts (one on refugees and one on international migration). In particular, the 2018 G.C.M. is a non-binding intergovernmental agreement that defines the common pledges to tackle challenges and opportunities in international migrations. The issue of environmental migration is included under Objective 2, which looks at addressing root causes of migration in the context of natural disasters, climate change and environmental degradation, as well as Objective 5, which identifies ways to strengthen opportunities for regular migration for those impacted by slow-onset natural disasters. On the contrary, the Global Compact on Refugees [hereinafter G.C.R.] addresses in a less prominently way environmental displacement. More in detail, the topic of climate change and disaster are only mentioned within the G.C.R.

²⁸ See G.A. Res. 217 (III)A, New York Declaration on Refugees and Migrants (Sept. 19, 2016) [hereinafter New York Declaration]. For an analysis of the Declaration see Lisa Ruozzi, *La Dichiarazione di New York sui rifugiati e migranti: verso un modello condiviso di gestione del fenomeno migratorio?*, in 1 ORDINE INTERNAZIONALE E DIRITTI UMANI, 24 (2017). (It.).

²⁹ *New York Declaration*, supra note 27, at point 1 where it is stated that:

Since earliest times, humanity has been on the move. Some people move in search of new economic opportunities and horizons. Others move to escape armed conflict, poverty, food insecurity, persecution, terrorism, or human rights violations and abuses. Still others do so in response to the adverse effects of climate change, natural disasters (some of which may be linked to climate change), or other environmental factors. Many move, indeed, for a combination of these reasons,

but also point 9 where it is stated that:

Refugees and migrants in large movements often face a desperate ordeal. Many take great risks, embarking on perilous journeys, which many may not survive. Some feel compelled to employ the services of criminal groups, including smugglers, and others may fall prey to such groups or become victims of trafficking. Even if they reach their destination, they face an uncertain reception and a precarious future.

Despite the global commitment briefly presented above,³⁰ the protection of environmental migrants remains a grey area, for three main reasons.

Firstly, the absence of precise data on the number of people moving for environmental reasons from one State to another or within their country of origin makes it difficult to assess the extent of environmental migrants protection or make precise predictions.³¹

Secondly, as mentioned before, it is difficult to define precisely environmental migration,³² as it is also influenced by other non-environment factors. Apart from evoking different images, the use of the terms *refugee*, *migrant* or *displaced person*, has political and legal implications, accentuating or reducing the forced nature of the movement and soliciting the responsibility of the countries of origin, transit and destination.³³

Thirdly, there are no *ad hoc* binding instruments granting some kind of protection to these people, while the existing instruments are inadequate. As a matter of fact, even the attempts³⁴ to grant the refugee status under the 1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol³⁵ have proven ineffective.³⁶ According to art. 1A(2) of the Geneva Convention,³⁷ there are three main requirements to obtain refugee status which are, however, the reasons for such ineffectiveness.

³⁰ See UNITED NATIONS ENVIRONMENTAL PROGRAMME, THE GLOBAL COMMITMENT 2022 (2022). <https://ellenmacarthurfoundation.org/global-commitment-2022/overview>.

³¹ See Ilian Kelman, *Imaginary Numbers of Climate Change Migrants?*, 8(5) SOC. SCI., 131 (2019).

³² See in particular W. Neil Adger et al., *Human Security*, in CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY, PART A: GLOBAL AND SECTORAL ASPECTS, 768 (Christopher B. Field et al. eds., 2014); see also Ingrid Boas et al., *Climate Migration Myths*, 9 NAT. CLIMATE CHANGE, 901 (2019); Saleh Ahmed, *Book Review: The Concept of Climate Migration: Advocacy and Its Prospects*, 19 GLOB. ENV'T. POL. 139, 139-141 (2019).

³³ See Anna Brambilla & Michela Castiglione, *Migrazioni Ambientali: Libertà di Circolazione vs. Protezione?*, *Cosmopolis Rivista di Filosofia e Teoria politica* 1, (2019), <https://www.cosmopolisonline.it/articolo.php?numero=XVII12019&id=3> [last visited 6 December 2022] (It.).

³⁴ See generally Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENV'T. L. REV., 349 (2009). See also James Morrissey, *Rethinking the 'Debate on Environmental Refugees': From 'Maximalists and Minimalists' to 'Proponents and Critics'*, 19 J. POL. ECOLOGY 36, (2012). See BENOÎT MAYER, THE CONCEPT OF CLIMATE MIGRATION: ADVOCACY AND ITS PROSPECTS (2016).

³⁵ See U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, (1954).

³⁶ On the inapplicability of the Geneva Convention to environmental migrants; see generally McAdam, *supra* note 20, at. 43; JANE McADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW 43 (2012). Even the Office of the U.N.C.H.R. rejected the use of the term "refugee" in this context on grounds that the term "refugee" is a legal term and should be reserved for refugees protected under the 1951 Geneva Convention. See U.N. High Commissioner for Refugees (U.N.H.C.R.), *Climate Change, Natural Disasters and Human Displacement: A U.N.H.C.R. Perspective* (Oct. 23, 2008).

³⁷ See Geneva Convention, *supra* note 36, at art. 1A(2) of the Geneva Convention the term refugee shall apply to any person who: [. . .] (2) [. . .] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

Primarily, the Convention requires “a well-founded fear of being persecuted”³⁸ for one of the five reasons enlisted (the so-called persecution requirement), which hardly amounts to climate change and environmental degradation. There is a reluctance³⁹ in characterizing “climate change” or the “environment” as agents of persecution.⁴⁰ Traditionally, persecutory acts encompass serious violations of human rights, either because of their intrinsic nature or because of their repetition,⁴¹ and the *dolus specialis* – i.e., the special intention to hurt. In the case of environmental migration, since the environment cannot be considered as a persecutor, there is no particular intent. In addition, such fear of being persecuted is connected to a discriminatory element,⁴² thus it must be individualized and proved. In other words, the five grounds of persecutions are tied to personal characteristics,⁴³ while the impacts of environmental degradation are largely indiscriminate. Thus, an environmental migrant would have to prove that something specific is exposing him or her to a real fear of persecution, but the mere environmental or climatic event is not sufficient to apply for international protection.⁴⁴

³⁸ At the international level, there is not universal definition of “well-founded fear of persecution”. See U.N. High Commissioner for Refugees (U.N.H.C.R.), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, at 9, 37, HCR/1P/4/ENG/REV. 4, (2d ed. 1992).

³⁹ See Catherine-Amélie Chassin, *Dealing with International Vulnerability: European Law and Climate-Induced Migrants*, in Francesca Ippolito & Sara Iglesias Sanchez, *Protecting Vulnerable Groups* 274.

⁴⁰ It is due to note that there are some legal scholars that argued in the opposite way. See generally Jessica B. Cooper, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 N.Y.U. ENV'T L. J. 480, 480-676 (1998). Cristopher M. Kozoll, *Poisoning the Well: Persecution, the Environmental, and Refugee Status*, 15 COLO. J. INT'L ENV'T L. & POL'Y 271 (2004). See Hossein Ayazi & Elsadig Elsheikh, *Climate Refugees: The Climate Crisis and Rights Denied* (2019), <https://escholarship.org/uc/item/58w8r30h> [last visited 6 December 2022].

⁴¹ As highlighted by McAdam, *supra* note 20, at 44, the act classified as “persecutory” can be also composed by a repetition of breaches: “[F]or example, an accumulation of breaches which, individually, would not be so severe but which together constitute a serious violation”. A similar approach can be found in the Council Directive 2011/95, of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 2011 O.J. (L 337/9), artt. 2 and 9.

⁴² See McAdam, *supra* note 20, at 44.

⁴³ See Susanna Villani, *Reflections on human rights law as suitable instrument of complementary protection applicable to environmental migration*, 3 Diritto, Immigrazione e Cittadinanza 1, 5 (2021), <https://www.dirittoimmigrazionecittadinanza.it/archivio-saggi-commenti/saggi/fascicolo-n-2-2021-2/824-reflections-on-human-rights-law-as-suitable-instrument-of-complementary-protection-applicable-to-environmental-migration/file> (It.).

⁴⁴ *Id.*

Furthermore, environmental and climatic events do not target a specific person or a specific group.⁴⁵ In this perspective, some authors have argued that the environmental factor could be interpreted as an aggravating element in the event of conflicts.⁴⁶ For example, in the event of the government's voluntary decision to not help specific ethnic groups after a disaster. As a matter of fact, in the few occasions in which environmental migrants have been considered as refugees, the environmental factor was connected to one of the five grounds of persecution.

Secondly, the definition only applies to people who have already crossed an international border; thus, they are already outside the country of their nationality or of their habitual residence.⁴⁷ *Stricto sensu*, the definition is not taking into account that most people affected by the adverse effects of environmental degradation and climate change tend to remain within their country of origin.⁴⁸ Thus, when displacement from a disaster remains within the affected country, environmental migrants should be recognized as internally displaced persons [hereinafter I.D.P.s]⁴⁹ under the 1998 Guiding Principles on Internal Displacement⁵⁰ [hereinafter G.P.I.D.] or under the Kampala Convention⁵¹ if the event occurs within the African Union' Member States. In this regard, the G.P.I.D. recognize that I.D.P.s are people who can be displaced by natural or human-made disasters and provide the international community and States - that wish to implement them in their national legislation - with a framework that addresses various human rights aspects of internal displacement.⁵² In particular, the G.P.I.D., starting from the recognition of those displaced for natural or human-made disasters as

⁴⁵ See Chassin, *supra* note 39, at 274 when she stated that “[a]t a given location and point in time, all people will be exposed to the same climatic phenomenon, no matter their age, religion, skin color, political opinions, and so on. In essence, [environmental] migration is a collective migration”.

⁴⁶ See Kozoll, *supra* note 40, at. 271; see also Eugénie Delval, *From the U.N. Human Rights Committee to European Courts: Which protection for climate-induced displaced person under European Law?*, E.U. Imm. Asylum L. Pol’y (April 8, 2020), <https://eumigrationlawblog.eu/from-the-u-n-human-rights-committee-to-european-courts-which-protection-for-climate-induced-displaced-persons-under-european-law/> [last visited 6 December 2022].

⁴⁷ See JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 1285 (2d ed. 2005).

⁴⁸ See GUY S. GOODWIN-GILL & JANE McADAM, *THE REFUGEE IN INTERNATIONAL LAW* 2 (3rd ed. 2007). On the tendency to remain within the country of origin; see Nansen Initiative on Disaster- Induced Cross Border Displacement [hereinafter Nansen Initiative], at. 3 (2015).

⁴⁹ See Francis M. Deng (Representative of the Secretary-General), *Guiding Principles on Internal Displacement*, U.N. Doc E/CN.4/1998/53/Add.2 (Feb. 11, 1998). According to the Principle no. 2, “internally displaced persons” are:

[P]ersons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized border.

⁵⁰ *Id.*

⁵¹ See African Union [O.A.U.] *Convention for the Protection and Assistance of Internally Displaced Persons in Africa* (Kampala Convention), Dec. 4, 2009.

⁵² See GIOVANNI SCIACCALUGA, *INTERNATIONAL LAW AND THE PROTECTION OF “CLIMATE REFUGEES”* 37 (1st ed. 2020).

I.D.P.s, tackle also the protection from and during displacement, the humanitarian assistance, as well as return, resettlement, and reintegration.⁵³

Thirdly, the Convention requires that the State of nationality of the applicant is unable or unwilling to protect. However, a person fleeing from the effects of environmental degradation is not escaping from his or her country of origin, but rather is seeking shelter from countries that have contributed to environmental degradation and climate change,⁵⁴ thus questioning the issue of who should bear the responsibility to protect those fleeing from an environmental disaster.

Considering such complexities and criticalities, alternative ways of protection for this category have been proposed by looking at the noteworthy increase of disputes and decisions brought before supranational, quasi-judicial and national bodies to complain about States' failure to comply with their positive obligations to limit the effects of climate change established in international agreements, such as the 2015 Paris Agreement.⁵⁵ As a matter of fact, there is constant evidence of the effects that climate change and environmental degradation have on human rights. Several reports,⁵⁶ including the U.N. Environmental Programme [hereinafter U.N.E.P.], have pinpointed how the adverse impacts of climate change and environmental degradation "combined with direct harms to people, property, and physical infrastructure, pose a serious threat to the enjoyment and exercise of human rights across the world".⁵⁷

In this scenario, the necessity to promote awareness about environmental migration, on both the adverse effects of climate change on human rights and on the elaboration of duties in environmental and human rights matters, has been promoted by the evolutionary interpretation of Courts.

Under the light of these theoretical premises, the present article proposes an analysis of the judicial debate about environmental migration. Hence, as a starting point, it will offer an overview of some noteworthy examples of the so-called "climate change litigation" (Section 1). Indeed, notwithstanding the lack of proper binding instruments

⁵³ See François Gemenne & Pauline Brücker, *From the Guiding Principles on Internal Displacement to the Nansen Initiative: What the Governance of Environmental Migration Can Learn from the Governance of Internal Displacement*, 27 INT'L J. REFUGEE L. 245 (2015).

⁵⁴ See McAdam, *supra* note 20, at 45.

⁵⁵ On the proposed solution to tackle the lack of protection of environmental migrants see Chiara Scissa, *Recognition and Protection of Environmental Migrants in International Law*, E-INT'L REL. (Jun. 24, 2021), <https://www.e-ir.info/pdf/91948> (last visited Dec. 6, 2022).

⁵⁶ A variety of international actors have highlighted the environmental effects on human rights. See *European Parliament Report on the effects of climate change on human rights and the role of environmental defenders on this matter*, A9-0039/2021 (Mar. 10, 2021), https://www.europarl.europa.eu/doceo/document/A-9-2021-0039_EN.html [last visited 6 December 2022]; Rep. of the Office of the U.N.H.C.R. on the Relationship between Climate Change and Human Rights, U.N. Doc A/HRC/10/61 (Jan. 15, 2009).

⁵⁷ Rep. of the U.N.E.P. on Climate Change and Human Rights (2015), <https://www.unep.org/resources/report/climate-change-and-human-rights>, [last visited 6 December 2022].

and the inapplicability or inadequacy of the existing legal instruments for protecting environmental migrants, noteworthy examples of increasing awareness about the relationship between environmental degradation and human rights can be found in several cases decided by international human rights judicial or quasi-judicial bodies. In particular, the implications of two recent decisions of the U.N. Human Rights Committee, and the increasing sensibility of the European Court of Human Rights in deciding environmental cases though a human-rights-based approach will be examined. By moving from the supranational context to the national one, the paper will focus on two recent decisions (Section 2) adopted by the French Bordeaux Administrative Court (Section 2.1) and the Italian Court of Cassation (Section 2.2). Indeed, they both represent relevant examples of the role played by national courts in broadening interpretation and application of the existing instruments of protection for environmental migrants. The analysis of the mentioned decisions will be then framed in the wider context of the legal framework of the European Union (Section 3). Indeed, the question whether the E.U., for its part, can guarantee a sort of protection for environmental migrants will be answered. Conclusive remarks will be finally proposed.

1. RECENT JUDICIAL DEBATE ON ENVIRONMENTAL MIGRATION AT THE INTERNATIONAL LEVEL

The first decision – albeit non-binding⁵⁸ – addressing environmental migration is the one of the U.N.H.R.C.⁵⁹ in the famous *Ioane Teitiota v. New Zealand* case.⁶⁰ On that occasion, the Committee recognized in an evolutionary manner, that there is an obligation of non-refoulement⁶¹ also to environmental migrants. Indeed, when the reasonable foreseeability of a natural event (whether a disaster with immediate effects or an event

⁵⁸ It is classified among the “soft law” recognition since the U.N. Human Rights Committee’s decisions are not binding. Despite that, they express the international human rights’ bodies trend in dealing with a specific issue. On the non-binding character of the United Nations Human Rights Committee’s decisions; see Ginevra Le Moli, *The Human Rights Committee, Environmental Protection and the Right to Life*, 69 INT’L & COMPAR. L. Q. 735 (2020).

⁵⁹ The U.N. Human Rights Committee is the quasi-judicial monitoring body of the International Covenant on Civil and Political Rights.

⁶⁰ Comm. on the Views adopted by the U.N.C.H.R. under Article 5(4) of the Optional Protocol, U.N. Doc. No. 2728016, (Jan. 7, 2020). For further analysis on the case; see Amina Maneggia, *Non-refoulement of Climate Change Migrants: Individual Human Rights Protection or ‘Responsibility to Protect’? The Teitiota Case Before the Human Rights Committee*, 2 DIRITTI UMANI E DIRITTO INTERNAZIONALE 635 (2020). (It.); see also Villani, *supra* note 43; Le Moli, *supra* note 58.

⁶¹ See ALEXA JAY ET AL., *FOURTH NATIONAL CLIMATE ASSESSMENT, VOLUME II: IMPACTS, RISK, AND ADAPTATION IN THE UNITED STATES* 33 (Reidmiller et al. eds, 2018).

with gradual consequences) threatens the right to life or the enjoyment of life in a dignified manner (art. 6 ICCPR) and the State of origin is unable to fulfill its positive obligations of protection, third States have an obligation of non-refoulement also to environmental migrants. In particular, the U.N.H.R.C. established that three conditions must be met in order to potentially require the application of the right to life and the obligation of *non-refoulement* in case of environmental disasters. Firstly, the threats to the right to life must be proved in its actuality or imminency, thus excluding those environmental risks that can only be presumed. Secondly, the country of origin should be unwilling or incapable to apply positive measures to guarantee the protection of the right to life in the face of environmental events. Lastly, the applicant should bear the burden of proof in demonstrating not only the real risk for his right to life, but also that the reasons behind his forced decision to flee depends primarily on the environmental conditions which make livelihood impossible in that area. As it will be analyzed below,⁶² the *Teitiota* case and the arguments issued by the U.N.H.R.C. were used by a National Court – i.e., the Italian Court of Cassation - in deciding what kind of domestic protection and guarantee to a migrant coming from an environmentally-degraded area.

Recently, on the 22nd of September 2022, the same Committee issued another ground-breaking decision in *Daniel Billy and others v. Australia (Torres Strait Islanders Petition)*.⁶³ The Committee, after examining a joint complaint filed by eight Australian nationals and six of their children (all indigenous inhabitants of four small, low-lying islands in the country's Torres Strait region), found that Australia has violated the rights of the Indigenous residents of the Torres Strait Islands under the I.C.C.P.R. by failing to protect them from the impacts of climate change. This is the first time in which the Committee found that a State's failure to protect people from the impacts of climate change can amount to a violation of International Human Rights Law under the Covenant. By doing so, the Committee has stated that the effects of climate change affect unequivocally the enjoyment of human rights.⁶⁴

⁶² See *infra* Section 2.2 of this paper, at 17.

⁶³ Comm. on the Views Adopted by the U.N.C.H.R. under Article 5(4) of the Optional Protocol, U.N. Doc. No. 3624/2019, (Sept. 22, 2022).

⁶⁴ See Erin Daly, *The UNHRC's Torres Strait Islands decision: A major Advance, and a Roadmap for the future*, THE GLOB. NETWORK FOR HUM. RTS AND ENV'T (Oct. 3, 2022), <https://gnhre.org/community/the-unhrcts-torres-strait-islands-decision-a-major-advance-and-a-roadmap-for-the-future/>; accord Christine Voigt, *UNHRC is Turning up the Heat: Human Rights Violations Due to Inadequate Adaptation Action to Climate Change*, EJIL.TALK (Sept. 26, 2022), <https://www.ejiltalk.org/unhrc-is-turning-up-the-heat-human-rights-violations-due-to-inadequate-adaptation-action-to-climate-change/>.

A glimmer of protection seems to be found by looking at the jurisprudence of the European Court of Human Rights.⁶⁵ Although the Strasbourg Court has not yet been called upon to decide on cases ascribable to forced migration for environmental migration, its copious jurisprudence is an effective tool capable of filling a normative gap in the international order, since human rights must be recognized for all individuals and, therefore, also for environmental migrants.⁶⁶ Indeed, the E.Ct.H.R. has increasingly been called upon to decide in environmental cases on the grounds that the exercise and enjoyment of certain rights enshrined in the Convention may be undermined by the existence of harm to the environment and exposure to environmental risks.⁶⁷ In particular, the right to life (art. 2), the right to respect for private and family life (art. 8), and prohibition of torture and cruel, inhuman or degrading punishment or treatment (art. 3) are likely to take on a significantly broad scope in relation to the case in which they come into play, and the breadth may even go as far as the recognition of new individual rights in accordance with the spirit of the Convention to ensure the broadest possible protection of the individual.⁶⁸

Such extensive interpretation has been seen in the Court's case law concerning migration.⁶⁹ As a matter of fact, on several occasions, the Court has guaranteed protection to foreigners who, as a result of a deportation order, were at the risk of suffering the violation of one of the rights enshrined in the Convention. Indeed, the right to life and the prohibition of torture extends the States' obligations of protection to

⁶⁵ It is due to note that, since 2009, the Council of Europe has been recognizing the continuous challenges and the lack of binding tools in the protection of environmental migrants. See, e.g., Eur. Par. Ass., *Resolution on Environmentally Induced Migration and Displacement: A 21st Century Challenge*, 9th Sess., Doc. No. 11814 (2009); Eur. Par. Ass., *Resolution on A Legal Status for «climate refugees»*, 34th Sess., Doc. No. 2037 (2019).

⁶⁶ On the applicability of the European Convention on Human Rights [hereinafter E.C.H.R.] and the E.Ct.H.R. case law in the European Court of Justice and Member States' decisions; see European Charter of Fundamental Rights, art. 52(3), (2000/C 364/01) which states that

[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law [from] providing more extensive protection.

See also Steve Peers et al., *Commentary on the E.U. Charter of Fundamental Rights* (Steve Peers et al. eds, 2nd ed, 2021).

⁶⁷ See, e.g., Eur. Ct. H.R., *Factsheet, Environment, and the European Court of Human Rights*, PRESS UNIT (2022), https://www.echr.coe.int/Documents/FS_Environment_ENG.pdf.

⁶⁸ See Francesco Perrini, *Il Riconoscimento della Protezione Umanitaria in Caso di Disastri Ambientali nel Recente Orientamento della Corte di Cassazione* [The Recognition of Humanitarian Protection in Case of Environmental Desasters in the recent Corte di Cassazione's case law], 2 ORDINE INTERNAZIONALE E DIRITTI UMANI 349 (2021).

⁶⁹ See *Italy v. Saadi*, App. No. 37201/66 Eur. Ct. H.R. (2008); *Italy v. Ben Khemais*, App. No. 246/07 Eur. Ct. H.R. (2009); *NDL v. Salah Sheekh*, App. No. 1947/04 Eur. Ct. H.R. (2007); *Sufi and Elmi v. UK*, App. No. 8319/07 and 1144/07 Eur. Ct. H.R. (2011); *Italy v. Hirsi Jamaa and Others*, App. No. 27765/09 Eur. Ct. H.R. (2012); *Jabari v. Turkey*, App. No. 40035/98 Eur. Ct. H.R. (2000). See Department for the Execution of Judgments of the European Court of Human Rights, *Thematic Factsheet: Migration and Asylum*, COUNCIL OF EUROPE (Nov. 2021), <https://rm.coe.int/thematic-factsheet-migration-asylum-eng/1680a46f9b>.

include the prohibition of *refoulement*. In particular, since *Soering v. United Kingdom*,⁷⁰ the E.Ct.H.R. has been affirming that States cannot directly or indirectly dismiss or reject a person if there is a risk that his life or physical integrity will be endangered in the country of origin. Since *Soering*, the E.Ct.H.R. has been developing a case law on art. 3,⁷¹ affirming that a State is not only obliged to guarantee the prohibition of torture but is also subject to the duty of *non-refoulement* to the country of origin if there is a risk of inhuman or degrading treatment⁷² - the latter being an extraterritorial effect under art. 3 of the E.C.H.R..⁷³

⁷⁰ See *Soering v. United Kingdom*, 88 Eur. Ct. H.R. (1989), where the Court extended the scope of Article 3 to include also foreign issues. In particular, the Court affirmed that

[I]t would hardly be compatible with the underlying values of the Convention, that “common heritage of political traditions, ideals, freedom and the rule of law” to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to the spirit and intent of the Article, and in the Court’s view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article (art. 3)

⁷¹ See *Cruz Varas and Others v. Sweden*, App. No. 46/1990, 1990 Y.B. Eur. Conv. on H.R. (Eur. Ct. H.R.); *Vilvarajah and Others v. United Kingdom*, App. No. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, 1991 Y.B. Eur. Conv. on H.R. (Eur. Ct. H.R.); *Chahal v. United Kingdom*, App. No. 22414/93, 1996 Y.B. Eur. Conv. on H.R. (Eur. Ct. H.R.); *Italy v. Saadi*, App. No. 37201/66 Eur. Ct. H.R.; *M.S.S. v. Belgium and Greece*, App. No. 30696/09 Eur. Ct. H.R. (2011); *Tarakhel v. Switzerland*, App. No. 29217/12 Eur. Ct. H.R. (2014); *Khlaifia and Others v. Italy*, App. No. 16483/12 Eur. Ct. H.R. (Dec. 15, 2016), <https://hudoc.echr.coe.int/fre?i=001-170054>. In addition, there is the pending *Duarte Agostinho v. Portugal*, App. No. 39371/20 Eur. Ct. H.R. (2020), <https://hudoc.echr.coe.int/fre?i=002-13055> which, among the others, is dealing with a violation of art. 3 ECHR, [https://hudoc.echr.coe.int/fre#%7B%22fulltext%22:\[%22duarte%22\],%22sort%22:\[%22kupdate%20Descending%22\],%22itemid%22:\[%22002-13055%22\]%7D](https://hudoc.echr.coe.int/fre#%7B%22fulltext%22:[%22duarte%22],%22sort%22:[%22kupdate%20Descending%22],%22itemid%22:[%22002-13055%22]%7D) [last visited 6 December 2022].

⁷² See Perrini, *supra* note 68.

⁷³ See Matthew Scott, *Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion Under Articles 3 and 8 of the European Convention on Human Rights?*, 26 INT’L J. REFUGEE L. 404 (2014).

Indeed, it could be affirmed that in the case of *refoulement* of an environmental migrant to a country where environmental degradation gives rise to conflicts,⁷⁴ or, in general, unlivable conditions that seriously undermine the right to life thus, concretizing inhuman or degrading treatment, such State's behavior would be incompatible with the case law developed by the E.Ct.H.R.⁷⁵

Such evolutionary interpretation of rights – i.e., art. 2 and art.8 – can also be seen in environmental protection. Indeed, in the leading case *Öneryildiz v. Turkey*,⁷⁶ the Court found that States have a positive obligation to respect the right to life not only when monitoring hazardous industrial activities, but also in case of environmental disasters. Also, in the case *Budayeva and Others v. Russia*,⁷⁷ the Court further stated that when there are serious and foreseeable risks to the safety of persons, national authorities have a duty to take measures capable of mitigating the effects of dangerous natural events. In the Court's jurisprudence, the protection of the right to a healthy environment also passes through a broad interpretation of art. 8 E.C.H.R. as testified by a variety of cases.⁷⁸ Such decisions concerned severely polluting activities and the Court has broadly interpreted art. 8 to the point of recognizing that severely polluting activities may constitute a limitation of the right to respect for the private life of persons living in the affected areas.⁷⁹

⁷⁴ See Brambilla & Castiglione, *supra* note 33; see also Emanuela Parisciani, *Migranti in fuga da situazioni di conflitto e violenza indiscriminata e la Convenzione Europea dei diritti dell'uomo: a margine della Sentenza K.A.B. contro Svezia* [Migrants Fleeing from Situations of Conflict and Arbitrary Violence and the European Human Rights Convention: Notes on K.A.B Sentence Against Sweden], *SIDIBLOG* (Nov. 6, 2013) (It.), <http://www.sidiblog.org/2013/11/06/migranti-in-fuga-da-situazioni-di-conflitto-e-violenza-indiscriminata-e-convenzione-europea-dei-diritti-delluomo-a-margine-della-sentenza-k-a-b-contro-svezia/>.

⁷⁵ On the assessment of the influence of health grounds in the application of the principle of *non-refoulement* under Art. 3 D v. United Kingdom, App. No. 30240/96, 1997 Y.B. Eur. Conv. on H.R. (Eur. Ct. H.R.). The line of reasoning of D v. United Kingdom was later concretized in these cases; see also N. v. United Kingdom, App. no. 26565/05 Eur. Ct. H.R. (2008); Paphosvili v. Belgium, App. No. 41738/10 Eur. Ct. H.R. (2016), *M.S.S. v. Belgium and Greece*, App. No. 30696/09 Eur. Ct. H.R. (2011); Sufi and Elmi v. U.K., App. No. 8319/07 and 1144/07 Eur. Ct. H.R. (2011).

⁷⁶ *Öneryildiz v. Turkey*, App. No. 48939/99, ¶ 71-72 Eur. Ct. H.R. (2004).

⁷⁷ *Budayeva and Others v. Russia*, App. No. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, ¶116, Eur. Ct. H.R. (2008).

⁷⁸ See generally *López Ostra v. Spain*, App. No. 16798/90, Eur. H.R. Rep. (1994); *Fadeyeva v. Russia*, App. No. 55723/00 Eur. Ct. H.R. (2005); *Di Sarno and Others v. Italy*, App. No. 30765/08 Eur. Ct. H.R. (2012); *Cordella and Others v. Italy*, App. No. 54414/13 and 54264/15, (2019).

⁷⁹ Also, it is worth mentioning the *Duarte Agostinho v. Portugal*, App. No. 39371/20, (2020), <https://hudoc.echr.coe.int/fre/#%7B%22fulltext%22:%5B%22duarte%22%22%22sort%22:%5B%22kdate%20Descending%22%22%22itemid%22:%5B%22002-13055%22%7D>, which is currently pending before the Court.

2. BEYOND THE INTERNATIONAL CONTEXT: NATIONAL COURTS OF E.U. MEMBER STATES AND ENVIRONMENTAL MIGRATION

Having illustrated the international scenario in which the human rights' effect of climate change and environmental degradation have been tackled, it is due to note that some National Courts of E.U. Member States have started recognizing the necessity to uphold the rights of environmental migrants, taking – directly or indirectly – into consideration the arguments upheld at the international level. In particular, the analysis will focus on two noteworthy rulings adopted by national courts in France and Italy, which stressed how the principle of *non-refoulement* and an evolutionary interpretation can be an alternative instrument to guarantee protection to environmental migrants.

The choice to compare these two decisions has been made with the awareness that these are two of the very few decisions at the national level that recognized the environmental conditions in the countries of origin that expose migrants to the violation of their fundamental rights – on the one hand, the right to health, and on the other hand, the right to life – in the event of repatriation.⁸⁰

2.1. RIGHT TO HEALTH, NON-REFOULEMENT AND HIGH LEVEL OF AIR POLLUTION: THE DECISION OF THE FRENCH BORDEAUX COURT OF APPEAL

In December 2020, the French Bordeaux Court of Appeal took a breakthrough decision by renewing a residence permit (the so-called *carte de séjour temporaire*) on the basis of the environmental conditions in the applicant's country of origin.⁸¹

The forty-year-old Bangladeshi man – known in the French news as Sheel – arrived in France in 2011. After diverse refusals of his asylum application, in 2015 he was able to obtain a temporary residence permit. As a matter of fact, the French *Code de l'entrée et du séjour des étrangers et du droit d'asile* [Code of the Entry and Residence of Foreigner and the Right of Asylum] envisages a specific residence permit for foreign nationals with health problems which require specific medical treatments that cannot be granted properly in

⁸⁰ In particular, there are few cases tackling these issues at the national level within the E.U. See VG (Administrative Trial Court) Baden - Wuerttemberg, Dec. 17, 2020, A 11 S 2042/20, at. 25 (Ger.).

⁸¹ See Cour administrative d'appel [CAA] [regional administrative court of appeal] Bordeaux, 2ème ch., Dec. 18, 2020 20BX02193, 20BX02195, <http://www.marinacastellaneta.it/blog/wp-content/uploads/2021/01/CAA-de-BORDEAUX-.pdf> (Fr.).

their country of origin.⁸² Indeed, that was the case of Sheel who suffered from severe asthma and sleep apnea.⁸³

Nevertheless, in 2019, the Haute-Garonne Prefecture's medical advisory team refused to renew his *carte de séjour temporaire*,⁸⁴ affirming the adequacy of the Bangladesh medical system in treating his illnesses,⁸⁵ thus leading to a deportation order. Subsequently, on 15 June 2020, his case was brought before the Administrative Court of Toulouse which rejected the Prefecture's deportation order. According to the Court in Toulouse, the man's return to Bangladesh would have led not only to insufficient treatment, but it would have also exacerbated his medical condition due to the high level of air pollution in the country.⁸⁶ Finally, in December 2020, the Haute-Garonne Prefecture appealed the decision of the Administrative Court of Toulouse, and the case was then brought before the Court of Administrative Appeals in Bordeaux.

In particular, by interpreting national legislation, the Court considered the following relevant factors for determining the inadequacy of the Bangladesh health system in providing and granting effective services to treat the man's various diseases: the unavailability in Bangladesh of both the prescribed medications – which had relieved him during the observation period – and the ventilator that required a monthly

⁸² According to art. L-313-11 of the French *Code de l'entrée et du séjour des étrangers et du droit d'asile* [Code of the Entry and Residence of Foreigner and the Right of Asylum] (Fr.),

A l'étranger résidant habituellement en France, si son état de santé nécessite une prise en charge médicale dont le défaut pourrait avoir pour lui des conséquences d'une exceptionnelle gravité et si, eu égard à l'offre de soins et aux caractéristiques du système de santé dans le pays dont il est originaire, il ne pourrait pas y bénéficier effectivement d'un traitement approprié. La condition prévue à l'article L. 313-2 n'est pas exigée. La décision de délivrer la carte de séjour est prise par l'autorité administrative après avis d'un collège de médecins du service médical de l'Office français de l'immigration et de l'intégration, dans des conditions définies par décret en Conseil d'Etat. [. . .]

⁸³ See Maro Mantziara, *Climate Refugees Can't Wait Any Longer*, OUR WORLD TOO (2020), <https://ourworldtoo.org.uk/2021/11/03/climate-refugees-cant-wait-any-longer/> [last visited 6 December 2022].

⁸⁴ The medical advisory team had the duty to revise the applicant's health conditions in order to renovate the residence permits. See art. L-313-11 of the French Code of the Entry and Residence of Foreigner and the Right of Asylum.

⁸⁵ According to art. R. 313-22 of the French *Code de l'entrée et du séjour des étrangers et du droit d'asile* [Code of the Entry and Residence of Foreigner and the Right of Asylum] (Fr.),

[P]our l'application du 11° de l'article L. 313-11, le préfet délivre la carte de séjour au vu d'un avis émis par un collège de médecins à compétence nationale de l'Office français de l'immigration et de l'intégration. / L'avis est émis dans les conditions fixées par arrêté du ministre chargé de l'immigration et du ministre chargé de la santé au vu, d'une part, d'un rapport médical établi par un médecin de l'Office français de l'immigration et de l'intégration et, d'autre part, des informations disponibles sur les possibilités de bénéficier effectivement d'un traitement approprié dans le pays d'origine de l'intéressé. (. . .).

⁸⁶ See Luc Lenoir, *La France a-t-elle accueilli son premier 'réfugié climatique'?*, LE FIGARO (Jan. 8, 2021), <https://www.lefigaro.fr/faits-divers/la-france-a-t-elle-accueilli-son-premier-refugie-climatique-20210108>, (Fr.).

replacement,⁸⁷ the significant improvements to his respiratory capacity since his arrival to France, and the hearing evidence of his father's death of asthma attack at fifty-four-years-old.⁸⁸ As a matter of fact, the Court stated that:

[I]t appears from the documents in the file that [Sheel] suffers from a chronic respiratory pathology combining severe allergic asthma treated daily with Symbicort 400 (antiasthmatic), Montelukast (antiasthmatic), Azélastine (antihistamine) and Salbutamol (bronchodilator), and a severe sleep apnea syndrome requiring the use of an electric ventilation device every night, which requires biannual maintenance and monthly replacement of the mask, filters and tubes. In Toulouse on July 25, 2019, the doctor in charge of assessing his health condition in Toulouse certified that the short and long-term care he receives has stabilized his respiratory function, which went from [fifty-eight percent] in 2013 to [seventy percent] in 2017.⁸⁹

Surprisingly, the Court acknowledged that Bangladesh' environmental conditions – namely the severe air pollution levels in the applicant's country of origin – would have led to a worsening of the respiratory pathology and even to death. Indeed, the Court stated that:

[. . .] in Bangladesh, [. . .] the rate of fine pollutant particles is one of the highest in the world, asthma-related mortality is 12.92 per 100,000 inhabitants compared to 0.82 in France. [Sheel], whose father died of asthmatic decompensation at the age of [fifty-four], would thus be exposed to a risk of aggravation of his state of health and premature death.⁹⁰

⁸⁷ See Chiara Scissa, *Migrazioni Ambientali tra Immobilismo Normativo e Dinamismo Giurisprudenziale: Un'Analisi di Tre Recenti Pronunce* [Environmental Migration between Normative Immobilism and Case Law Dynamism: an Analysis of Three Recent Sentences], 2 FORUM DI QUADERNI COSTITUZIONALI RASSEGNA 296 (2021).

⁸⁸ See Amali Tower & Ryan Plano, *French Court Recognizes Country's First Environmentally Impacted Migrant*, CLIMATE REFUGEES, (Jan. 15, 2021), <https://www.climate-refugees.org/spotlight/2021/1/15/french-court>.

⁸⁹ See Cour administrative d'appel [CAA] [regional administrative court of appeal] Bordeaux, 2ème ch., Dec. 18, 2020 20BX02193, 20BX02195, <http://www.marinacastellaneta.it/blog/wp-content/uploads/2021/01/CAA-de-BORDEAUX-.pdf>, at. 4.

⁹⁰ *Id.*

In addition, the Court of Bordeaux quoted the data collected by the World Health Organization (W.H.O.), according to which “air pollution was a high aggravating risk factor in the case of 572,600 deaths in Bangladesh that were attributed to non-communicable diseases in 2018 alone”.⁹¹ Citing the 2020 Environmental Performance Index (E.P.I.), the Court recognized also that Bangladesh is one of the countries with the worst levels of air pollution in the world.⁹²

The Court overturned the deportation order considering that the general context of the Bangladesh’s health system and the inevitable adverse effects of the environmental degradation would surely exacerbate the health and life conditions of the applicant, leading eventually to a risk to his own life and even to death. Thus, the Court found that the health and environmental conditions of the country of origin were so alarming that the renewal of the residence permit for health reasons was deemed necessary. As a matter of fact, the Court concluded its judgment by affirming that:

[T]he accessibility and the quality-of-care services are not comparable to European standards in Bangladesh, where health professionals deplore a lack of equipment and drug shortages.⁹³

Thus, [Shell] would find himself confronted in his country of origin both with an aggravation of his respiratory pathology due to atmospheric pollution, with the risk of interruption of a treatment less well suited to his state of health, and to malfunctions of the respiratory system which he has a vital need due, on the one hand, to difficulties in replacing parts, in particular pipes that have to be changed regularly, and on the other hand, to power cuts during the night. In these particular circumstances, he could not be regarded as actually being able to benefit from appropriate treatment in Bangladesh, so that the refusal to renew his residence permit disregards the provisions of the Code for the Entry and Stay of Foreigners and the right to asylum.⁹⁴

⁹¹ *Id.*

⁹² *Id.*

⁹³ On the European standards in health matters; see GIACOMO DI FEDERICO & STEFANIA NEGRI, *UNIONE EUROPEA E SALUTE. PRINCIPI, AZIONI, DIRITTI E SICUREZZA* 307-39 (2020). It is due to note that the 8th of December, the Council of the E.U. finally gave “green light” to adapt EU standardization rules. Such regulation lays down procedures for developing harmonized standards within the E.U. which will make it easier to place products on the single market and thereby they will strengthen the E.U.’s competitiveness. See Council of the European Union Press Release 1059/22, *Council gives final green light to adapted EU standardization rules*, (December 8, 2022).

⁹⁴ See Cour administrative d’appel [CAA] [regional administrative court of appeal] Bordeaux, 2ème ch., Dec. 18, 2020 20BX02193, 20BX02195, <http://www.marinacastellaneta.it/blog/wp-content/uploads/2021/01/CAA-de-BORDEAUX-.pdf>, at. 4. In particular, the refusal to renew his residence permit would violate Art. 11° of Art. L. 131-11.

This was the first case in which environmental degradation and its connection with the enjoyment of the individual right to health was evoked as the leading argument for a Court's final ruling in France.

2.2. ENVIRONMENTAL DEGRADATION AND NON-REFOULEMENT: THE DECISION OF THE ITALIAN SUPREME COURT OF CASSATION.

In November 2020, the Italian Supreme Court of Cassation⁹⁵ upheld the action brought by a Nigerian applicant against the decision of the Court of First Instance in Ancona that rejected his application for subsidiary protection, or in the alternative, humanitarian protection.⁹⁶

In this case,⁹⁷ the applicant, following the environmental instability in its region of origin – the Niger Delta – fled to Italy, seeking protection. According to the man, his region of origin was characterized by the presence of a serious form of environmental instability created by the indiscriminate exploitation of the area, primarily by oil companies; conflicts and political instability; environmental issues linked to the frequent sabotage, theft and damage causing spillages of oil shares, thus contaminating all zones nearby.⁹⁸ However, despite the critical situation in the region, the Court of First Instance of Ancona did not consider sufficient the presence of an armed conflict and generalized violence in the region – capable of constituting a serious and individual threat to the person's life – to grant subsidiary protection.⁹⁹ Additionally, the Tribunal did not consider granting humanitarian protection, given the condition of “environmental

⁹⁵ Besides the decisions by the Italian Supreme Court of Cassation, also courts of first instance decided cases on environmental migration. See, e.g., Trib. Aquila, 18 Feb. 2018, n. 1522/1, <https://www.dirittoimmigrazionecittadinanza.it/allegati/fascicolo-n-2-2018/umanitaria-3/245-trib-aq-16-2-2018/file>, (It.).

⁹⁶ It is due to note that in the Italian legislation, apart from the traditional instrument of international protection, there is the humanitarian protection regulated by the D.Lgs. n. 288/188 at the Article 5, para. 6. The humanitarian protection might be granted when the applicant is not eligible for international protection but affirms and proves to have specific and particular needs recognized as fundamental. See Nazzarena Zorzella, *La Protezione Umanitaria nel Sistema Giuridico Italiano*, DIRITTO, IMMIGRAZIONE E CITTADINANZA, Mar. 2018, at 1. (It.); Valeria Marengoni, *Il Permesso di Soggiorno per Motivi Umanitari*, DIRITTO, IMMIGRAZIONE E CITTADINANZA, Dec. 2012, at 59.

⁹⁷ Cass., 24 Feb. 2021, n. 5022, Giur. It. 2021, II (It.).

⁹⁸ *Id.* at 6.

⁹⁹ Directive 2011/95, *supra* note 41, at art. 2(f), a person eligible for subsidiary protection is a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

disaster” and the collective insecurity in the region of origin.¹⁰⁰ Due to the Tribunal’s lack of assessment of the situation in the Niger Delta in the evaluation of the applicant’s requests, the Court of Cassation found grounds to justify the grant of humanitarian protection under Italian law.¹⁰¹

Starting from mentioning the noteworthy *Teitiota* case and its interpretation of the right to life,¹⁰² the Court of Cassation stated that:

Whenever, [. . .] in a given area, the judge recognizes a situation capable of integrating an environmental disaster, or a context of such severe impairment of the natural resources that there is the exclusion of entire segments of the population from their enjoyment, the assessment of the widespread danger existing in the applicant’s country of origin, for the purpose of the humanitarian protection’s recognition, must be conducted with specific reference to the particular risk for the right to life and to a decent life deriving from the environmental degradation, climate change and the unsustainable development of the area.¹⁰³

Through the reference to the *Teitiota* case, the Court seemed to confirm an extensive interpretation of the right to life in the evaluation of international protection through the transposition of the international law’s principles of the U.N. Committee’s case in the national system, not only in terms of rights of *non-refoulement*, but also in terms of granting and recognizing some forms of protection.¹⁰⁴ As a matter of fact, the Committee had stated the principle according to which States have the duty to ensure and grant people’s right to life.¹⁰⁵ To be recalled that such rights, according to the U.N. Committee, also encompass all the reasonably foreseeable threats and potentially lethal situations that may involve the loss of life or a substantial worsening condition of the existence, including environmental degradation, climate change and unsustainable development. These environmental phenomena constitute some of the most serious and urgent threats to the life of present and future generations¹⁰⁶: they can negatively affect the well-being

¹⁰⁰ For further analysis of the criminal institute of “environmental disaster” described in the Italian Criminal Code, see Fabrizio Vona, *Environmental Disasters and Humanitarian Protection: A Fertile Ground for Litigating Climate Change and Human Rights in Italy?*, 1 IT. REV. INT’L & COMPAR. L. 146 (2021).

¹⁰¹ See *supra*, note 96. In addition, it must be said that the “humanitarian protection” can be granted when applicant’s expulsion will zeroing his fundamental rights to life, freedom, and auto-determination; see Cass., 24 Febbraio 2021, n. 5022, Giur. It. 2021, II (It); Cass., 4 Febbraio 2022, n.2563, Giur. It. 2022, II (It), at. 5.4.

¹⁰² See U.N. Human Rights Committee, views adopted, *supra* note 60.

¹⁰³ See Cass., 24 Febbraio 2021, n. 5022, Giur. It. 2021, II (It), at 5.

¹⁰⁴ See Perrini, *supra* note 68, at 349.

¹⁰⁵ See U.N. Human Rights Committee, views adopted, *supra* note 60, at 9.12 and 9.13.

¹⁰⁶ *Id.* at 9.4.

of an individual and, therefore, can cause a violation of the individual right to life.¹⁰⁷ In particular, the U.N. Committee considered that the general principle of *non-refoulement* – which prohibits the repatriation of an asylum seeker in a country in which there are substantial risks of irreparable damage to personal safety or that of the family members – also includes the right to a decent and dignified existence and to be free from any act or omission that could cause an unnatural or premature death of the human person.

Based on U.N. Committee’s considerations, the Italian Court embraced the idea that the risks connected to the individual’s right to life are not only those associated with armed conflicts. On the contrary, there are also “situations of social and environmental degradation or of unsustainable exploitation of the natural resources”¹⁰⁸ capable of weakening the right to life and the right to live with dignity. In particular, the Court affirmed that:

[F]or the purpose of recognizing protection, the risks to the individual life do not necessarily derive from an armed conflict. On the contrary, they can depend on the socio-environmental conditions [. . .] [suitable to] jeopardize the very survival of the individual and hisrelatives. In this perspective, war or armed conflict, in general, represent the most striking manifestation of man’s destructive action, but they do not exhaust the range of behaviors capable of compromising the individual’s right to live with dignity.¹⁰⁹

Thus, the Court specified that the concept of “ineradicable core constituting the foundation of personal dignity [. . .] is the minimum essential limit below which the right to life and the right to a dignified existence of an individual is not guaranteed”.¹¹⁰ According to the Court, a violation of such rights can occur not only with reference to armed conflict, but, also, in relation to any context that is materially capable of putting the fundamental rights to life, liberty and self-determination of the individual at risk. Among such situations, the Court also encompasses “situations of environmental disaster, [. . .] climate change, and unsustainable exploitation of natural resources”.¹¹¹ More in detail, a risk to the individual’s right is present in each situation of environmental degradation capable of undermining the right to life, the right to freedom, to auto-determination.

¹⁰⁷ *Id.* at 9.5. c

¹⁰⁸ Cass., 24 Febbraio 2021, n. 5022, Giur. It. 2021, II (It), at 5-6.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 8-9.

Ultimately, the Italian Court of Cassation's decision demonstrates the progress in upholding the environmental migrants' rights. Firstly, the Court acknowledged the necessity to grant protection to those migrating from their country of origin because of environmental degradation and the effects of climate change. Secondly, the Court relied on its reasoning on the U.N. Human Rights Committee's decision in the *Teitiota* case, thus highlighting – besides its interpretation of the individual's right to life – the importance of supranational quasi-judicial bodies in interpreting human rights in an evolutionary way. Thirdly, the Court confirms its line of reasoning¹¹² and its case-by-case approach of scrutiny¹¹³ in dealing with the particular risk to the right to life in a specific territorial area.

The Court's approach seems to confirm that in the event the country of origin is affected by natural disasters or environmental degradation, it is sufficient for the applicant to demonstrate a general difficulty in having access to the minimum conditions for the enjoyment of a dignified life. However, such approach raises some concerns regarding its compatibility with the residence permit for humanitarian reasons. More in detail, the rationale behind the humanitarian protection is the protection of situations of personal and individual vulnerabilities, whereas environmental degradation and natural disasters – as mentioned above in relation to the Geneva Convention¹¹⁴ – are considered as general threats to the rights of the individual even if their effects lead to vulnerable situations.

¹¹² See Corte di Cassazione, prima sezione, Ordinanza n. 7832, 20th Mar. 2019 (It.).

¹¹³ Villani, *supra* note 43; Le Moli, *supra* note 58, at 5.

¹¹⁴ See *supra* Introduction, at 6-9.

3. SPOTLIGHT ON THE EUROPEAN UNION LEGAL FRAMEWORK

The European Union institutions (i.e., European Council, Council of the E.U., the European Commission and the European Parliament), Member States – i.e., also France and Italy – have all, through various degrees and at different time period, tried to offer leadership in international climate change politics in global *fora*.¹¹⁵ Despite the E.U. being late in addressing the topic of environmental migration, it has increasingly addressed the nexus of environmental change and migration over the past decade.¹¹⁶

Starting from the institutional level, the European Commission has frequently recognized the nexus between human mobility and the environment and stressed the necessity to address environmental migrations in various communications.¹¹⁷ Also, the European Parliament, for its part, promoted the urgency to address the topic, through the adoption of a Resolution.¹¹⁸

Despite such E.U. institutional commitments, when it comes to binding instruments it is possible to note that environmental migration suffers the same shortcomings highlighted at the international level. In particular, environmental migration is placed in an uncoordinated limbo between E.U. environmental and migration policies, thus being somehow in contrast with the objectives and values that guide these policies within the E.U.

Looking at primary law provisions defining the E.U. migration policies, they are designed in a broad manner, thus capable of handling environmental migrants' protection.¹¹⁹ In particular, art. 77(3) T.F.E.U. states that the Union shall ensure “the absence of any controls on persons, whatever their nationality, when crossing internal

¹¹⁵ On the role of the E.U. in climate change politics see RUDIGER WURZEL & JAMES CONNELLY, *THE EUROPEAN UNION AS A LEADER IN INTERNATIONAL CLIMATE CHANGE POLITICS 1* (Rudiger Wurzel & James Connelly eds., 2011).

¹¹⁶ As a matter of fact, besides the references mentioned in the present paper, environmental change and migration is addressed also in the E.U. civil protection, humanitarian aid and development policies. See European Parliament Study, “*Climate Change and Migration. Legal and Policy Challenges and Responses to Environmentally Induced Migration*” (July, 2020), [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655591/IPOL_STU\(2020\)655591_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655591/IPOL_STU(2020)655591_EN.pdf) [last visited 6 December 2022].

¹¹⁷ Communication, The Global Approach to Migration and Mobility, COM (2011) 743 final (Nov.18, 2011), p. 7; Communication, An EU Strategy on Adaptation to Climate Change, COM (2013) 216 final (April 16 2013), and its Staff Working Document, Climate change, Environmental Degradation, and Migration, SWD (2013) 138 final (April 16, 2013); Communication, A European Agenda on Migration, COM (2015) 240 final, (May 13, 2015) p. 7. For a further analysis; see Monika Mayrhofer & Margit Ammer, *People Moving in the Context of Environmental Change: The Cautious Approach of the European Union* 4 EUR. J. MIGRATION & L. 389 (2014).

¹¹⁸ Joint Motion for a Resolution on the consequences of drought, fire, and other extreme weather phenomena: increasing the EU's efforts to fight climate change, Eur. Parl. Doc, (2022/2829(RSP)), (2022). See European Parliament Study, *supra* note 116.

¹¹⁹ See Giuseppe Morgese, *Environmental Migrants and the EU Immigration and Asylum Law: Is There Any Chance for Protection, in Migration and the Environment. Some Reflections on Current Legal Issues and Possible Ways Forward* 50 (Giovanni C. Bruno et al., 2017).

borders”, but also that “carrying out checks on persons and efficient monitoring of the crossing of external borders”. In addition, art. 79 T.F.E.U. affirms that the Union should have “a common immigration policy aimed at ensuring the efficient management of migration flows, fair treatment of third-country nationals, and the prevention of, and enhanced measures to combat, illegal immigrations and trafficking in human beings” and that such policies, according to art. 80 T.F.E.U., “shall be governed by the principle of solidarity and fair sharing of responsibility”. In turn, the Charter of Fundamental Rights of the European Union [hereinafter E.C.H.F.R.] states the obligation to respect the fundamental rights of every individual as such and the prohibition of discrimination in any respect (art. 21), and reaffirms, in addition to the right to asylum (art. 18) as guaranteed by international conventions, the prohibition of collective expulsions and the prohibition of extradition (art. 19) when there is a risk of the death penalty, torture or inhuman and degrading treatment (art. 4).¹²⁰

Besides these broad formulations in the Treaties, current secondary law instruments fail to grant environmental migrants a proper protection within the E.U.¹²¹ Looking at the Directive 2011/95 [hereinafter Qualification Directive]¹²² - which regulates both the refugee’s status¹²³ See Heather Alexander & Jonathan Simon, *Unable to Return in the 1951 Refugee Convention: Stateless Refugees and Climate Change*, 26 FLORIDA J. INT’L L. 532 (2015). and the subsidiary protection¹²⁴ See Hemme Battjes, *Subsidiary Protection and Other Alternative Forms of Protection*, in *Research Handbook on International Law and*

¹²⁰ The prohibition of inhuman and degrading treatment is a core argument within the case law of the E.C.J. which, with reference to the Dublin Regulation, challenges the application of the criterion of responsibility of the country of first entry when there are systemic deficiencies in the asylum procedure and in the applicants’ reception conditions in that country which constitute serious and proven grounds for believing that the applicant runs a real risk of being subjected to inhuman and degrading treatment. See Case C-394/12, *Shamso Abdullhai v. Bundesasylamt*, ECLI:EU:C:2013:813 (Dec. 13, 2013); Case C-4/11, *Bundesrepublik Deutschland v Kaveh Puid*, ECLI:EU:C:2013:740 (Nov. 14, 2013); Case C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department and M. E. v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, ECLI:EU:C:2011:865 (Dec. 21, 2011).

¹²¹ For an analysis of the applicability of E.C.A.S. instruments to environmental migrants; see Morgese, *supra* note 119, at 47.

¹²² See Directive 2011/95, *supra* note 41, at art. 9-26.

¹²³ *Id.* art. 2, lett. D):

“refugee” means a third-country national [or a stateless person] who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality [or the country of former habitual residence] and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country.

¹²⁴ See Directive 2011/95, *supra* note 41, at art. 2, lett. F)

a person eligible for subsidiary protection’ means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm [. . .] and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

Migration 541, 550-56 (Vincet Chetail & Céline Bauhoz eds, 2014). : as for the refugee status, the Directive recalls the 1951 Refugee Convention’s definition,¹²⁵ thus raising the same concerns explained above.¹²⁶ Whereas in the subsidiary protection, the “real risk of suffering a serious harm” requested to obtain such protection does not seem applicable, unless a particularly extensive interpretation¹²⁷ of the notion of “serious harm” occurred *ex art. 15(b)*.¹²⁸ The Court of Justice of the European Union (C.J.E.U.) – despite not having yet had the occasion to decide on environmental migration cases – tried to expand the interpretation of “serious harm” – as a ground encompassing the environmental factor – in the subsidiary protection under art. 15(b) of the Qualification directive. While in *Elgafaji v. Staatssecretaris van Justitie*,¹²⁹ the Court ruled that the wording of art. 15(b) is similar to art. 3 E.C.H.R. – thus recalling all the case law previously mentioned¹³⁰; in *M’Bodj v. Belgium*¹³¹ the Luxembourg judges affirmed that the “serious harm” required by the directive must be different from art. 3 E.C.H.R., and that it must be related to personal persecution and come from a third party (*ex art. 6 of the Directive*).¹³²

Hence, environmental migrants do not seem to obtain proper safeguards under the subsidiary protection. Another (arguably) form of protection could be the Temporary Protection Status [hereinafter T.P.S.] enriched in the Directive 2001/95.¹³³ As stated in art. 1, the purpose of the Directive is:

[T]o establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin and to promote a

¹²⁵ On the applicability of the 1951 Geneva Convention within the E.U. legal system without its ratification, see Case C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department and M. E. v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, ECLI:EU:C:2011:865.

¹²⁶ See *supra* Introduction, at 6-9.

¹²⁷ An example of such extensive interpretation can be seen in the Judgment of the Case C-163/17, *Abubacarr Jawo v. Bunderrepublik Deutschland*, ECLI:EU:C:2019:218, ¶ 92 (March 19, 2019). See Maarten den Heijer, *Transferring a Refugee to Homelessness in Another Member States: Jawo and Ibrahim*, 57 COMMON MKT. L. REV. 539 (2020).

¹²⁸ See Directive 2011/95, *supra* note 41, at art. 15(b) where there are listed the cases in which there is a “serious harm”. On the limits of the E.U. subsidiary protection in the protection of environmental migrants; see also FRANCESCA PERRINI, *CAMBIAMENTI CLIMATICI E MIGRAZIONI FORZATE. VERSO UNA TUTELA INTERNAZIONALE DEI MIGRANTI AMBIENTALI* 83 (2018).

¹²⁹ Case C-465/07, *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie*, ECLI:EU:C:2009:94, (Feb. 17, 2009).

¹³⁰ See *supra* Section 1, at 11-14.

¹³¹ Case C-542/13, *Mohamed M’Bodj v. État belge*, ECLI:EU:C:2014:2452, (Dec. 18, 2014).

¹³² See Delval, *supra* note 46.

¹³³ See Council Directive 2001/55 of July 20, 2001, On Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof, annex, 2001 O.J. (L 212) 12, 23.

balance of effort between Member States in receiving and bearing the consequences of receiving such persons.

Nevertheless, the definition of “mass influx” should encompass “the arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided [. . .]”.¹³⁴ Thus, some authors consider the T.P.S. as an applicable regime to environmentally displaced persons following an environmental disaster, mainly due to the broad formulation of the eligibility criteria and the absence of an exhaustive list as to who may fall under this legal regime.¹³⁵ However, the directive establishes an exceptional procedure applicable only in “the event of a mass influx or imminent mass influx”, thus excluding from its scope those who are not part of such mass influx arriving in the E.U.

Looking at the environmental side, the high level of protection and improvement of the quality of the environment and the sustainable development have been promoted as objectives of the E.U. (art. 3 of the T.F.E.U.). Also, after the entry into force of the 2009 Lisbon Treaty, the Union’s action in these fields have been strengthened, through the inclusion of the fight against climate change, the promotion of the protection of the environment also for future generations (artt. 191-193 of the T.F.E.U.).¹³⁶ In addition, art. 11 of the T.F.E.U. requires the integration of environmental protection “into the definition and implementation of the Union’s policies and activities”.¹³⁷ Furthermore, art. 37 of the E.C.H.F.R.¹³⁸ defines the principle of environmental protection, requiring that to integrate a “high level of environmental protection” and “the improvement of the quality of the environment” extends, in principle, to all Union policies (internal and external); in other words, such principle should be integrated also in migration policies.

Even the recent E.U. legislative proposals confirm the protection gap. Indeed, in 2020 the European Commission presented two Communications aimed at addressing the

¹³⁴ *Id.* art. 2(d).

¹³⁵ *Id.* art. 2(a). *See also* Morgese, *supra* note 119, at 54-56.

¹³⁶ Consolidated Version of the Treaty on the Functioning of the European Union art. 191(1), May 9, 2008, 2008 O.J. (C 115) 47 states that: “[T]he Union policy on the environment shall contribute to pursuit of [. . .] promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change”.

¹³⁷ T.F.E.U. art. 11 states that “[t]he requirements of environmental protection must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development”. On the issues concerning the justiciability of the principle enriched in TFEU art. 11; Agata Cecilia Amato Mangiameli, *Article 11*, in 1 TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION – A COMMENTARY 299 (Hermann-Josef Blanke & Stelio Mangiameli eds., 2021).

¹³⁸ Charter Of The Fundamental Rights Of The European Union art. 37, Dec. 18, 2000, 2000 O.J. (C 364) 1 states 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 assured in accordance with the principle of sustainable development”. For an analysis of this article; *see also* Eloise Scotford, *Environmental Rights and Principles: Investigating Article 37 of the EU Charter of Fundamental Rights*, in ENVIRONMENTAL RIGHTS IN EUROPE AND BEYOND (Sanja Bogojević & Rosemary Rayfuse eds., 2018).

(possible) future adoption of legislative proposals tackling, on the one hand, migration and, on the other hand, climate change. Unfortunately, these Communications, albeit being adopted in the same time period, do not communicate with each other. On the one hand, the Communication on the E.U. Green Deal¹³⁹ – which aims at achieving climate neutrality by 2050, does not address the issue of migration in any of its forms; on the other hand, the Communication on the New Pact on Migration and Asylum¹⁴⁰ the purpose of which- is to integrate or reform the Common European Asylum System (C.E.A.S.) – does not mention climate change or environmental protection. The New Pact addresses the safety of refugees but does not mention the needs of climate-induced migrants and, above all, does not recognize climate stress as a ground to seek refugee status.¹⁴¹

The E.U. undoubtedly plays a leading role in the fight against climate change, the promotion of environmental sustainability, and fuels the international discourse about the “green” transition. However, when it comes to environmental migration, the E.U. follows the international trend of preferring the use of soft law instruments.

Indeed, the confirmation of the same inconsistencies arises again within the E.U. Commission conclusions at the C.O.P.27 in Sharm el-Sheikh. On that occasion, the Commission highlighted how

the consequences of climate change are unevenly distributed around the world, since we have seen extreme weather events happen often in the most vulnerable countries. It is therefore crucial that developed countries help developing countries to become more resilient to extreme weather conditions [. . .] This is therefore our duty to support countries to adapt to and prevent the impacts of climate change, focusing on where the needs are most urgent.¹⁴²

¹³⁹ See Commission Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Green Deal*, COM(2019) 640 final (Dec. 11, 2019).

¹⁴⁰ See Commission Communication on a New Pact on Migration and Asylum, COM (2020) 609 final (Sep. 23, 2020).

¹⁴¹ See European Parliament, LIBE Committee, *The Future of Climate Migration*, Eamonn Noonan and ANA Rusu (March 2022), [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655591/IPOL_STU\(2020\)655591_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655591/IPOL_STU(2020)655591_EN.pdf) (last visited Dec. 6, 2022).

¹⁴² See European Commission Press Release IP/22/6888, *Team Europe Steps up Support for Climate Change Adaptation and Resilience in Africa Under Global Gateway* (November 16, 2022).

CONCLUSIONS

As the data continues to demonstrate, environmental migration is a constantly growing phenomenon that will not affect only the so-called future generations. On the contrary, the adverse effects of climate change and environmental degradation are currently perceived, highlighting how they undermine human rights and the necessity to protect the most affected ones. As a matter of fact, in a situation of environmental disaster, the primary responsibility to grant protection should be on the State of origin. As the U.N. Human Rights Committee's decisions outlined, States have the obligation to ensure protection for their citizens and that people live life with dignity,¹⁴³ through also the creation of tools to prevent, mitigate, adapt, and eventually manage internal and cross-borders climate-induced migration.

Despite the lack of effective protection in the international legal framework and the proliferation of soft law acts recognizing the urgency to address environmental migration, the emerging supranational, but especially national case-law of E.U. Member States' courts confirm the trend in tackling the lack of protection for environmental migrants through the incorporation of human rights in environmental cases, thus demonstrating the will to create an environmental migration awareness, on both the adverse effects of climate change and on the recognition of duties in environmental and human rights matters.

Even if these national decisions dealt with the adverse effects of environmental degradation, the environmental factual aspects of the cases are different. In the French case, the environmental aspect of migration is associated with the severe air level of pollution in the country of origin, whereas in the Italian case, there is the exploitation of natural resources by oil companies and political instability. Despite the respective differences, these two cases highlight one of the main aspects of environmental migration: the multi-causality. Both these cases stress that the reasons behind the forced or voluntary decision to migrate are not only linked to environmental factors. There are other reasons and elements, such as political instability, poverty that affect, even the type of protection to guarantee. In addition, in these selected decisions the judges did not use the same legal remedies. On the one hand, in the French case, there was the request for a decision of deportation and, on the other, in the Italian case, the request for international protection. The Court of Bordeaux relied on the right to health and the inadequacy of the Bangladesh health system compared to the French one in treating his diseases and in overturning the deportation order; instead, the Italian Court fixed an

¹⁴³ See U.N. Human Rights Committee, views adopted, *supra* note 60, at 9.12 and 9.13.

extensive reading of the right to life in dealing with the request of international protection. Eventually, through the annulment of the deportation order in France and the recognition of national protection in Italy, the decisions of the Administrative Court of Bordeaux and the Italian Court of Cassation stressed the necessity – albeit the duty – to recognize alternative or parallel instruments of protection for environmental migrants.¹⁴⁴

The use of a broader interpretation of human rights by national courts – in particular the right to health, the right to life and to live with dignity– testifies to the international lack of protection, but also the international trend of filling such protection gaps through a human rights approach.

Despite the political statements at the supranational level, it seems that quasi-judicial and judicial bodies represent the real promotion of an adaptation process of the law to the increasing human developments and necessities¹⁴⁵ – i.e., the growing number of climate litigation cases.¹⁴⁶ Even if it will take time for judicial bodies to constitute a solid case law on this topic, the growing application of existing human rights law by national courts – and also the constant efforts of civil society groups – is pushing the environmental migration phenomenon in the spotlight.¹⁴⁷ Thus, such judicial involvement is stressing the necessity to consider the wider range of issues¹⁴⁸ that affect those who migrate for environmental reasons when taking legal decisions on climate change and environmental matters.

Environmental migrations, like other forms of migration, such as those due to living conditions that are objectively impossible, call for the implementation of a mighty, joint effort by the entire international community and supranational organizations, such as the E.U. The duty to cope with the massive flows with which they are invested cannot be borne solely by the, however limited, efforts of individual national courts.

¹⁴⁴ See Villani, *supra* note 43; Le Moli, *supra* note 58, at 26.

¹⁴⁵ See Perrini, *supra* note 68, at 350.

¹⁴⁶ See Villani, *supra* note 43; see also Le Moli, *supra* note 58.

¹⁴⁷ See Vona, *supra* note 100, at 148.

¹⁴⁸ See Jacqueline Pell & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 *TRANSNAT'L ENV'T L.* 37 (2018).