Environmental disasters, climate change and displacement

a study on the effectiveness of the current legal refugee and human rights framework in protecting environmentally-displaced people in the European Union

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Abstract

While migratory movements steadily increase, factors that force people to move continue to change. Environmental damage and climate change have significant consequences on human security, which brings us to the core of this research: the nexus between climate change and migration. The relevance of the issue under examination has been well expressed by the literature, and studies have found a significant causal relationship between environmental factors and migration. It is precisely for this reason that this relatively new and unexplored field demands for higher legal and political attention, both at the international and at the European Union level. The scale of internal and cross-border migratory flow is expected to rise as a result of accelerated climate change which will force more and more people to leave their homes. This will unarguably have unprecedented impacts on human security all over the world, Europe included. Notwithstanding these predictions, to this day, the term 'climate refugee' is not internationally recognised, and the United Nations refugee convention does not provide long-term legal protection to people who flee their home countries due to extreme weather events. The purpose of this study is twofold. First, this research aims to find out to what extent the international, European, and national legal orders already provide for a degree of protection for environmental migrants. Secondly, recommendations on how to regulate the issue in question at the EU level will be provided.

1. Introduction

The number of deaths from natural disasters is highly variable. It would come as no surprise to reveal that natural disasters such as floods, droughts, rising sea levels, glacial melting, to name a few, impose huge stresses on livelihoods. Looking over the past decade, approximately 60,000 people globally died from natural disasters each year,[1] and in the future, sections of the world may potentially become uninhabitable due to severe environmental degradation, be it caused by climate change or not.

Some scholars estimate that today there are around 25 million environmental refugees in the world, and studies also suggest that migration flows due to environmental factors will largely increase.[2] The economist Sir Nicholas Stern, for instance, foresees that by 2050 this number will raise up to 200 million,[3] while according to the non-governmental organisation (NGO) Christian AID it will be one billion.[4] Furthermore, the Intergovernmental Panel on Climate Change (IPCC) has already indicated that one of the greatest effects of climate change may be on human migration.[5]

Already in 2008, at the Council of the European Union, Mr. Javier Solana[6] made some security considerations related to climate migration, and predicted *that "there will be millions of environmental migrants, with climate change as one of the major drivers of this phenomenon"* and that *"Europe must expect substantially increased migratory pressure"*. [7] Something which is widely recognised is that climate change is having, and will continue to have, a huge impact in exacerbating environmental disasters. Climate change aggravates extreme weather events, making them deadlier and more widespread. According to Gianmaria Sannino, head of the Climate Modelling Laboratory at the Italian National Agency for New

[1] Ritchie, H., Roser, M., (2014). *Natural Disasters*. Published online at OurWorldInData.org. Available at: https://ourworldindata.org/natural-disasters.
[2] See Foresight, The Government Office for Science, (2011). *Migration and global environmental change: future challenges and opportunities;* Laczko, F., Aghazarm, C. (2009). *Migration, Environment and Climate Change: Assessing the Evidence*, International Organisation for Migration; N. Myers (1997). *Environmental Refugees*. Population and Environment: A journal of Interdisciplinary Studies, Volume 19, Number 2; Myers, C. A., Slack, T., & Singelmann, J. (2008). *Social vulnerability and migration in the wake of disaster: The case of Hurricanes Katrina and Rita.* Population and Environment: A Journal of Interdisciplinary Studies, *29*(6), 271–291; International Organisation for Migration (2014). *The Middle East and North Africa*. Annual report.
[3] Stern, N., *The Economics of Climate Change: The Stern Review*.
[4] Christian Aid, (2007) *Human tide: the real migration crisis*. A Christian Aid report.
[5] Intergovernmental Panel on Climate Change (IPCC), Climate Change: The IPCC Scientific Assessment: Final Report of Working Group I (Cambridge: CUP, 1990).
[6] Javier Solana served as the European Union's High Representative for Common Foreign and Security Policy, Secretary General of the Council of the European Union and Secretary-General of the Western European Union and held these posts from October 1999 to December 2009.
[7] Climate Change and International Security, (2008). S113/08 14 Paper from the High Representative and the European Commission to the European Council, S113/08 14.

Technologies, Energy and Sustainable Economic Development (ENEA), *"climate projections show that the events that we are now classifying as extreme will become more frequent in the future. They will become the new normal".*

While healthy ecosystems and rich biodiversity are fundamental to life on our planet, the latter is currently extremely under threat, and this inevitably represents a huge problem. Rising of temperatures, tropical deforestation, destruction of wetlands and coral reefs are constantly increasing. In Europe, for instance, Germany and the Netherlands lost nearly 60% of their wetlands between 1950 and 1980. The European Commission published a White Paper in 2009 on Adapting to Climate Change,[8] which, together with the EU Strategy on Adaptation to Climate Change, recognised the importance of ecosystems in tackling climate change and highlighted that protecting biodiversity can help us adapt to climate change**.**

Currently, environmental migrants are not adequately protected by international law, neither in their reception and assistance nor in their safeguarding of rights. The definition of 'refugee' contained in Article 1.A(2) of the Refugee Convention 1951, in fact, does not encompass environmental migrants, which results in them facing legal uncertainty and lack of protection when they cross the borders. Because of the lack of an international or regional provision extending protection from *refoulement* to people affected by disasters who are outside of their country of origin, many see individuals affected as falling through a 'protection gap'[9]

Although most of movement dictated by environmental changes or natural disasters tends to happen locally, there exist also migrants who are forced to cross their country's borders in order to find safety. In the context of the 2011-2012 drought crisis in the Horn of Africa, for instance, which exacerbated the pre-existing instability within Somalia, around 1,3 million Somalis were internally displaced. In addition, approximately 290,000 disaster-displaced people were reported to have sought protection across international borders.[10] In Nigeria, people are already being impacted by the first signs of climate change. In the northern part of the country, the extension of deserts has caused the disappearance of 200 villages, while more than 560,000 people were displaced from their homes by the 2010 floods. These different

[8] European Commission, (2009). White paper - Adapting to climate change : towards a European framework for action {SEC(2009) 386} {SEC(2009) 387} {SEC(2009) 388} /* COM/2009/0147 final */. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52009DC0147.

[9] See, *inter alia,* Kälin, W., Schrepfer N., (2012). *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*'. UNHCR Legal and Protection Policy Research Series.

[10] The Nansen Initiative, (2015). Agenda for the protection of cross-border displaced persons in the context of disasters and climate change. Volume II.

pressures will push internal populations to migrate towards the centre of Nigeria, and at the same time there will be a rapid growth of the urban population in search of greater economic opportunities. The combination of these trend factors will stimulate many Nigerians to move to the north, and potentially to Europe.[11] Furthermore, due to the 2014 Balkan flooding, for instance, which is considered to be linked to climate change, some people migrated from Bosnia and Herzegovina to other European countries.[12]

In addition to that, The UNCCD (United Nations Convention to Combat Desertification) Desertification Report reported in 2014 an estimate according to which 60 million people could be displaced from the desertified areas of Sub-Saharan Africa to North Africa and Europe in the following decade.[13] It is relevant to note that nine out of ten migrants arriving in Italy via the Mediterranean route come from the Sahel strip, where agriculture is highly dependent on climatic variations.[14] Migration from Bangladesh, one of the countries most affected by the consequences of climate change, has also increased significantly in recent years. According to data released by the Italian Ministry of the Interior, the Bengalis are the third largest group from the Mediterranean routes, whereas until a few years ago they were not even among the top ten in our country.[15]

The objective of this legal research will be to analyse the current protection system in the European Union and its member states, in order to assess to what extent people displaced by environmental disasters can be granted international protection in the European Union. It is important to note that this aim is pursued independently of the existence of a causal link between the two phenomena of natural disasters and migration. Indeed, it is extremely difficult not only to define environmental displacement, but also, as a consequence, to find reliable connections between the two phenomena.

Indeed, one of the reasons for this difficulty in finding a correlation between environmental disasters and migratory movements, is that environmental displacement appears to be a highly multi-causal phenomenon. This is so because natural disasters, be they triggered by climate change or not, represent a huge influence on a range of economic, social and political drivers which, in turn, affect migratory movements. Therefore, given the complexity of such interactions, and the consequent wide uncertainty in predicting exact numbers of environmental

[11] Gubbiotti, M., Finelli, T., Peruzzi, E. (2012). *Profughi Ambientali: Cambiamento climatico e migrazioni forzate*. Legambiente Onlus - Dipartimento Internazionale
[12] Euronews, (2020). How climate change triggered a second exodus in Bosnia and Herzegovina.
[13] Cogliati Dezza, V., (2017). *"Profughi ambientali"? L'Europa sta a guardare.*
[14] Santolini, F., (2021). *Ambiente, l'Italia apre le porte ai migranti climatici.* La Repubblica.
[15] *Ibid.*

displacement, it is almost impossible to distinguish individuals who are displaced exclusively because of environmental factors from those whose movement results from the cumulation between environmental disasters and other factors (e.g. poverty, conflicts, lack of states' capacity to protect…). Thus, this category of displaced people is still in search of legal recognition.

One of the assumptions on which this thesis is based is that natural disasters impact populations in a manner that violates their basic human rights, including the right to live a dignified life, the right to livelihoods, to adequate housing, to adequate food and water, the right to education. This is especially true for people who are forced to migrate because environmental disasters render their life in their place of habitual residence unbearable. The complex biographies of those arriving in Europe show that the decision to migrate is often taken for a combination of reasons. In this context of multi-causality, Europe's task must be not only to provide assistance to asylum seekers, but also to find a regulatory framework and a political strategy capable of offering answers to stratified and complex phenomena.

1.1. Terminology and definitions

1.1.1 Human security

The term 'human security' was coined in the early 1990s, and it emerged as a challenge to the traditional definition of national security, strictly linked to military security and a state's ability to defend itself against external threats. The term has been widely used by scholars who have sought to shift the discourse on security away from its state-centered orientation, towards a more individualised conception of security, involving the protection of individuals within societies.[16]

Sabina Alkire, in 2002, defined human security as a measure meant *"to safeguard the vital core of all human lives from critical pervasive threats, without impeding long-term human fulfilment"*.[17] A comprehensive definition of human security as focused on the protection of individual persons has been given in 2012 by the UN General Assembly's resolution 66/290, where it was stated that *"human security is an approach to assist Member States in identifying and addressing widespread and cross-cutting challenges to the survival, livelihood and dignity*

[16] S. Neil Macfarlane and Yuen Foong Khong, (2006). *Human Security and the UN: A Critical History*, Foreign Affairs; Arcudi, G. (2006). *La sécurité entre permanence et changement*, Relations Internationales, Vol. 1, No. 125, pp. 97-109. ISSN 0335-2013.

[17] Alkire, S. (2002). *A conceptual framework for human security - working paper no. 2*. Center for Research on Inequality, Human Security and Ethnicity (CRISE), Queen Elizabeth House.

of their people." It calls for *"people-centred, comprehensive, context-specific and prevention-oriented responses that strengthen the protection and empowerment of all people.*" [18]

Following this line of thought, the UNDP introduced a people-centred approach, rather than one focused on states and territories, arguing that human security is fundamentally concerned with human life and dignity. In its report, the UNDP disentangled the four main characteristics of human security: except for being people-centred, human security is universal, its components are interdependent, and it is best ensured through prevention. More specifically, the report argues that the scope of global security includes threats in seven areas: 1) economic security; 2) food security; 3) health security; 4) environmental security; 5) personal security; 6) community security; 7) political security.

In this view, it is important to note that environmental change does not undermine human security in isolation from the broader range of social factors mentioned above. It has also been asserted by the UNDP report that in order to tackle the problem of global insecurity, we need to ensure the protection two important freedoms. On the one hand, the 'freedom from fear', which refers to being protected from wars, violent conflicts, prosecution or physical harassment; emergency assistance, conflict prevention and resolution peace-building being the main concerns of this approach. On the other hand, the 'freedom of want' needs to be ensured, which requires access to education, jobs and natural resources. This freedom broadens the agenda also to include hunger, disease and natural disasters, which are considered inseparable concepts in addressing the root of human insecurity.

Environmental degradation also caused by climate change and international migration are identified by the UNDP's report as some of the biggest threats to human security. The mentioned challenges are also some of those which most easily spill over national borders, and therefore are more difficult to contain. All forms of environmental degradation threaten human security. Emissions of chlorofluorocarbons, the production of greenhouse gases, biological diversity, destruction of coastal marine habitats, threaten the lives of billions of people. These events all drift inexorably across national frontiers, having a truly global impact.

As it has been argued by the United Nations Trust Fund for Human Security, *"climate change is also a 'threat multiplier'. The loss of land and livelihoods, against a backdrop of persistent poverty, displacement and other insecurities, can trigger competition for scarce natural resources and fuel social tensions"*.[19] In the meantime, continued environmental

[18] United Nations General Assembly (2012). Resolution A/RES/66/290 Follow-up to paragraph 143 on human security of the 2005 World Summit Outcome.
[19] United Nations Trust Fund for Human Security. https://www.un.org/humansecurity/climate-change/.

degradation, together with expanding populations, limited employment opportunities and closed international markets, force millions of individuals to leave their own countries in search of a better life. All the above-mentioned interconnected issues threaten global human security. Given the cross-border nature of such challenges, it is in the interest of all nations to discover new ways of cooperating to respond to these threats that constitute the global framework of human insecurity.

1.1.2 Forced displacement

It has been generally agreed that the term 'forced displacement', also referred to as 'forced migration' describes the involuntary or coerced movement of a person or people away from their home or home country. Nevertheless, governments, NGOs, other international organisations and scholars have defined the term in a variety of ways, paying more attention to different factors each time, and either in a narrower or broader manner.

According to Alden Speare, for instance, every form of migration contains an element of voluntariness. He suggests that migration should be considered 'forced' exclusively when a person is physically transported from a place to another without any physical chance to escape.[20] However, this statement does not take into account slightly more indirect factors which push people to migrate, including possible imminent threats to life or livelihood which leave individuals with little or no choice, such as factors related to conflicts or to environmental disasters.

A broader definition is offered by Zetter, who posits that even what is believed to be a voluntary migration could be the consequence of indirect coercion, for instance when structural inequalities 'force' some groups to abandon their homelands.[21] The International Organisation for Migration (IOM) and the United Nations High Commissioner for Refugees (UNHCR) also provide for broader definitions. While the former refers to a forced migrant as any person migrating with the aim to *"escape persecution, conflict, repression, natural and human-made disasters, ecological degradation, or other situations that endanger their lives, freedom or*

[20] Speare, A. Jr. (1974). *Residential satisfaction as an intervening variable in residential mobility*, Demography 11(2): 173–188.
[21] Zetter, R. (2007). *More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization.* Journal of Refugee Studies Vol. 20, No. 2.

livelihood", the latter defines forced displacement as resulting from *"persecution, conflict, generalised violence or human rights violations*".[22]

While by the end of 2014, 59.5 million individuals were forcibly displaced worldwide as a result of persecution, conflict, generalised violence, or human rights violations, the UNHCR estimates that global forced displacement has surpassed 80 million at mid-2020.[23]

1.1.3 Environmentally-displaced people

In the 1980s, UNEP Director El-Hinnawi defined environmentally-displaced people, more commonly referred to as 'environmental migrants' as *"people who have been forced to leave their homes due to temporary or permanent needs because of major disruptions (natural and/or human-induced) that have endangered their existence or seriously damaged their quality of life"*. El-Hinnawi distinguished between three types of environmental migrants: (i) people who are temporarily displaced due to environmental stresses caused by both natural and man-made disasters but who may later return to their places of origin to begin reconstruction; (ii) people who are permanently displaced and relocated to other areas; (iii) people who are temporarily or permanently displaced because they can no longer sustain themselves with the resources of their land due to environmental degradation.

In the 1990s, the British environmentalist Norman Myers, considered to be one of the most authoritative experts on the subject, defined environmental refugees as *"people who can no longer secure livelihoods in their homelands due to environmental factors of an unusual magnitude and who, faced with these environmental threats, feel they have no alternative but to seek livelihoods elsewhere, either within their own country or outside its borders, on a semi-permanent or permanent basis"*.[24] The IOM proposed to define environmental migrants as "*persons or groups of persons who, predominantly for reasons of sudden or progressive change in the environment that adversely affects their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad"*.[25]

Notwithstanding the existence of punctual definitions, to this day, there is no international agreement on a term to be used to refer to a person or people that move for

[22] United Nations High Commissioner for Refugees (UNHCR), (2014). *Global Trends – Forced Displacement in 2014*.
[23] United Nations High Commissioner for Refugees (UNHCR), (2020). *Refugee Data Finder*.
[24] Myers, N., (1999*). Esodo ambientale. Popoli in fuga da terre difficili*, Edizioni Ambiente, Milano, p. 18.
[25] International Organisation for Migration (IOM), (2007). MC/INF/288 - Discussion Note: Migration and the Environment.

environment-related reasons. As a consequence, this type of migrants face legal uncertainty whenever they cross borders. In this regard, it is also worth noting the difference between the phenomenon of environmental displacement and that of climate displacement. While the former refers to all sorts of changes in the environment which cause natural disasters, the latter describes movement due to a change in the environment due exclusively to climate change. Climate migration is, therefore, a subcategory of environmental migration.[26]

All these definitions are very broad and flexible, and show that climate migration can take many complex forms according to several factors: whether it is forced or voluntary, temporary or permanent, internal or international, individual or collective, of proximity or of long distance.[27] It is important to note that the above-mentioned definitions are working definitions with an analytic and advocacy purpose, which do not have any legal value.

In this thesis, it will be referred to 'environmental displacement' (or 'environmental migration') and 'environmentally-displaced people' (or 'environmental migrants') as umbrella terms, also including 'climate migration' and 'climate migrants'. Therefore, 'environmental migration' includes all movements, which are mainly driven by an environmental factor, notwithstanding if these movements are triggered by disasters related to climate change or not. Finally, the wrongfully yet commonly-used term 'environmental refugees' will not be employed in this work, as it is erroneous as a matter of law, besides being conceptually inaccurate. Indeed, at present, the term 'environmental refugees' or 'climate refugees' has no basis in international refugee law.[28]

1.1.4 Environmental disasters

A disaster has been defined by the United Nations Office for Disaster Risk Reduction (UNDRR), as *"a serious disruption of the functioning of a community or society involving widespread human, material, economic or environmental losses and impacts, which exceeds the ability of the affected community or society to cope with using its own resources."*

Environmental disasters can belong to two big categories: purely natural disasters, and human-induced disasters. A natural disaster is defined by the UN as: *"the consequence of events triggered by natural hazards that overwhelms local response capacity and seriously*

[26] Warsaw International Mechanism, Executive Committee, Action Area 6: Migration, Displacement and Human Mobility – Submission from the International Organization for Migration (IOM, 2016); M. Traore Chazalnoël and D. Ionesco, *Defining Climate Migrants – Beyond Semantics* (IOM weblog, 6 June 2016).
[27] International Organisation for Migration (IOM), (2020), Environmental Migration Portal - Environmental Migration.
[28] Goyal, R. (2020). *Environmental Refugees - Error 404: Not Found in International Law*.

affects the social and economic development of a region." Human-made disasters are hazards caused by human action or inaction. As opposed to natural disasters, therefore, they have an element of human intent or negligence. For instance, as we will see below, inaction by the government to prevent a natural disaster or lack of means deployed to protect the people affected can be considered as attributable to the government itself, which has therefore, to some extent, caused the disaster to happen or to have bad effects.

Furthermore, it is useful to distinguish between sudden-onset disasters and slow-onset disasters. According to the Platform on Disaster Displacement, sudden-onset disasters comprise hydro meteorological hazards such as flooding, windstorms or mudslides, and geophysical hazards including earthquakes, tsunamis or volcano eruptions. Slow-onset disasters, instead, relate to environmental degradation processes such as droughts and desertification, increased salinisation, rising sea levels or thawing of permafrost. Such types of disasters are usually related to climate change.

In this thesis, the term 'natural disasters' will be used as an umbrella term referring to all types of disasters: natural, human-induced, slow-onset and rapid-onset.

1.2. Relevance of the phenomenon at the European Union level

At the EU level, the debate on the issue of displacement caused by environmental factors has been reinforced by the entry into force of the Lisbon Treaty,[29] which granted the Union competences in various areas, enabling it to act separately on the two phenomena of climate change and migration, and therefore to comprehensively address the issue which is the focus of this thesis.

More precisely, Article 21 of the Treaty on the European Union (TEU) poses the objectives of addressing in the best and most comprehensive way the big global problems, *"assist populations, countries and regions confronting natural or man-made disasters"* through means of international cooperation and good governance. Furthermore, Article 78 of the Treaty on the Functioning of the European Union (TFEU) grants explicit external competence to the EU to develop *"partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary*

[29] The Lisbon Treaty was signed on the 13th of December 2007 and entered into force on the 1st of December 2009.

protection".[30] Finally, the Treaties also explicitly include the fight against climate change among the objectives of environmental policy.[31]

At the institutional level, the first EU institution to engage with the topic of environmentally-displaced people was the European Parliament, which, in 1999 included the issue of 'climate refugees' in its resolution on *The Environment, Security and Foreign Policy*[32], where it was stressed the extent of the challenge and warned against possible problems that this phenomenon could cause to the EU, namely regional instability. In 2008, during a one-day seminar organised by the Greens / European Free Alliance (EFA) parliamentary group, a declaration was adopted, where the lack of legal protection for environmental migrants in the European Union was finally acknowledged. The Declaration, in fact, invited international institutions to *"organise legal protection for the victims of climate disruptions and of possible displaced persons (current or future) who do not benefit today from any recognition"*. [33]

Another important step towards an EU approach on climate-change-driven migration taken at the EU level was the European Council adopting the so-called Stockholm Programme, which included a paragraph on climate change and migration. While underlining that the links between climate change, migration and development need to be further explored, the Council also invited the Commission to present an analysis of the effects of climate change on international migration, including the effects it may have on immigration to the European Union.[34] As a response, the European Commission published in 2013 a working document[35] where it was pointed out that over time there has been more and more evidence to suggest that climate change and environmental degradation are likely to assume increasing importance in triggering migration to the European Union.

In 2011, the Global Approach to Migration and Mobility (GAMM), which constituted the framework for the cooperation of the EU with third countries in the area of migration and asylum, recognised that *"addressing environmentally induced migration, also by means of*

[30] Treaty on the Functioning of the European Union, Article 78.
[31] Article 191(1) TFEU precisely states that: "*Union policy on the environment shall contribute to pursuit of the following objectives: preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources; promoting measures at international level to deal with regional or worldwide environmental; problems, and in particular combating climate change".*
[32] European Parliament (1999). Resolution on the environment, security and foreign policy.
[33] European Commission, (2013). Commission Staff Working Document, Climate change, environmental degradation, and migration. Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. An EU Strategy on adaptation to climate change. Brussels, 16.4.2013 SWD(2013) 138 final.
[34] European Council, The Stockholm Programme - An open and secure Europe serving and protecting the citizens. Adopted the 11 December 2009. doc. 17024/09.
[35] *Supra* note 36.

adaptation to the adverse effects of climate change, should be considered part of the Global Approach". A few years later, the Commission presented an Adaptation Strategy and working paper on climate change, environmental degradation and migration,[36] identifying climate-change-driven migration as a crucial issue in the migration agenda.

Notwithstanding these steps taken at the EU level, at present, there is no coherent EU policy approach on how to respond to the phenomenon of environmentally-induced migration. Among the Member States of the Union, only a few countries have concretely envisaged the protection of environmentally-displaced persons: Finland, Sweden and Italy.

1.3. Research questions and their relevance

Both climate change and migration are, separately, two historical crises that the European Union is going through these days. Understanding the connection between the two, and to what extent the former leads to the latter, is extremely interesting from both a political point of view and from a legal one. Forced migration in general is one of the most urgent threats that people in developing countries are facing, and at the same time, gradual as well as sudden environmental changes are resulting in substantial human movement and displacement. Increased migratory movements can contribute to further environmental degradation, but migration can also represent a strategy to cope and survive for those who move.

Christian Aid predicts that, if we continue on these trends, a further 1 billion people will be forced out of their homes between now and 2050.[37] Millions of women, men and children have been forced to escape their homelands because of the increasing number of natural disasters, and unlike refugees, who struggle across borders to escape persecution, they are also largely voiceless, as they enjoy no particular status or protection under international law and no international agency is responsible for their welfare. Christian Aid has also reported that the threat from climate change is extremely immediate in Mali, as it is one of the areas of the world most vulnerable to global warming. Therefore, increasing numbers of people are trying to reach Europe in search of refuge.[38] Furthermore, in 2006, the Chief of the Defence Staff and Britain's most senior serviceman Sir Jock Stirrup, highlighted that "*climate change and growing competition for scarce resources are together likely to increase the incidence of*

[36] European Commission (2013). *An EU Strategy on adaptation to climate change*. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions.
[37] See *supra* note 4.
[38] *Ibid.*

humanitarian crises. The spread of desert regions, a scarcity of water, coastal erosion, declining arable land, damage to infrastructure from extreme weather: all this could undermine security".[39]

Although there has been very limited policy development and little discussion in the European Union in addressing the link between climate change and migration, the EU unarguably holds increasing regulatory powers over the environment as well as over migration. This suggests that there is significant potential and substantial room for policy development in the area of environmental migration. My study departs from the assumption that effective management of environmental migration is essential to ensuring human security and to facilitating sustainable development. What policies and laws exist for this purpose? What are the gaps? In light of what I mentioned above, this thesis will be guided by a layered approach: it will revolve around one main interrogation complemented by two sub-questions:

RQ 1. *How are environmental migrants legally protected in the European Union, and how could EU legislation adapt to protect the position of environmental migrants and human security within the EU?*

> RQ 1.1. *From which legal sources do environmental migrants derive their rights, and have these been sufficiently implemented in EU law?*
>
> RQ 1.2. *To what extent does Member States legislation offer protection for environmental migrants?*

Existing literature on the topic has so far focused on environmental migration at the international level, overlooking the European perspective, as well as EU legal responses. Studies already exist on the extent to which current international law protects environmental migrants, and on how the protection can be improved, and some solutions are indeed proposed.[40] However, the literature has awarded little importance to the issue from a European

[39] Lecture by Air Chief Marshal Sir Jock Stirrup, Chief of the Defence Staff, UK Ministry of Defence, December 2006.

[40] See Ammer, M., Nowak, M., Stadlmayr, L.,. Hafner, G. (2010) *Legal Status and Legal Treatment of Environmental Refugees*, on behalf of the Federal Environment Agency (Germany); Atapattu, S. (2020). *Climate change and displacement: protecting 'climate refugees' within a framework of justice and human rights*. Journal of Human Rights and the Environment 11(1):86-113.

perspective, and has not, to my knowledge, made any future projections on how the European situation might be improved.

The main reason why it is interesting to examine the role of the European Union in the context of environmentally-induced migration is that the EU is considered to be the world's most developed form of regionalised supranational governance and because it is highly engaged in both the area of migration and that of environmental policy.[41] This is why evolution in the EU concerning the protection of environmentally-displaced persons is to be expected. It would be valuable to critically analyse normative as well as operational gaps with regard to the achievement of the best protection of individuals in the field of environmental migration.

While national legislation in most countries does not take climate factors into account when granting asylum, Finland, Sweden and Italy are the only EU Member States whose legal systems provide for a certain degree of protection for people escaping from climate disasters. While Denmark does not refer to environmental migrants in its official asylum policy, it has adopted a pragmatic approach: 31 refugees from Afghanistan fleeing drought were granted asylum in 2001.

To this day, there are no studies analysing comprehensively the international framework and the European Union framework with a closer focus on national systems, and especially proposing recommendations for an EU response to the phenomenon of environmentally driven migration.

1.4. Structure of the thesis

This thesis is divided into seven chapters. Following this introduction, the second chapter exposes the methodologies employed during this legal research. The third chapter provides some background on the context of the research questions, and it intends to summarise the existing literature on the link between climate events and migratory movements, especially insisting on the multicausality of the phenomenon and on the difficulty in establishing a reliable connection. Chapters four and five detail the legal framework protecting individuals seeking asylum in the European Union, focusing on both refugee law and human rights law. Chapter six is dedicated to present the results of the analysis carried out in the previous chapters, and it highlights the legal gaps of the examined framework concerning the protection of people displaced by extreme weather events, as well as its entry points. Finally, in chapter seven I

[41] Geddes, A., et al. (2012). *Migration, environmental change, and the 'challenges of governance'*. Environment and Planning C: Government and Policy 2012, volume 30, pages 951 – 967.

provide general guidelines and recommendations for legislators and policymakers to open up avenues for the recognition of a status to environmentally-displaced people.

2. Methodology

The purpose of the legal research carried out in this thesis is twofold. On the one hand, as a law is usually not designed to address every contingency that might possibly arise in the future, I aim to highlight ambiguities and gaps of the current international, European and national sets of norms concerning climate migration. On the other hand, my goal is to, on the basis of analytical and comparative research, suggest reforms of current legislation in the field of migration with a view to making it more inclusive in terms of granting protection for reasons of environmental disasters. Therefore, recommendations will be drawn for policy-makers to better enforce protection for environmental migrants at the supranational level, imagining a comprehensive legislative solution for the European Union. In this context, several possibilities will be analysed and proposed.

In this study, it will be referred to 'environmental migrants' or 'environmentally-displaced people' according to the definition provided by the IOM in 2007,[42] encompassing all those persons who are forced to leave their current place of residence, either temporarily or permanently, due to environmental disruption.[43] For the purpose of this research, I will include in this definition people who are forced to displace because of either rapid-onset or slow-onset events caused both by human-made changes, and nature-caused events (i.e. earthquakes, volcanic eruptions).

In my thesis, I will first and foremost use two methodologies of legal research, namely doctrinal legal research and comparative legal research, which consists of a combination of looking at primary and secondary legal sources and drawing conclusions from there, with comparing national legal systems in the field of legal protection for environmental migrants. The two research methods are outlined in more detail in the following paragraphs.

2.1 Doctrinal legal research

Doctrinal legal research focuses on the analysis of existing legal norms. According to Ian Dobinson and Francis Johns, the central question of this research method essentially asks what the law is in a particular area and context, and how it has been developed and applied. [44] Furthermore, Dr. S.R. Myneni has defined doctrinal legal research as *"a research that has been*

[42] See *supra* note 28.
[43] See *supra* note 26.
[44] Dobinson, I., Johns, F. (2007). *Qualitative Legal Research,* in Research Methods for Law, Edinburgh University Press, Edinburgh, 18-19 (Michael McConville & Wing Hong Chui eds., 2007).

carried out on a legal proposition or propositions by way of analysing the existing statutory provisions and cases by applying the reasoning power." [45]

Based on the definitions provided by the scholars, we can assert that the doctrinal legal research methodology allows the researcher to compose a descriptive and detailed analysis of the law, namely statutes, case law, regulations, etc. with the objective of providing a critical stance and commentary on the state of the law. The main purposes of doctrinal legal research are to contribute to the consistency and certainty of law, as well as to improve existing law on a specific matter by building new principles and provide foundation for study on other various socio-legal issues. Under this approach, it will also be beneficial to identify ambiguities and criticisms of the law, and offer solutions.

In order to answer the main research question outlined above, I am going to employ the doctrinal legal research method to conduct an analysis of the current framework at the international and European level. On the basis of that analysis, I will then evaluate the current level of protection of environmental migrants in the EU and examine the legal basis against which to provide for recommendations. I am going to investigate the existing international law in place that concerns environmentally-driven migration, namely international refugee law and international human rights law. The extent to which such laws already offer a degree of protection to environmental migrants will be studied and existing gaps as well as possible avenues in their application will be assessed.

Subsequently, the doctrinal legal research method will allow me to answer to the first sub-question, therefore to understand the extent to which the international protection system concerning environmental migrants is implemented in European Union law, as well as to show what impact the international regime has had in the EU in protecting environmental migrants. The methodology of doctrinal legal research will be complemented with the so-called comparative legal research method. As it has been mentioned above, the advantages of employing the doctrinal method are mainly that its analysis of legal principles provides for quick answers to practical problems. Furthermore, this methodology allows the researcher to give insights into the evolution and development of the law, while highlighting its inconsistencies, gaps and uncertainties. Finally, on the basis of doctrinal legal studies, future direction of the law can be predicted.[46] Nevertheless, the doctrinal research method also entails shortcomings. It is considered to be too theoretical, trivial and technical as well as limited to

[45] Myneni, S.R. (2006). *Legal Research Methodology*, Allahabad Law Agency, India, 32 (1st ed. 4th prtg. 2006).
[46] Verma, S.K., Wani, A. (2001). *Legal Research and Methodology*. Indian Law Institute, New Delhi 2nd Edition, at p. 656-657.

the perception of the researcher and away from the actual working of the law.[47] Besides being away from how the law works in practice, the doctrinal method is also criticised for being devoid of any support from social facts. The doctrinal method, in order to be effective, has to be complemented with the comparative method.

2.2 Comparative legal research

Comparative legal research involves a critical and analytical comparison of legislations, highlighting the cultural and social character of the law, and examining how the law concerning a specific matter acts in practice. For this reason, comparative research is useful in amending and developing the law.

In a section published within the Elgar Encyclopedia of Comparative Law,[48] Patrick Glenn stated that comparative legal research is an instrument of acquiring knowledge and information on the law and having a better understanding of it. Furthermore, according to Glenn, this research methodology is particularly suited for harmonising the law.

In my research, I am going to use this comparative legal research in order to move from the supranational level to the national level. In particular, I am going to conduct a comparative analysis of the Finnish, the Swedish and the Italian legislations on migration and asylum, with the aim of understanding the advantages and disadvantages of the three regulatory systems, as well as their common objectives. The reason why I chose to compare the systems of these three countries is that they are, so far, the only ones which provide for some sort of legal protection for environmental migrants. In this view, it will be interesting to examine how the matter is already being regulated at the national level, and evaluate whether the same matter can be better regulated at the supranational level.

The advantages of this research method are that it allows to find common ground or determine best practices, and ultimately propose solutions.

2.3 Data collection

The methodologies described above require the analysis of various sources of information, which can be classified as primary and secondary sources. While among the former we find legislations, treaties, norms, regulations, directives, international conventions, orders and court judgements, the latter include those sources that refer and relate to the law while not being

[47] Kharel, A., (2018). *Doctrinal Legal Research.* SSRN Electronic Journal.
[48] Glenn, H., (2006). *Aims of Comparative Law*. Cheltenham: Elgar.

themselves primary sources, namely legal commentaries, academic literature, press releases, official speeches, statements or communications from different EU institutions and agencies (e.g. Commission, Parliament, European External Action Service). In addition to that, quantitative data in the form of surveys, reports and questionnaires will be used, gathered by non-governmental organisations, IOM, UNHCR.

3. Background: the link between environmental change and migration

According to the IOM,[49] natural disasters and climate change can pose immense challenges to human security. Extreme events potentially cause substantial damage and destruction to basic infrastructure and services also resulting in family separations and disruptions to healthcare and education services. As living conditions degrade and trigger such lack of services and decent living conditions, migration becomes one of the adaptation strategies, at least for those who can afford it.

In 1990, the Intergovernmental Panel on Climate Change (IPCC), revealed that, because more and more people would likely be impacted by environmental phenomena such as shoreline erosion, coastal flooding and agricultural disruption,[50] it might be necessary to consider that affected populations would, in response to such extreme weather events, be forced to migrate, and resettle outside their national boundaries.[51] The question has also been raised by the UNHCR, especially during the Executive Committee meeting in 2007, when the High Commissioner Antonio Guterres noted that natural disasters occur more frequently and are of more devastating impact. He claimed that climate change and environmental degradation add an even more complex dimension to issues of forced displacement. [52] In the European arena, in 2008, the Council of Europe Parliamentary Assembly's Committee on Migration, Refugees and Population compiled a report on environmentally-induced migration and displacement, where it was admitted that Europe is not immune to the consequences of climate change and environmentally-induced migration.[53]

Notwithstanding these claims at the international and European level, and although the most quoted predictions estimate that 200 million people will be forced to migrate due to climate change by 2050,[54] a direct link between environmental change and displacement is not easy to identify. Yet, already in 1991, a Working Group on Solutions and Protection within the Executive Committee of UNHCR reported that there was a need to provide international

[49] See *supra* note 28.
[50] Intergovernmental Panel on Climate Change (IPCC), Climate Change: The IPCC Scientific Assessment: Final Report of Working Group I (Cambridge: CUP, 1990); IPCC, Climate Change 2007: Synthesis Report: Summary for Policymakers (Cambridge: CUP, 2007).
[51] IPCC Special Report: The Regional Impacts of Climate Change: An Assessment of Vulnerability: Summary for Policymakers (Geneva: IPCC, 1997) Part 6.8.
[52] United Nations General Assembly, (2007). Report of the fifty-eighth session of the Executive Committee of the High Commissioner's Programme. A/AC.96/1048.
[53] Council of Europe Parliamentary Assembly, Committee on Migration, Refugees and Population, 'Environmentally Induced Migration and Displacement: A 21st Century Challenge', COE Doc 11785.
[54] See Stern Review Team (2006): The Economics of Climate Change. London: HM Treasury, p. 56.

protection to persons who are forcibly displaced and prevented from returning home because of environmental disasters, be such disasters human-made or purely naturally-caused.[55]

3.1 Drivers of migration

Migration movements within and across borders can result from several sets of factors. It has been argued that the main 'drivers' of migration are five; they are often interdependent and they can be classified as follows: 1) Economic drivers; 2) Social drivers; 3) Political drivers; 4) Demographic drivers; 5) Environmental drivers.[56]

Economic drivers are regarded to produce the most powerful and direct effects, both within and across borders. In this area, employment opportunities and income differentials between places play a major role in shaping migration patterns, especially as an adaptation strategy. The fact that the search for economic opportunities is a decisive factor in migration decision-making is confirmed by migrant workers comprising over 70 percent of all international migrants.[57] In addition to that, poverty is also recognised as key determinant of an individual's vulnerability and consequently her or his ability to migrate.

Social drivers, such as access to family or another kind of network, facilitates the possibility to migrate. The 'culture of migration' can sometimes represent a ritual act of passage among communities or families. This process is also referred to as 'cumulative causation', as the social connections forged by previous migration create the connections to sustain future migration. Furthermore, access to education and the level of literacy also increases the ability and desire to move.

Political drivers can potentially influence migratory movements through a series of paths. Political insecurity in general, expressed through the breakdown of governance structures or the emergence of violent conflict might trigger forced displacement. The level of trust in government and of institutionalisation and infrastructure within a community is also considered to be influencing displacement. It is also true that conflict and political repression

[55] Schwartz, M., (1993). *International Legal Protection for Victims of Environmental Abuse*. 18 Yale Journal of International Law 355, 379.
[56] Geddes, A., Adger, W., Arnell, N., Black, R. and Thomas, D., (2012). *Migration, Environmental Change, and the 'Challenges of Governance'*. Environment and Planning C: Government and Policy, 30(6), pp.951-967; Foresight: Migration and Global Environmental Change (2011) Final Project Report The Government Office for Science, London; Parrish, R., Colbourn, T., Lauriola, P., Leonardi, G., Hajat, S. and Zeka, A., (2020). *A Critical Analysis of the Drivers of Human Migration Patterns in the Presence of Climate Change: A New Conceptual Model*. International Journal of Environmental Research and Public Health, 17(17), p.6036.
[57] ILO Global estimates on migrant workers, 2015.

might also be a reason that prevent people from leaving, leading to cases of 'involuntary immobility'.[58]

Demographic drivers are closely related to economic ones. Pressures relating to increasing population are usually not a direct driver of migration; instead, they operate in interaction with other drivers. Furthermore, most migration related to demographic pressures occurs internally, rather than across borders, and many migrants move from areas of relatively low population densities to areas of relatively higher population densities.

Finally, environmental factors, which are of utmost interest considering the topic of this thesis, include those related to climate change and natural disasters. As highlighted above, climate change and environmental impacts are part of the same environmental crisis, and they both increasingly influence migration patterns. Although events caused by extreme environmental occurrences also encompass results of climate change, it has been suggested that the risk of displacement is likely to increase because of the amplifying effect that climate change has on the frequency and severity of disasters. Namely, climate change acts as a threat amplifier, causing disasters to become more frequent, as well as more intense and prolonged.[59]

Environmental factors are considered to directly and indirectly impact the resilience and vulnerability of individuals and communities, therefore often leading to migration. However, environmental factors heavily interact with other drivers, including those outlined above. Environmental change can drive migration and can also change the ways in which the other drivers operate. A proof of the fact that environment affects migration in combination with the other four drivers is also that if and when people return to their home countries is highly related to the social, economic and political context, both in the home and in the host countries.

As suggested above, climate change is capable of amplifying the frequency and intensity of certain weather events. According to a report of the International Panel on Climate Change published in 2007, [60] the main drivers of movement related to environmental factors in this century will be related to climate change, and they will principally include: global warming; sea-level rise; melting glaciers; accelerated drought, desertification and scarcity of water resources. All these instances are some of the main evidences of climate change. Hermen

[58] Lubkemann, S. C., (2008). *Involuntary Immobility: On a Theoretical Invisibility in Forced Migration Studies.* Journal of Refugee Studies, Volume 21, Issue 4, December 2008.
[59] Climate Council Australia, (2015). *Damage from Cyclone Pam was Exacerbated by Climate Change* Briefing Statement, 2.
[60] International Panel on Climate Change, Climate Change: The Physical Science Basis, Summary for Policymakers, Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel of Climate Change 2-16. (2007).

Ketel has found that 90% of the natural disasters occurred in the last few decades resulted from climate-related hazards, most of them finding their first cause in global warming.[61] Ketel also stated that impacts related to global warming have a deleterious effect on the livelihood of certain populations, ultimately leading to mass migration.

What is to be learned from this brief analysis is that migration is a complex and multicausal phenomenon, therefore it might be difficult to isolate the environmental factor in respect to the other four drivers. The goal of the following paragraph is to point out in what ways and to what extent factors related to environmental change can be influenced by other drivers.

3.2 Environmental displacement: a multicausal phenomenon

As it has been highlighted above, the word 'displacement' describes the forced movement of people from their homes, be it temporary, permanent, small-scale, large-scale, within a country or across an international border. In the context of environmental disasters – either due to climate change or not – people may be displaced when the impacts of extreme weather events cause that they can no longer remain in their homes and need to seek safety, assistance and protection elsewhere.

There are several types of environmental disasters that can provoke migratory movements. Namely, events are classified in two macro-categories: rapid-onset changes, such as floods, landslides, wildfires, volcanic eruptions, earthquakes and tsunamis, and slow-onset changes, namely sea-level rise, deforestation, pollution, desertification, erosion and drought. According to a study carried out in 2011 by the European Parliament,[62] land degradation is progressively increasing, and more than 2 billion people are living in areas classified as dry subhumid and arid, therefore they are extremely vulnerable to the loss of crucial resources such as water supply. Notwithstanding this, according to the same study, the links between drought, desertification and migration are complex and difficult to identify, given the slow character of the change.

It is essential to recognise the multi-causal character of displacement, in which climate change and environmental pressures are only one of the triggering factors.[63] When

[61] Ketel, H. J, (2004). *Global Warming and Human Migration*, in Climate Change, Human Systems and Policy.
[62] *Supra* note 100. See also Leighton, M., (2011*). Drought, desertification and migration: past experiences, predicted impacts and human rights issues*. In: Etienne Piguet, Antoine Pécoud, Paul de Guchteneire (ed.): Migration and Climate change. UNESCO, pp. 331-358.
[63] See e.g., Foresight, Migration and Global Environmental Change: Final Project Report, The Government Office for Science, 2011; Laczko, F., Aghazarm, C. (2009). *Migration, Environment and Climate Change: Assessing the Evidence*, International Organization for Migration.

environmental disasters do cause displacement, they are usually aggravated by socio-economic and political factors such as political instability, lack of security, social exclusion, which are therefore exacerbated by extreme environmental events. Rather than being the sole cause of displacement, natural disasters are said to have an *"incremental impact, add[ing] to already existing problems, and compound[ing] existing threats"*.[64] Indeed, as McCue posits, migration involves a multiplicity of causation; it is the outcome of the interaction of many environmental and other socioeconomic factors which cause mass movement. [65]

According to the IOM,[66] people are forcibly displaced because of environmental events when they are, at the same time: 1) exposed or expect to be exposed to a rapid-onset natural hazard or slow-onset environmental change, and 2) lack the resilience to withstand impacts. The reasons why individuals may lack resilience can be of either social, economic or political nature, and they include: poverty, social and economic marginalisation, poor urban planning, expansion of settlements into risk-prone areas, population growth, weak governance regarding disaster risk reduction and management, and in some situations, violence or armed conflict. Furthermore, major factors which influence the ability of an individual to migrate are the availability of a supporting family or network, both at home and in destination countries, as well as the level of knowledge of the host country.[67] The link between environmental problems, demographic factors and political instability is emphasised by Morrissey,[68] who argued that an increase in population together with a poor governance structure results in individuals living in developing countries being more vulnerable to the impacts of environmental hazards, which leads them to the decision to migrate.

In addition to environmental factors interacting with triggers of different nature, extreme weather events can also act as an indirect cause of displacement. Potential consequences of environmental and climate change are scarcity of water availability, food insecurity, depletion of natural resources, and prevalence of disease.[69] These circumstances, which force people to share resources, easily lead to conflicts, which in turn, triggers mass

[64] McAdam, J., (2001). *Climate Change Displacement and International Law: Complementary Protection Stndards.*Legal and Protection Policy Research Series. PPLA/2011/03.
[65] McCue, G., (1993). *Environmental Refugees: Applying International Environmental Law to Involuntary Migration.*
[66] IOM, (2017). *Environmental Migrants and Global Governance: Facts, Policies and Practices.*
[67] King, T., (2005). *Environmental Displacement: Coordinating Efforts to Find Solutions*, 18 Geo. Int'l Envrl. L. Rev.
[68] Morrissey, J., (2009). *Environmental Change and Forced Migration: a State of the Art Review*, 28. Refugee Studies Centre.
[69] See *supra* note 66.

migration.[70] In this case, we would therefore say that environmental or climate changes are not a direct cause of migration, rather an indirect one, and we would talk about environmentally-generated conflicts.

According to UNHCR, given that migration is the result of the interaction of several factors, isolating the role of climate or environmental changes in the decision to migrate is extremely difficult.[71] It is indeed almost impossible to refer to environmental disasters as the single responsible factor for triggering large-scale displacement. While it is more common for people affected by environmental disaster to migrate within the borders of their own country, yet, there is evidence "*that many [internally displaced persons] fail to find safety and security in their own country, leading to significant numbers of cross-border movements within and beyond the region"*.[72]

Notwithstanding the fact that establishing a direct link between environmental changes and migration is unlikely to happen in the near future, the IOM has multiple times reiterated that some migrants cross international borders due to environmental disasters, either temporarily or permanently. As it has been asserted, environmental pressures cannot be considered to be the only cause of displacement, whether internal or international. Although this recognition is interesting from the wider perspective of the causal link, it is not relevant in the context of an individual demanding international protection and who has fled a country that has been adversely affected by a natural disaster. From a protection perspective, the difference between the climate change-related and the other displacement causes is immaterial. As Roger Zetter has argued, the multi-causal character of migration should not be overly highlighted, as it might dangerously act as an excuse for policy-makers to avoid developing coherent responses to the issue, in the end denying the rights of forced climate migrants.[73]

According to a study carried out by the European Parliament in 2011,[74] different political and legal responses are needed at each stage of environmentally-induced migration, and on different areas. Response should range from actions to mitigate climate change, the

[70] According to the OCHA, forty-two million people were displaced from conflict in 2008. See, in this regard, United Nations Office for the Coordination of Human Affairs, Monitoring Disaster Displacement in the Context of Climate Change, (2009).
[71] See remarks made by High Commissioner António Guterres in an interview with *The Guardian* in J. Borger, 'Conflicts Fuelled by Climate Change Causing New Refugee Crisis, Warns UN' *The Guardian* (17 June 2008).
[72] Internal Displacement Monitoring Centre (IDMC), GRID 2019: Global Report on Internal Displacement, 1 (2019).
[73] Environmental Change and Displacement Assessing the Evidence and Developing Norms for Response. Report of a workshop held by the Refugee Studies Centre and the International Migration Institute, University of Oxford, 8-9 January 2009. Summarised by Merit Hietanen, St. Cross College.
[74] European Parliament, Directorate General for Internal Policies, (2001). "*Climate refugees": legal and policy responses to environmentally induced migration.*

offer of protection during the phase of displacement and re-integration or resettlement measures in the last stage. This research will focus on the type of response which involved protection for displaced people. Indeed, human rights and the concept of environmental (or climate) justice, aim to fill the legal and political gap for millions of migrants who do not benefit from international legal protection as the cause of their migration is not yet fully enshrined in either international or regional law.[75]

As it has been repeatedly highlighted above, it is extremely difficult not only to define environmental displacement, but also, as a consequence, to find reliable connections between the occurrence of environmental and migratory movements. In this regard, it is important to note that the aim of this study is to conduct a purely legal research, analysising legal frameworks in the context of two of the most topical crisis that the European Union is going through. The research is, therefore, carried out independently of the existence of a causal link between the two phenomena. In this view, the following chapter analyses the existing legal framework at the international, European and national level, with the objective to assess to what extent environmental migrants enjoy legal protection in the European Union.

[75] Manou, D. (2017), *Climate Change, Migration and Human Rights*, Taylor & Francis.

4. The legal framework I – refugee law

This chapter proposes to analyse the current legal framework, both at the international and at the European Union level, of refugee law, focusing on conditions and characteristics of international protection. A global instrument which will not be analysed below, but which deserves to be mentioned, is the Global Compact for Migration, which demonstrates that the international community is beginning to recognise the connections among environmental degradation – including climate change – and the influx of migrants and asylum-seekers.

The Compact states that "*societies are undergoing demographic, economic, social and environmental changes at different scales that may have implications for and result from migration*".[76] This is already a powerful statement which suggests a certain inclination towards reuniting the two topics of migration and climate change, somehow recognising the links between the two. More specifically, the document demands a higher degree of cooperation to States, in order to address effects of climate change and environmental degradation, while including a commitment not to return individuals where there is a real risk of irreparable harm. [77]

Although language clearly reveals that the international community recognises that climate change is a factor that influences asylum seekers, the Global Compact is a soft law instrument; being it a non-binding agreement, it does not provide any legal protections for environmentally-displaced people.

4.1 The notion of international protection

Under international human rights law, states have the primary responsibility to protect the human rights of all citizens and non-citizens within their territory or jurisdiction. The UNHCR defines international protection as *"all actions aimed at ensuring the equal access to and enjoyment of the rights of women, men, girls and boys of concern to UNHCR, in accordance with the relevant bodies of law (including international humanitarian, human rights and refugee law)".* Additionally, the UNHCR states that international protection equals securing the admission of refugees and asylum-seekers to a safe country. The concept of 'international protection' is also based on the principle of non-refoulement – that will be further discussed

[76] Mile, A., (2021). *Protecting Climate Migrants: A Gap in International Asylum Law.* Earth Refuge.
[77] Delval, E., (2020). *From the U.N. Human Rights Committee to European Courts: Which protection for climate-induced displaced persons under European Law?*

and explained below – which precludes States from returning individuals to any territory where they face a real risk of persecution or other serious harm.

The entities responsible for granting and ensuring international protection to refugees are governments. In 2017 the UNHCR claimed that people who are in need of international protection are those who are outside their home country and unable to return because of a serious threat to either: 1) life; 2) physical integrity; freedom. Such danger may result from either 1) persecution; 2) armed conflict; 3) violence; 4) serious public disorder. Finally, these people are entitled to international protection when their own government is unable or unwilling to protect them from the existing threat.[78] A related concept in this context is that of 'non-returnability', theorised by Kälin and Schrepfer in 2012.[79] The two authors did not focus on the reasons for departure of individuals, but rather on whether they can be expected to return taking into account the present situation, which might also deteriorate. According to Kälin and Schrepfer a three-step test should be performed, which would examine whether to remove a person in that specific circumstance. First of all, the return has to be 'legally permissible*'*, meaning that the principle of non-refoulement should not be violated. Secondly, there should be no physical and practical impediments for the return of the individual to happen, meaning that it has to be 'factually feasible*'*. Finally, it has to be *'*morally reasonable' to send someone back. This means that there should not be humanitarian reasons why if returned, a person would be in lack of protection or assistance. Kälin and Schrepfer also state if these three conditions are not fulfilled, then individuals should *"be admitted and granted at least temporary stay in the country where they have found refuge until the conditions for their return in safety and dignity are fulfilled".* Where people are displaced within national borders, the obligation of states under international human rights treaties and refugee law concerning international protection is straightforward, and it is well clarified by soft law instruments. However, when people are displaced across international borders, the receiving State is obliged to treat them in accordance with international standards of protection and human rights obligations. The question of individuals displaced because of an environmental disaster is not as clear; questions remain as to whether protection should be granted or not.

In 2019, the UNHCR[80] has recognised that the concept of international protection may extend to include also situations where there is an inability of the country of origin to protect

[78] United Nations High Commissioner for Refugees (UNHCR), (2017). *Migrants in Vulnerable Situations': UNHCR's Perspective.*
[79] Walter, K., Schrepfer, N. (2012). *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*. Geneva: UNHCR Legal and Protection Policy Research Series.
[80] UNHCR (United Nations High Commissioner for Refugees). 2017. Persons in Need of International Protection.

individuals from serious harm, and where, in virtue of this, they are displaced across international borders, for instance in the context of natural disasters or public health emergencies. In addition to that, Garlick and Inder have recently differentiated the concept of 'international protection' and that of simply 'protection'. They stated that while the former refers to a status granted by a State to non-nationals of that State fleeing from persecution, human rights violations and serious harms, the latter describes assistance offered by the international community to persons impacted by conflict, disaster or State violence.[81]

Although according to these broad definitions, people displaced by environmental disasters deserve some sort of protection, and although moving away from a climate disaster is a rational adaptation response, current legal frameworks do not facilitate cross-border movement in the context of environment-related impacts. Those who migrate motivated by environmental degradation and are displaced across international borders still move in a condition of uncertainty, as there is a notable legal gap in the protection of this category of migrants. Indeed, while internally displaced people – namely people who migrate within the borders of their nation – fall into the category of environmental migrants, the same is not true for international migrants who aspire to access the right to asylum across borders. This ultimately means that those who are referred to as 'environmental migrants' risk detention or expulsion when attempting to cross an international border in search for refuge.

4.2 International refugee law

Refugee law is the branch of law which deals with the rights and duties that States have vis-à-vis refugees. At the international level, protection gaps exist in the case of cross-border movements of people fleeing from environmental disasters or from the possibility of them occurring. In this paragraph, I will discuss the cornerstone of the international refugee protection regime, which constitutes a legal gap concerning the protection of this category of people.

4.2.1 The 1951 Geneva Refugee Convention

As highlighted above, protection gaps exist in the case of cross-border movements of people fleeing from environmental disasters or from the possibility of them occurring. Indeed, this category of migrants is not automatically protected by the the cornerstone of the international

[81] Garlick, M., Inder C., (2021). *Protection of refugees and migrants in the era of the global compacts*, Interventions, 23:2, 207-226.

refugee protection regime: the 1951 Geneva Convention Relating to the Status of Refugees.[82] The document aimed to provide a more stable legal status for foreigners or stateless persons who fled and remained displaced because they feared returning to their homeland after the political, ethnic and territorial upheavals following the atrocities of World War II and in the climate of the Cold War.

Article 1.A(2) of the Geneva Convention, defines a 'refugee' as a person who "*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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it".* [83] This definition of refugee has been criticised for being limited in scope, as it limits the possibility of being granted refugee status to a narrow group who are being directly persecuted for specific reasons.[84] Article 1 lists the five grounds of persecution under which an individual is eligible for the status of refugee – race, religion, nationality, membership of a particular social group and political opinion. Indeed, such a broad definition shows a lack of integration between the definition of refugee and other categories of human rights, such as economic, social, cultural and environmental rights.

According to Terje Einarsen,[85] notwithstanding the broad character of the definition, the latter does not actually cover every group that might be referred to as 'refugees' in common usage of the term. The substantial limitation identified by Einarsen consists in the lack of reference to: (i) internally displaced refugees – namely people who have not crossed an international border – ; (ii) migrants of economic or personal convenience; (iii) stateless persons who are not also liable to persecution; and (iv) accidental victims of natural disasters, environmental problems, or a violent society without an element of discrimination or differential treatment that expose any given group or individual to a higher risk of harm than others.

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[82] UN High Commissioner for Refugees (UNHCR), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, September 2011. Hereinafter: Geneva Convention or Refugee Convention.
[83] Geneva Refugee Convention Article 1.A.(2).
[84] Cole, P. (2015). *What's Wrong with the Refugee Convention?* E-International Relations.; Einarsen, T. (2011). *Drafting History of the 1951 Convention and the 1967 Protocol.* From: The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary, Edited By: Andreas Zimmermann, Felix Machts (Assistant), Jonas Dörschner (Assistant). Oxford Commentaries on International Law.
[85] *Supra note 16.*

In addition to defining the term, the Geneva Convention also details the rights to which individuals identified as 'refugees', as well as asylum-seekers are entitled. Art. 33 states that refugees shall not be expelled or returned to situations where their life and freedom are at risk. These rights are based on the principle of *non-refoulement* and are reaffirmed by Article 3 of the European Convention on Human Rights (ECHR) and Article 19(2) of the Charter of Fundamental Rights (CFR or the Charter).[86] This principle translates into the obligation not to transfer, directly or indirectly, a refugee or asylum seeker to a place where he or she risks to be persecuted, tortured or subjected to other inhuman or degrading treatment or punishment on account of his or her race, religion, nationality, membership of a particular social group or political opinion. [87] Reservations to article 33 are not permitted by the treaty,[88] therefore States parties cannot derogate from this *non-refoulement* obligation, except in cases provided for by Articles 32 and 33 of the Convention, which allow for the expulsion of a refugee *"on grounds of national security or public order"* and where there are serious reasons for which the individual can be considered a danger or a threat to the security of the country in which he resides. [89] The prohibition of *refoulement* applies irrespective of whether or not the person has already been recognised as a refugee and/or whether or not she or he has made a formal application for such recognition.

European countries are obliged to verify on a case-by-case basis that each expulsion is carried out in accordance with this principle. It is asserted that in order to force an individual to leave the territory of first asylum, there must be a country of second asylum – known as the 'safe third country'– that is ready and willing to welcome the asylum-seeker. A third country is considered 'safe' within the meaning of Article 38(1) of the Asylum Procedures Directive,[90] according to which a country may be so qualified if three conditions are met: 1) there is no risk of serious harm as defined in the Qualification Directive,[91] namely death penalty, torture or

[86] Article 3 of the European Convention on Human Rights claims the prohibition of torture, stating that *"no one shall be subjected to torture or to inhuman or degrading treatment or punishment";* Article 19 of the Charter of Fundamental Rights affirms the protection in the event of removal, expulsion or extradition; it states that *"collective expulsions are prohibited"* and that *"no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment".*

[87] Convention Relating to the Status of Refugees, Article 33.1

[88] Ibid, Article 42.

[89] Convention Relating to the Status of Refugees, Articles 32 and 33.

[90] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013. Available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32013L0032.

[91] This Directive will extensively analysed below. Directive 2011/95/EU 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

inhuman or degrading treatment, serious threat to the applicant's life arising from indiscriminate violence in situations of armed conflict; 2) the principle of non-refoulement in accordance with the Geneva Convention is respected; 3) the possibility exists to request refugee status and, for those recognised as such, to obtain protection under the Geneva Convention.

The notion of persecution in refugee law and environmental displacement

Although the Geneva Refugee Convention represents a crucial document in the definition and legal protection of refugees, it does not provide a definition for the term 'persecution', nor there is a universally accepted definition in the legal literature on the subject.

Although the term 'persecution' is not codified under international refugee law, it has evolved significantly by means of doctrine and case law. In order to establish a basic distinction and structure an analysis, it would be useful to point out the definition of 'persecution' given by the Nouveau Petit Robert dictionary, which defines it a type of harm which meets the following characteristics: (i) it is inflicted by a human persecutor – not by natural catastrophes or poverty alone; (ii) it is unjust and discriminatory; (iii) cruel or serious; (iv) persistent – in the sense that it does not relate to episodic harm, but rather to a sustained or systemic threat of serious and unjust harm. According to this very comprehensive definition, individuals harmed by environmental disasters cannot be said to be persecuted. Indeed, they especially do not meet the first criterion, where it is explicitly stated that the term does not encompass natural catastrophes.

A much wider interpretation has been given by a leading international refugee law expert, Hathaway. [92] He stated that persecution is *"the sustained or systemic violation of basic human rights demonstrative of a failure of state protection".* In this view, if we consider that environmental catastrophes may result into fundamental rights being violated, either by the causes of the disaster itself, or because the State fails to protect the people affected, or because the State even is partly responsible for the disaster due to flawed policies, then, environmental displaced might, to a certain extent, fall in the category of persecuted people.

Although the above-mentioned definitions of 'persecution' seem not to encompass environmental migrants, at least not explicitly, it is still true that the Geneva Convention, namely the main document regulating refugee law, does not define the term. Although this lack

protection, and for the content of the protection granted (recast), OJ L 337, 20.12.2011. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095.

[92] Hathaway, J.C., (1991). *The Law of Refugee Status*, Toronto, Butterworths, 1991. For a similarly broad approach, see also McAdam, J., (2014). *Climate Change, Forced Migration, and International Law*. Oxford University Press.

of definition has long been criticised by scholars,[93] the UNHCR has argued in a training manual[94] on international protection that it is a deliberate choice, made as part of a flexible approach, in order to allow the term to encompass several forms of persecution depending on the context. The same has been argued by Grahl-Madsen, who states that "*the drafters have wanted to introduce a flexible concept which might be applied to circumstances as they might arise",*[95]

Following this alleged search for flexibility, in practice the Convention has already been applied in an extensive way to include forms of harm, such as domestic abuse, which were not initially included in the original meaning of the document. However, even though this hints to the fact that, in the future, more categories of people might find protection under the Geneva Convention, it is still unlikely to encompass environmental migrants, especially given the restrictive grounds against which an act is defined as persecutory. [96]

In international law

In international law, the concept of persecution is explained in Article 7 of the Rome Statute of the International Criminal Court, where it is described as a crime against humanity, alongside other acts which happen in a 'widespread or systematic' manner.[97] In the same Statute, precisely Article 7 (2), it is specified that 'persecution' is the *"intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."* This definition seems to be more flexible and open than the ones given by scholars. Indeed, climate or environmental catastrophes have the potential, as it will be more deeply discussed below, to harm fundamental human rights. However, the term 'intentional' contained in Article 7 of the Statute does not leave much room for extensive interpretation.

However, it is highly significant that, in a policy document drafted on 15 September 2016 by Prosecutor Fatou Bensouda [98], the ICC has decided to include within its jurisdiction

[93] Goodwin-Gill, G. and McAdam, J., n.d. *The refugee in international law*; Nasr, L., (2016). *International Refugee Law: Definitions and Limitations of the 1951 Refugee Convention.* The London School of Economics and Political Science.
[94] UNHCR, (2005). *An Introduction to International Protection. Protecting persons of concern to UNHCR.*
[95] Grahl-Madsen, A. *The Status of Refugees in International Law*, vol. I, 1966, 196 or 197. Maiani, F., (2008). *The Concept of "Persecution" in Refugee Law: Indeterminacy, Context-sensitivity, and the Quest for a Principled Approach.*
[96] See Hathaway, J.C., (1991). *The Law of Refugee Status*, Toronto, Butterworths, 1991. See also Maiani, F., (2008). *The Concept of "Persecution" in Refugee Law: Indeterminacy, Context-sensitivity, and the Quest for a Principled Approach*.
[97] *Rome Statute of the International Criminal Court* (concluded 17 July 1998, entered into force 1 July 2002).
[98] International Criminal Court, (2016). *Policy paper on case selection and prioritasation*. Office of the Prosecutor.

crimes resulting in the 'destruction of the environment', 'illegal exploitation of natural resources' and 'illegal expropriation of land' and to prosecute governments and individuals responsible for such crimes: In this way, all violations of the human rights of entire populations that are the result of such actions are in fact brought under the broader category of 'crimes against humanity' (Article 5(b) and Article 7 of the Statute), to the point of leading many to speak of the actual immanence in the international legal system of the crime of 'ecocide'. [99] Precisely because of this initiative taken in 2016 by the Prosecutor, in January 2021 a representation of indigenous groups in the Amazon denounced Brazilian President Jair Bolsonaro at the International Criminal Court, pointing to him as responsible for the dismantling of environmental policies to protect the rainforest and the consequent violation of the human rights of indigenous peoples.

In European Union law

At the EU level, the term 'persecution' has been defined by a 1996 Joint Position published by the Council,[100] according to which, in order to be referred to as 'persecution' an act must fulfil two criteria: (i) it has to be 'sufficiently serious' either because of their inherent nature, or because of its repetition; (ii) it must be preventing the person in question from continuing to live in her or his country of origin in virtue of the fact that it attacks her or his human rights. In addition to that, in order to be classified as persecutory, an act has to be based on one of the grounds mentioned by Article 1.A of the Geneva Convention; namely race, religion, nationality, membership of a particular social group or political opinions.

Case law at the European level has repeatedly ruled on what acts persecution comprises, and in the analysed rulings, environmental factors have not been found to constitute ground for

[99] Already in 1972, as a result of the worldwide outrage caused by the environmental disaster caused by the American army in Vietnam with the use of napalm, the Swedish Prime Minister Olof Palme qualified that war as 'ecocide' (UN Conference on the Environment 1972). Similarly, in 1985, the rapporteur Benjamin Withaker recommended that the UN include ecocide in the 1948 Convention and consider it as an autonomous crime, on a par with genocide and ethnocide. The notion of ecocide was then reaffirmed by the non-governmental organisation EEE (End Ecocide on Earth), which, with the collaboration of experts in international law and environmental law, submitted a draft amendment to the Rome Statute to introduce ecocide as a new crime against peace. As a result of the initiative taken in 2016 by Prosecutor Bensouda, in January 2021 a representative of indigenous groups in the Amazon filed a complaint with the International Criminal Court against the Brazilian President Jair Bolsonaro, indicating that he is responsible for the dismantling of environmental policies to protect the rainforest and the consequent violation of the human rights of the populations living there.

[100] Council of the European Union, (1996). Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees. (6/196/JHA). OJ : JOL_1996_063_R_0002_01.

persecution. In *Prosecutor v Simic*,[101] it was held that the crime of persecution is constituted of two acts: (i) the *actus reus*: there is discrimination which infringes a fundamental right laid down in international customary law or treaty law; (ii) the *mens rea*: the act (or deliberate inaction) was carried out with the express intention to discriminate on one of the listed grounds, specifically race, religion or politics. According to rulings upheld by the Council of State of The Netherlands, for instance, murder and physical maltreatment are necessarily elements of persecution.[102] None of the grounds listed in the mentioned case law is equal nor closely similar to harm resulting from natural disasters.

The political sphere

On a more extensive note, UNHCR's Director of International Protection observed that *"persecution cannot and should not be defined solely on the basis of serious human rights violations*". He stated that whenever multiple severely adverse events which would not, alone, amount to persecution, would do so when their cumulative effect is considered. This is especially so when such cumulation of measures *"make life in the country of origin so insecure from many perspectives for the individual concerned, that the only way out of this predicament is to leave the country of origin."*[103] In this view, it might well be argued that, given the multicausality of environmental migration discussed above, that whenever a natural disaster gives rise to other occurrences such as a shortage of resources, conflicts or extreme poverty, it may fall within the scope of persecution.

However, as we will see below, better grounds for granting a certain degree of protection to environmental migrants are found in other instruments. It also has to be noted that the UNHCR, while stating that the Geneva Convention does deliberatively not define the term 'persecution' in order to allow for flexibility, specifies that *"neither natural disasters nor poor economic conditions are considered to be persecution".*

[101] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY), *Prosecutor v. Blagoje Simić, Miroslav Tadić, Simo Zarić* (judgement 17 October 2003) para. 47. See also ICTY, *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* (concluded 25 May 1993) Article 5(h). (The Statute established the ICTY and was appended to and adopted by UN Security Council Resolution 827.)

[102] Raad van State, Afdeling Rechtspraak (ARRvS), 29 June 1982, R.V., 1982, 3; ARRvS., 12 July 1982, R.V., 1982, 7.

[103] United Nations High Commissioner for Refugees (UNHCR), (2002). Statement by Ms Erika Feller, Director, Department of International Protection, UNHCR' (SCIFA Brussels 6 Nov. 2002) 3.

4.3 European refugee law

The most far-reaching regional developments on international protection of refugees have come from the European Union (EU), which, in 1999 established a common European asylum system based on the full and inclusive application of the Geneva Convention[104]. Since then, five key legislative instruments have been adopted in original and revised (or "recast") versions. Each of them adds content to refugee law in an area not addressed by the 1951 Convention. The five main instruments of European refugee law are the Dublin Regulation,[105] the Asylum Procedures Directive, [106] the Reception Conditions Directive,[107] the Qualifications Directive,[108] and the Temporary Protection Directive.[109] However, this chapter will focus only on the last two, as they are those which contain the provisions regarding the topic of this thesis, namely conditions for international protection. The European external borders agency (Frontex) and the European Asylum Support Office (EASO), established respectively in 2005 and in 2010, together with the European Court of Human Rights, which has addressed asylum issues in the context of the European Convention on Human Rights and Fundamental Freedoms, still have significant influence on the wider development of refugee law.[110]

Article 78 of the Treaty on the Functioning of the European Union (TFEU) is a primary law provision that affirms that for the purpose of developing a common policy on asylum, subsidiary protection and temporary protection to third country nationals, the European Union authorises the influence of an external source, and is bound to abide by the Geneva Refugee

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[104] See UNHCR, (2005). *An Introduction to International Protection. Protecting persons of concern to UNHCR* and UNHCR, (2017). *A guide to international refugee protection and building state asylum systems.* Handbook for Parliamentarians N° 27.

[105] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. *OJ L 180, 29.6.2013, p. 31–59.* Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32013R0604.

[106] See *supra* note 100.

[107] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)
OJ L 180, 29.6.2013, p. 96–116. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033.

[108] See *supra* note 101.
OJ L 337, 20.12.2011, p. 9–26. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095.

[109] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof
OJ L 212, 7.8.2001, p. 12–23. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32001L0055.

[110] UNHCR, (2017). *A guide to international refugee protection and building state asylum systems*. Handbook for Parliamentarians N° 27.

Convention and other relevant treaties.[111] The Convention appears to be a parameter, a legality benchmark with which all secondary norms in the field of asylum policy at the European level have to comply. This indeed means that the Geneva Convention can be invoked to challenge the legitimacy of future legislation. In addition to that, secondary European Union legislation also refers to the Geneva Convention, thinking of the latter as a normative or interpretative source.[112]

As mentioned above, the protection regime under the Refugee Convention is not applicable to those fleeing from the impacts of environmental or climate change, and, at the EU level, there is currently no distinct instrument applicable to 'environmentally displaced individuals'. This, therefore, results in those crossing international borders in search of a refuge from climate change generally being denied access as asylum-seekers.

4.3.1. Qualification Directive

Aim and scope

The so-called Qualification Directive declares in its preamble that the European Council's work towards establishing a Common European Asylum System has been based on the *"full and inclusive application"* of the Geneva Convention, and that the Convention constitutes *"the cornerstone of the international legal regime for the protection of refugees."*[113] Furthermore, Article 12 (1) (a) declares that *"a third country national or a stateless person is excluded from being a refugee, if he or she falls within the scope of Article 1 D of the Geneva Convention".*[114] Similarly, Article 20 makes it clear that Chapter VII shall apply *"without prejudice"* according to the provisions laid down in the Geneva Convention.[115]

Notwithstanding this strong recall to the Convention, it is well known that the directive in question was born from a desire of the international community to broaden categories of international protection for those people who did not meet the criteria set at Geneva according

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

[112] Matera, C., (2015). *Towards an asylum law of armed conflicts? The Diakité judgement of the Court of Justice of the European Union and its implications.* Questions of International Law.

[113] Qualification Directive, recitals (3) and (4).

[114] Article 1 D of the Geneva Convention states that the document *"shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance".*

[115] Qualification Directive, Article 20 (1).

to which the status of refugee could be granted. The impetus came from a Danish proposal[116] in 1997 followed by a note by the Netherlands Presidency[117] in the same year. These two inputs focused primarily on creating a new kind of protection based on Article 3 of the ECHR, which prohibits inhuman and degrading treatment.

The Qualification Directive defines what characteristics an individual has to possess in order to qualify as a refugee, or, alternatively, as a beneficiary of subsidiary protection. This instrument was therefore born with the aim of harmonising rules on a different kind of international protection which already existed in some member states, but not in others, who rather adopted ad hoc instruments (Belgium, Ireland, United Kingdom).

Initially, the idea of harmonising not only existing rules but also adding environmental, compassionate or other triggers that might justify subsidiary protection was proposed, but it was quickly abandoned.[118] This hints to the fact that, although the directive constitutes positive steps towards more legal certainty in the EU, and although its premises make general reference to an objective of protecting *"those who, forced by circumstances, legitimately seek protection in the Union"* [119] and do not exclude exceptions to the rule of 'individuality' of serious harm,[120] the directive's scope remains limited, which causes it to avoid leading to more people being granted international protection in the EU.[121]

While the 1951 Geneva Refugee Convention remains the central legal instrument in the context of international protection, and it shall be applied *"full[y] and inclusive[ly]",*[122] specifically concerning the status of refugee, the Qualification Directive introduces a secondary type of international protection in the European Union: the so-called subsidiary protection. The directive stipulates the legal criteria for qualification for subsidiary protection and further develops the criteria for refugee status.

Refugee status

[116] Note from the Danish Delegation to Migration and Asylum Working Parties 'Subsidiary Protection' 6764/97 ASIM 52 (17 Mar. 1997).
[117] Note from the Presidency to Asylum/Migration Working Group 'Implications of Article 3 of the European Convention on Human Rights for the Expulsion of Illegally Resident Third Country Nationals' 7779/97 ASIM 89 (28 Apr. 1997).
[118] Note from Presidency to Asylum Working Party 'Discussion Paper on Subsidiary Protection' 13167/99 ASILE 41 (19 Nov. 1999) 2.
[119] Qualification Directive, Recital 2.
[120] Qualification Directive, Recital 35.
[121] McAdam, J., (2005). *The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime*. Oxford University Press.
[122] Qualification Directive, Recital (3).

The Qualification Directive defines a refugee exactly as in the Geneva Convention.[123] The process of examination of an application for international protection is detailed in chapter II of the Qualification Directive. Article 4 describes the assessment process of facts and circumstances under which individuals can be considered to belong to the categories of either refugees or beneficiary of subsidiary protection. It is stated that analysis should be carried out on a case-by-case basis, objectively and impartially, considering the following elements: (i) information relating to the country of origin of the applicant, including laws, regulations, and accessibility to protection; (ii) individual circumstances of the applicant including their background and personal characteristics; (iii) threats to which the applicant has been exposed or expects to be exposed to persecution or serious harm.[124]

According to a 2011 ruling of the Court of Justice,[125] this decision-making process of assessing whether an individual can be qualified as either a refugee or a beneficiary of subsidiary protection, can be seen as an operation consisting in two separate steps, of which Article 4 is only the first. The judgement states, in fact, that Article 4 equals to the assessment of *"factual circumstances which may constitute evidence that supports the application"*[126] This first step consists in collecting information, accepting material facts and assess their credibility, and on the basis of that, carry out a risk assessment, to check whether the treatment suffered by the applicant can possibly amount to persecution or serious harm.[127]

Subsequently, the second stage of this process is the so-called *"legal appraisal of that evidence"*[128], which consists in the real act of deciding, on the basis of the risk assessment carried out previously, whether the applicant is eligible for refugee status.[129] The conditions considered in the mentioned second step are laid down in article 9 of the Qualification Directive. The provision specifies that an act, in order to be considered as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, must either (i) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, or (ii) be an accumulation of various measures, including sufficiently severe violations of human rights.[130] In addition to that, Article 9 (1) (a) also states that, in particular, the rights that must

[123] Qualification Directive, Article 2(d).
[124] Qualification Directive, Article 4.
[125] Judgment of the Court (First Chamber), 22 November 2012. M. M. v Minister for Justice, Equality and Law Reform and Others. Case C-277/11. ECLI:EU:C:2012:744
[126] Ibid. at para. 64.
[127] See European Asylum Support Office (EASO), (2018). *EASO Practical Guide: Qualification for international protection.* EASO Practical Guides Series.
[128] CJEU judgment in M.M. (Case C-277/11) at para. 64.
[129] *Supra* note 159.
[130] Qualification Directive, Article 9.

not be violated are the non-derogable ones set out in Article 15 (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, namely: (i) right to life; (ii) prohibition of torture and inhuman or degrading treatment or punishment; (iii) prohibition of slavery and servitude; (iv) principle of 'no punishment without law'.

In this view, can an environmental disaster be regarded as violating the non-derogable human right to life? The right to life is often linked to an environmental perspective, according to which this right can be seriously undermined by natural disasters, whether resulting from climate change or not. Although it can be argued that an extreme weather event may constitute an act of persecution which is 'sufficiently serious by its nature' and which violates the human right to life, there are two main reasons why we cannot speak about persecution in the case of the Qualification Directive.

First, Article 10 of the directive lays down specific reasons for persecution which must apply, which are the same as those detailed in the Geneva Convention, namely race, religion, nationality, membership of a particular social group or political opinion. The listed reasons do not mention environmental disasters nor leave much space for interpretation. In addition to that, Article 10(2) requires a 'connection' between the present Convention ground and the acts of persecution. However, it has been clarified by the UNHCR Guidelines on International Protection that evidence of a direct intent and nexus between the persecutory action and one of the five reasons can, in a special case, not constitute a requirement.[131]

Namely, a discriminatory intent and connection may not have to be established where the State shows indifference towards the victims of violence and takes no steps to protect them, and where that indifference is based on the victims' status as a member of a particular social group. Hathaway considered that *"it is sufficient to show that the government simply could not be bothered to protect a portion of the at-risk group – reasoning, for example, that because they are 'only' women or indigenous persons they were not worthy of an expenditure of government resources. In such circumstances, the failure of protection is causally connected to a Convention ground and refugee status should be recognised".*[132] Drawing on this type of analysis, in cases where a State is, for a Convention reason, indifferent to a harm caused to an individual by an environmental disaster, and does not take steps to protect the individual from

[131] United Nations High Commissioner for Refugees (UNHCR), (2002). UNHCR Guidelines on International Protection No. 2: 'Membership of a Particular Social Group' within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (unhcr 2002).
[132] J.C. Hathaway, (2014). *Food Deprivation: A Basis for Refugee Status?*

that harm, it is possible to establish an entitlement to refugee status in the context of climate change-related harm.

The second reason why we cannot refer to environmental disasters as a persecutory act within the meaning of the Qualification Directive, is that in order to do so, it would be necessary to identify an actor of persecutor, as explained by Article 6 of the directive, which lists the actors of persecution. In this view, some categories of migrants fleeing from a human-made disaster might, according to an interpretation carried out in a broad and humanitarian manner, provided that there is a link with one of the five Convention grounds of persecution, or that we are in presence of a special exception, be protected by the Geneva Convention. However, all those fleeing disasters entirely caused by natural factors will be left out of the Convention's and directive's scope.

Subsidiary protection

In case it turns out that an individual does not meet the requirements to be qualified as a refugee, an assessment to check whether subsidiary protection is applicable will be carried out. Subsidiary protection is defined in Article 2(f),[133] according to which, in order to be eligible for this type of international protection, an individual must be either a third-country national, or a stateless person who does not qualify as refugee and who, if returned to her or his home is country, is believed to be exposed to *"a real risk of suffering serious harm"*. Essentially, from this definition, we understand that an individual can be considered as entitled to subsidiary protection only when it has already been established that she or he does not qualify as a refugee within the meaning of the definition contained in the Geneva Convention.

The procedure of qualification for subsidiary protection is detailed in chapter V of the Qualification Directive. Article 15 specifies that 'serious harm' within the meaning of Article 2(f), consists of a) death penalty or execution; or b) torture or inhuman or degrading treatment or punishment; or c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. Since death penalty is defined as the state-sanctioned killing of a person as punishment for a crime, harms inflicted by a natural disaster cannot, by definition, be referred to as death penalty. Concerning

[133] The Article states that "'*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 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".*

point c, it is interesting to refer to a judgement of 10 June 2021, the *Bundesrepublik Deutschland case*.[134] In this instance the Court of Justice ruled that the wording 'serious and individual threat' to the life of the applicant for subsidiary protection must be interpreted broadly. This implies that national authorities must carry out a comprehensive assessment of all the relevant circumstances of the individual case, in particular those which characterise the situation of the applicant's country of origin.[135] A ruling such as this one suggests that, if the existing directive is not sufficient to protect certain categories of people, the time might be ripe for the legislator, following case law inputs, to fill this legal vacuum.

However, point b seems to be the one which offers the possibility of the most extensive interpretation of this article. The act of torture, contained in point b, has been defined by Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as an intentional act that inflicts severe pain or suffering, whether physical or mental, for the purpose of obtaining a confession by the subject.[136] According to article 16 of the same Convention, inhuman or degrading treatment is defined as treatment which is contrary to human rights but which does not amount to torture as defined by Article 1. In this view, we notice that, while the harm resulting from environmental disaster cannot be qualified as torture, it does have the potential of causing the affected people to suffer inhumane or degrading treatment.

Indeed, Kolmannskog and Myrstad[137] have argued that there is a strong possibility that point b can be applied to natural disasters, also on the basis of a human rights approach guided by case law which will be discussed in the following chapter. In addition to that, in *Elgafaji v Staatssecretaris van Justitie,*[138] for instance, the Court considered that Article 15(b) corresponds 'in essence' to Article 3 ECHR, which prohibits inhuman or degrading treatment.[139] This observation indeed provides a persuasive argument to hold that relevant *non-refoulement* jurisprudence from the European Court of Human Rights might guide the interpretation of the scope of Article 15(b) of the Qualification Directive towards granting

[134] *CF and DN v Bundesrepublik Deutschland* (2021). Request for a preliminary ruling from the Verwaltungsgerichtshof Baden-Württemberg. Case C-901/19. ECLI:EU:C:2021:472.
[135] Ibid. at para. 40.
[136] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984. entry into force 26 June 1987, in accordance with article 27 (1). Article 1.
[137] See Kolmannskog V. and Myrstad F., (2009). *Environmental Displacement in European Asylum Law*, European Journal of Migration and Law, p. 313-326.
[138] *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* (2009), Reference for a preliminary ruling: Raad van State – Netherlands, Case C-465/07.
[139] *Ibid.*, at para. 28.

subsidiary protection in cases of extreme natural disasters on the basis of Article 3 of the ECHR. However, in the Elgafaji case the CJEU held that *"Article 15(c) of the Directive is a provision, the content of which is different from that of Article 3 of the ECHR, and the interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR"* [140]

Furthermore, also in the M'Bodj case,[141] Article 15(b) of the Qualification Directive was interpreted restrictively. Indeed, the CJEU ruled that the concept of serious harm does not cover the situation of a general lack of healthcare to which an individual suffering from a serious illness may be subjected if returned to his or her country of origin, unless the person in question is intentionally deprived of healthcare.[142] What can be concluded from the reasoning applied in this ruling is that the 'serious harm' referred to in the directive must come from a third actor and it has to be carried out intentionally, it cannot be based on "*a general shortcoming in the health system of the country of origin*".[143] If we apply this reasoning to environmental harm, we can posit that article 15 b) of the Qualification Directive is not able to protect harmed individuals who migrate.

As we will see in the following chapter, a similar situation was judged very differently by the ECtHR, using a human rights approach.

4.3.2. Temporary Protection Directive

Aim and scope

The Temporary Protection Directive was born as a EU's response to the need for special procedures to deal with mass influxes of displaced persons stemming from the 1990s conflicts in the former Yugoslavia, in Kosovo and elsewhere. It has been revealed that during the negotiations, the Finnish delegation pushed for the inclusion of a phrase recognising persons displaced by natural disasters. Eventually, the Finnish delegation has given in to pressures coming from other Member States, especially Belgium and Spain, which *"pointed out that such situations were not mentioned in any international legal document on refugees"*.[144] This

[140] *Ibid.*
[141] *Mohamed M'Bodj v État belge* (2014), Request for a preliminary ruling from the Cour constitutionnelle (Belgium). Case C-542/13.
[142] M'bodj Case, para. 41.
[143] M'bodj Case, para. 35.
[144] Council (2001). Outcome of proceedings, 6128/01. See also Kolmannskog V. and Myrstad F., (2009). *Environmental Displacement in European Asylum Law*, European Journal of Migration and Law, p. 313-326.

gives a hint of what we will analyse below, namely of the more open approach of Finland compared to that of other Member States.

The aim of the Temporary Protection Directive is therefore to establish minimum standards for granting migrants 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. The founding awareness was that, since *"cases of mass influx of displaced persons who cannot return to their country of origin have become more substantial in Europe in recent years"*, it would be interesting to develop *"exceptional schemes to offer them immediate temporary protection*".[145] In contrast to the 1951 Convention, which implements status determination on an individual basis, temporary protection offers group-based protection which is used to provide an emergency safe harbour to those in immediate need.

Although the concept of temporary protection might seem similar to that of subsidiary protection, there are crucial differences between the two. The notion of subsidiary protection was defined by the Austrian Presidency in 1998 as *"protection for persons from third states who do not fall within the scope of the Geneva Convention but who still have need of some other form of international protection"*.[146] Therefore, subsidiary protection is distinguished from temporary protection on the basis that the former was granted following individual status determination, whereas the latter denotes protection granted in a mass influx situation.

While the concept of protection as described in the Temporary Protection Directive might seem to broaden that of refugee status and of subsidiary protection within the meaning of, respectively, the Geneva Convention and the Qualification Directive, temporary protection has never been employed so far, and it is generally regarded as an exceptional measure, only to be applied in situations of mass influx.[147] The UNHCR has also defined the Temporary Protection Directive as a tool of international protection, which offers sanctuary to those fleeing humanitarian crises.[148]

The Temporary Protection Directive applies to 'displaced persons' as defined by Article 2(c). Namely, displaced persons are third-country nationals or stateless persons who were forced to leave their region of origin and are unable to return in safe and durable conditions because of the situation prevailing in their home country. More precisely, this directive addresses to (i) persons who have fled areas of armed conflict or endemic violence; (ii) persons

[145] Temporary Protection Directive, Recital (2).
[146] 1999 note from the Austrian Presidency.
[147] European Commission, (2016). Study on the temporary protection directive: Final report.
[148] United Nations Human Rights Committee (UNHRC), 'Guidelines on Temporary Protection or Stay Arrangements' (n 9) para 3.

at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights.[149] Clearly, there is no explicit mention nor an agreement on whether environmentally displaced persons can be protected within the scope of this Directive.

Considering the first point, Skordas' definition of endemic violence is particularly relevant, which states that "*endemic violence exists if the lack of effective law enforcement mechanisms is an entrenched feature of a dysfunctional political system, or of collapsing authority in failed states, or if the legitimate authorities are not capable of exercising monopoly of force"*.[150] Following this definition, environmental disaster is not encompassed.

Taking into account the second point, if we take the view that extreme whether events create situations in which non-derogable right to life is violated, such events would constitute violations of human rights. In addition to that, it has been argued that generalised violations of human rights often occur in, during or after a natural disaster.[151] In situations where the government is unwilling or unable to protect its population – or a part of it – from a natural disaster, it could be argued that a generalised violation of human rights is taking place. For instance, following the cyclone Nargis in May 2008, France and other countries accused the Burmese Junta of breaching fundamental human rights by not providing adequate disaster relief and for rejecting international aid.[152] In addition to that, the European Court of Justice has recently ruled that the right to life has been breached by the Russian authorities as they failed to act in preventing a mudslide.[153] We see, therefore, that failure to prevent, ex-ante, and failure to protect, ex-post, may, according to some interpretations, be considered as a generalised violation of human rights mostly the right to life, under the Temporary Protection Directive.

Strengths

Furthermore, the directive in question can be considered as possessing two main strengths, which might potentially be useful in extending its scope. First of all, it provides a broad definition of 'mass influx' to cover a wide range of different types of inflows and not confining the concept to numerical thresholds. More precisely, 'mass influx' is defined as the *"arrival in the Community of a large number of displaced persons, who come from a specific country or*

[149] Temporary Protection Directive, Article 2 (c)
[150] C. Allen., (1999). *Warfare, endemic violence & state collapse in Africa*, Review of African Political Economy, 26:81, 367-384.
[151] Kolmannskog V. and Myrstad F., (2009). *Environmental Displacement in European Asylum Law*, European Journal of Migration and Law, p. 313-326.
[152] *Ibid.*
[153] *Budayeva and others v. Russia* (2008). 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02.

geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme".[154]

Moreover, the UNHCR's Executive Committee defined in Conclusion no. 100 the term 'mass influx' as a situation characterised by: (i) considerable numbers of people arriving over an international border; (ii) a rapid rate of arrival; (iii) inadequate absorption or response capacity in host States, particularly during the emergency; (iv) individual asylum procedures, where they exist, which are unable to deal with the assessment of such large numbers.[155] This is promising in that it renders the Directive the only instrument in the EU which provides for the possibility of a large group of persons being granted protection. Secondly, the directive is a flexible instrument to be invoked at Member States' discretion, allowing for immediate protection to be granted after assessing situations a case-by-case basis. As Article 5 states, it is the Council, through the adoption of a Decision by a qualified majority, on the basis of a Commission proposal, which has the faculty of declaring the existence of a mass influx of displaced persons. The Decision will, then, introduce *"temporary protection for the displaced persons to which it refers, in all the Member States"*.[156] The fact that the granting or not of international protection to a certain group of individuals depends on a political decision of the Council, instead of depending on each member state's laws on protection obligations, leaves some hope in terms of possibly reducing the protection gap related to environmental migrants, as it grants a higher level of homogeneity. Obviously however, the challenge would lay in mobilising the political will and agreement to do so. [157]

Furthermore, as it is stated in Recital 12, as the nature of minimum standards commands, Member States have the capacity to *"introduce or maintain more favourable provisions for persons enjoying temporary protection in the event of a mass influx of displaced persons"*[158]. This is an interesting provision because, since there is currently no harmonised instrument at the international or EU level which protects environmental asylum-seekers, each case involving this category of migrants demanding international protection always has to be examined on a case by case basis, and at the national level.

Weaknesses

[154] Temporary Protection Directive Article 2 (d).
[155] United Nations High Commissioner for Refugees (UNHCR), (2004). Executive Committee No. 100 (LV). Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations.
[156] Temporary Protection Directive, Article 5 (3).
[157] Kolmannskog V. and Myrstad F., (2009). *Environmental Displacement in European Asylum Law,* European Journal of Migration and Law, p. 313-326.
[158] Temporary Protection Directive, Recital 12.

This directive also entails some drawbacks in terms of protection to be granted to environmental migrants. First of all, it constitutes a limited instrument to people who are not in a position to return home in the near future. This is so because Article 4 of the Temporary Protection Directive stipulates that the duration of temporary protection is of one year, with a maximum possible extension up to three years.[159] However, it has been argued that not only reconstruction after a natural disaster can take longer than 3 years, but in case of gradual environmental degradation due to climate change, the displaced can in most cases never return to his region of origin.[160] Because of this, according to Lopez, the maximum duration of three years seems incompatible with the obligation for Member States to apply temporary protection *"with due respect for human rights and fundamental freedoms and their obligations regarding non- refoulement",* as provided for in Article 3 (2) of the Directive.[161] Secondly, although offering protection in case of 'mass influx' represents a novelty in the international protection legal framework, and therefore is to be seen as a positive introduction, we also have to take into account that persons displaced by gradual environmental degradation due to climate change are less likely to arrive in a situation of mass influx than victims of sudden natural disasters. Thus, while the former category might be granted some sort of protection, people belonging to the latter might result as non-protected. [162]

4.3.3. National legislation

Although at the European Union level the Geneva Refugee Convention is considered a cornerstone of international protection law, deviation from it is possible. In 1996, a Joint Position was published by the Council concerning the harmonised application of the definition of the term 'refugee' in Article 1 of the Geneva Convention. Paragraph 1 of this Position states that, although in the EU international protection is granted on the basis of the Refugee Convention, determination of the refugee status is in every case based on criteria decided by the competent national bodies. It is also clarified that the conditions defined in Article 1 of the Convention do not affect the standards of domestic law against which a Member State may decide whether to grant protection to an individual.

[159] Temporary Protection Directive, Article 4.
[160] Lopez, A., (2007). *The Protection of Environmentally-Displaced Persons in International Law*. Environmental Law, Spring 2007, Vol. 37, No. 2 (Spring 2007), pp. 365-409. See also de Moor, N., *Environmental displacement: a new security risk for Europe?*
[161] The provision states that: "*Member States shall apply temporary protection with due respect for human rights and fundamental freedoms and their obligations regarding non-refoulement".*
[162] 'de Moor, N., *Environmental displacement: a new security risk for Europe?*

Indeed, while member states are required to harmonise their domestic legislation with the acquis , the process of 'harmonisation' implies that member states are entitled to a certain degree of flexibility. As stipulated by Article 288 TFEU, the standards contained in the directives are minimum standards, and although *"a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed",* it shall also *"leave to the national authorities the choice of form and methods".* However, it has been stated by previous case law that where national standards are introduced, they should provide more favourable – rather than more restrictive – conditions.[163] Indeed, a Member State may *"permit a person to remain in its territory if his safety or physical integrity would be endangered if he were to return to his country because of circumstances which are not covered by the Geneva Convention but which constitute a reason for not returning him to his country of origin".* [164]

The international community, including the European Union, has failed to provide efficient and comprehensive legal protection to environmentally displaced persons. Several Member States provide in their own legislation the possibility of granting protection under the form of a residence permit on a discretionary basis to a third-country national in cases where humanitarian reasons justify so. However, such permits are issued rarely and only upon a specific assessment of the individual circumstances.[165]

Among these countries we find, for instance, Portugal[166] and Denmark.[167] The Danish government has in practice proceeded with applying this provision, issuing residence permits on humanitarian grounds to families with minor children from certain areas in Afghanistan particularly affected by drought and food insecurity, and who would find themselves in an extremely vulnerable situation upon return.[168] The United Kingdom has also in the past granted

[163] Feijen, L., (2014). *Filling the Gaps? Subsidiary Protection and Non-EU Harmonized Protection Status(es) in the Nordic Countries. International Journal of Refugee Law*, 2014, Vol. 26, No. 2, 173–197 doi:10.1093/ijrl/eeu022.
[164] See *supra* note 100.
[165] See *supra* note 33.
[166] Art. 7, Paragraph 1, of the Asylum Law (Law No. 27/2008, dated 30 June) offers subsidiary protection in Portugal which can be granted for 'humanitarian reasons', which has been offered mostly, *inter alia,* to third-country nationals who do not meet the requirements defined in other legal frameworks. In addition, it is also important to note that the concept of 'serious harm' has been enshrined in Portuguese law as being a *"serious threat against the life or physical integrity of the applicant"* (Art. 7, Paragraph 2, Line c) of the asylum law), expanding the scope of the 'serious individual threat' referred to in the Qualification Directive. See also Serviço de estrangeiros e fronteiras – sef, "Portugal National Report (November 2009) Protection Statuses Complementing eu Legislation Re-garding Immigration and Asylum in Portugal.
[167] The Danish Aliens Act, Section 9 b. provides that: *"(1) Upon application, a residence permit can be issued to an alien who, in cases not falling within section 7(1) and (2), is in such a position that essential considerations of a humanitarian nature conclusively make it appropriate to grant the application."*
[168] See European Commission, *supra* note 183; see also Comparative Study on the Existence and Application of Categorised Protection in Selected European Countries, prepared by the International Centre for Migration Policy

ad hoc protection to people fleeing environmental disasters, namely in response to the Montserrat volcanic eruption in 1995/1997.[169]

However, in the Eurppean Union, only three Member States have explicitly stated statutory protection for persons fleeing environmental disasters in their national legislation. Sweden, Finland and Italy, indeed do recognise the figure of environmental migrants as a category of 'persons in need of protection' and, at least on paper, offer protective measures to them as well. The aim of the comparative analysis that follows is that of verifying whether one of these three systems of protection can be taken as a model to be applied by other member states, or even at the EU level.

Swedish Aliens Act

The Swedish Aliens Act undoubtedly widens the scope of the Qualification Directive, and more precisely, broadens the definition of 'subsidiary protection' within the meaning of the directive, referring instead to 'persons otherwise in need of protection' and including new categories of people who might deserve asylum.

Chapter 4, section 1 of the Swedish Aliens Act defines a refugee exactly according to the definition of the Geneva Refugee Convention. In case an individual does not qualify as a refugee within the above-mentioned meaning, the definition of a 'person otherwise in need of protection' might apply. A 'person otherwise in need of protection' is defined by Section 2 as an alien who does not qualify as a refugee and who is outside of her or his home country. This type of protection can be granted to an asylum-seeker who meets one of the following criteria: (i) feels a well-founded fear of suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment; or (ii) needs protection because of external or internal armed conflict or, because of other severe conflicts in the country of origin, feels a well-founded fear of being subjected to serious abuses; or (ii) is unable to return to the country of origin because of an environmental disaster.[170]

As we can see in point 3, according to the Aliens Act, people fleeing an environmental disaster who seek international protection in Sweden are indeed protected. Concerning the rights awarded to people who are otherwise in need of protection, chapter 5 points out that international protection in Sweden builds on the concept of residence permit rather than on that

Development, Vienna, commissioned and funded by the Advisory Committee on Aliens Affairs (ACVZ), The Netherlands, January 2006, p. 35.

[169] Memorandum from the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, Baroness Symons, 9 February 1998.

[170] Swedish Aliens Act, Chapter 4 Section 2.

of a status. The permit acts as the legal basis for inclusion in the population registry and the access to social and economic benefits under Swedish law. Aliens in need of protection are therefore granted all social and economic rights and benefits on the same terms as for Swedish citizens.[171] This vision was, however, not supported by the UNHCR, who argued that, while persons forced to leave their countries due to ecological or environmental disasters should be given residence permits, this should happen in a separate procedure from that used to determine a need for protection.[172]

Concerning the scope of the provision detailing the type of protection to be granted to those who do not qualify as refugees, but who meet the requirements stated above, only sudden disasters would be included as 'environmental disasters' in the law, while slow-onset disasters and degradation of people's livelihoods are not encompassed by the definition.[173] It is also specified that in order for this type of protection to be granted to environmentally-displaced people, there should not be any alternative of internal flight safe and available. Finally, people 'otherwise in need of protection' are subject to a fundamental limitation, as it was stated in the *travaux préparatoires*. Namely, since in the case of a mass influx Sweden may not have the capacity to receive large numbers of aliens in need of protection, a 'saving clause' was inserted, allowing the government to refuse to grant protection in those cases.[174] Therefore, the government has the faculty of denying international protection *"if this is necessary because limitations have arisen in Sweden's capacity to receive aliens".*[175] Finally, the provision has never been applied to date.[176]

Indeed, the hugest backward step to this widening of conditions to be eligible for international protection, came visible during the so-called 'refugee crisis' of 2015 and 2016, when Sweden instituted a temporary repeal[177] in effect from July 20, 2016 to July 19, 2019,

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[171] European Migration Network, (2010). The Practices in Sweden Concerning the Granting of Non-EU Harmonised Protection Statuses.

[172] UNHCR, (2009). *Climate change, natural disasters and human displacement: a UNHCR perspective*. See also European Migration Network, (2010). *The Practices in Sweden Concerning the Granting of Non-EU Harmonised Protection Statuses*.

[173] Preparatory work, prop. 1996/97:25 s. 101, p. 100. See also Kolmannskog V. and Myrstad F., (2009). *Environmental Displacement in European Asylum Law*, European Journal of Migration and Law, p. 313-326; Feijen, L., (2014). *Filling the Gaps? Subsidiary Protection and Non-EU Harmonized Protection Status(es) in the Nordic Countries. International Journal of Refugee Law*, 2014, Vol. 26, No. 2, 173–197. doi:10.1093/ijrl/eeu022.

[174] *Ibid.*

[175] Swedish Aliens Act (716/2005), Chapter 5, Section 25.

[176] European Migration Network, (2010). *The Practices in Sweden Concerning the Granting of Non-EU Harmonised Protection Statuses*.

[177] Proposal to temporarily limit the possibility of obtaining a residence permit in Sweden. Prop. 2015/16: 174. Published April 28, 2016Available (in Swedish) at: https://www.regeringen.se/49927f/contentassets/075968fdd8c94788977dba14bae16444/forslag-om-att-tillfalligt-begransa-mojligheten-att-fa-uppehallstillstand-i-sverige-prop.-201516174.

subsequently extended in June 2019 until July 2021.[178] Under this measure, persons otherwise in need of protection – including environmentally-displaced people – no longer have any right to a residence permit, while persons eligible for the refugee status or alternative protection status are eligible only for temporary residence permits.

Finnish Aliens Act

Following a similar approach to that employed in Sweden, the Finnish Aliens Act also explicitly grants international protection to people who are forcibly displaced by factors related to the environment.

The Finnish Act ensures four types of international protection: asylum,[179] subsidiary protection,[180] humanitarian protection,[181] and temporary protection.[182] The first two kinds of protection entirely correspond to those ensured by the Geneva Refugee Convention and by the Qualification Directive, on the basis of, respectively, 'a well-founded fear of persecution' and 'serious harm'. The novelty introduced, instead, by humanitarian protection, regulated by Chapter 6 Section 88 of the Act, lays in the possibility of granting protection to persons who cannot be offered asylum or subsidiary protection on the basis of , respectively, Section 87 and Section 88.

In addition to that, the individuals in question must not be able to return to their country of origin or habitual residence as a result of either (i) an environmental catastrophe; or (ii) a bad security situation which may be due to a) an international or internal armed conflict; or b) a poor human rights situation. The provision is named as 'tertiary', meaning that the applicant shall first be assessed for asylum and subsidiary protection and only if neither of these statuses is applicable will humanitarian protection be considered. [183]

Concerning the scope of humanitarian protection, it is offered by Finland without specifying limitations on the type of environmental events. Namely, people affected by both rapid and slow onset events are protected by the provision. In addition to that, the possibility of granting protection is also not limited in terms of the nature of the disaster: both human-

[178] Extension of the law on temporary restrictions on the possibility of obtaining a residence permit in Sweden, Prop. 2018/19: 128. Available (in Swedish) at: https://www.regeringen.se/4adab3/contentassets/ed1736a7533440a9a4b12dec6878b1e5/prop-201819-128.pdf.
[179] Finnish Aliens Act (301/2004), Chapter 6, Section 87.
[180] Finnish Aliens Act (301/2004), Chapter 6, Section 88.
[181] Finnish Aliens Act (301/2004), Chapter 6, Section 88a.
[182] Finnish Aliens Act (301/2004), Chapter 6, Section 109.
[183] Feijen, L., (2014). *Filling the Gaps? Subsidiary Protection and Non-EU Harmonized Protection Status(es) in the Nordic Countries. International Journal of Refugee Law*, 2014, Vol. 26, No. 2, 173–197. doi:10.1093/ijrl/eeu022.

induced and natural hazards are in fact included in the scope of the Finnish Act, as stated by the *travaux préparatoires.*[184]

Furthermore, Section 109 of the Finnish Aliens Act stipulates that 'temporary protection' can be granted to aliens who *"cannot return safely to their home country or country of permanent residence because there has been a massive displacement of people in the country or its neighbouring areas as a result of an armed conflict, some other violent situation or an environmental disaster"*.

Therefore, the Finnish Act, in addition to being more precise in its provisions granting protection to environmentally-displaced people, distinguishing between humanitarian and temporary protection, does not present all the limitations encountered in the Swedish Act. As we can see from the Government Bill 323/2009, there are no fixed judicial criteria for granting protection on this ground, it is only necessary that the environment of the country from which the migrant has fled be *"unusable for residential purposes or hazardous to person's health."*[185]

However, also the Finnish Act entails a few drawbacks in relation to its applicability. First of all, the Finnish government, decided in 2008 that restrictive measures should be implemented to the application of humanitarian protection. Namely, each case should, from then on, be assessed individually, examining the possibilities of each applicant of returning to her or his country of origin or habitual residence rather than her or his nationality or geographical area of origin.

In addition to that, after the refugee crisis of 2015, it was decided, just as in Sweden, to repeal the provisions relating to humanitarian protection impacting both pending and granted applications. However, since temporary protection under Section 109 was not repealed, cases of mass influxes of environmentally-displaced people are still addressed by the Act. [186] The reasoning of the government in pursuing the repeal of part of the Aliens act, as stated in the proposal of repeal itself, lays on the increasing number of applications for international protection both in Finland and in Europe. The Finnish government essentially preferred to avoid that Finnish legislation and practice be different – and more favourable – than other European Union member states and the minimum level set by European Union legislation. Finally, the Finnish provision, just like the Swedish one, has never been applied.

Italian legislation

[184] See *supra* note 33.
[185] European Migration Network, (2010). The different national practices concerning granting of non-EU harmonised protection statuses.
[186] The Government's proposal to Parliament to amend the Aliens Act, HE 2 /2016 vp. Available at: https://www.eduskunta.fi/FI/vaski/HallituksenEsitys/Sivut/HE_2+2016.aspx.

Moving on to analyse the Italian law, it is possible to observe how a positive obligation to offer protection against a risk arising from extreme natural events has already been recognised also in this national legal order.

In Italy, Article 20[187] of the Legislative Decree No. 286 of 1998, on the consolidated text of provisions governing immigration and the status of the foreigner[188] details the extraordinary reception measures for exceptional events. The provision stipulates that temporary protection has to be granted on the basis of humanitarian needs on the occasion of (i) conflicts; (ii) natural disasters; and (iii) other events of particular seriousness. The mentioned events have to occur in countries not belonging to the European Union.[189]

In addition to that, Article 20-bis[190] of the same Legislative Decree establishes the so-called 'disaster residence permit', which is issued in cases where the country to which the foreigner is supposed to return is in a situation of serious disaster that does not allow her or him to return in safety. As it is further specified by paragraph 2 of the same article, this type of permit is valid for six months and may be renewed if the conditions of serious disaster referred to in paragraph 1 continue to apply.

In October 2020, the above-mentioned Legislative Decree has been further amended by the Law Decree n. 130,[191] which states that a disaster residence permit can, where the requirements are met, be converted into a residence permit for employment purposes.[192]

Therefore, in Italian law, exactly as in the Swedish and Finnish Acts, the possibility of offering protection to people displaced by natural disasters is explicitly stated. From the application angle, however, the Italian legislation appears to be more advanced than those of Sweden and Finland. Indeed, In Italy, environmental and climate migration is beginning to be discussed, not only in the media but also in case law. A ruling by the Court of L'Aquila on 18 February 2018 recognises the right of a Bangladeshi citizen to humanitarian protection as a victim of flooding, an environmental disaster that allegedly caused him to lose his farmland, his only means of livelihood. At the same time, this catastrophic event also represents a gradual effect of climate change. [193] The judgment therefore marked a historic step forward in the

[187] Article introduced by Law n. 40 dated 6 March 1998, Art. 18.
[188] Available (unofficial English translation) at: https://www.refworld.org/docid/54a2c23a4.html.
[189] Legislative Decree No. 286 of 1998, Article 20.
[190] Article inserted by article 1 (1, h), legislative decree n. 113 of 4 October 2018, converted, with amendments, by Law n. 132 of 1 December 2018.
[191] D.L. 21/10/2020 n. 130 converted with amendments by L. 18/12/2020 n. 173.
[192] D.L. 21/10/2020 n. 130, Article 1.
[193] Tribunale di L'Aquila, Ord. n. R.G. 1522/1 del 18 febbraio 2018.

Italian context, constituting for the first time a case of environmental migration, opening the doorway to future protection claims for individuals whose life is threatened by climate change.

5. The legal framework II – Human rights law

Within the legal framework devoted to the protection of refugees and asylum-seekers, European – and international – human rights law is a crucial component from which a series of rights and obligations derive, since it focuses on preserving the dignity and well-being of every individual. Therefore, refugees and asylum-seekers are entitled to two partially overlapping sets of rights: the specific rights of refugees, under refugee law,[194] which has been discussed in the previous chapter, and human rights law.

5.1. Human rights and the environment: a soft law approach

For a long time, environmental policy and human rights have been two separate thematic areas, with no interconnection whatsoever. It is well-known that environmental changes have heavily impacted the human rights of individuals in all parts of the world. However, those for which such events have the hugest and most negative consequences are those in already vulnerable situations, especially concerning human displacement. The table below summarises some ways in which environment-caused events can impact people's human rights.

Effects	**Examples of rights affected**
Extreme weather events	Right to life
Increased food insecurity and risk of hunger	Right to adequate food, right to be free from hunger
Sea-level rise and flooding	Right to adequate housing
Stress on health status	Right to the highest attainable standard of health
Increased water stress	Right to safe drinking water

Source: Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights', UN Doc. A/HRC/10/61, 15 January 2009.

According to the 1998 Universal Declaration of Human Rights (UDHR) *"everyone has the right to life, liberty and security of person."*[195] The same principle is then reiterated by the International Covenant on Civil and Political Rights (ICCPR).[196] This clearly entails that states

[194] UNHCR, (2017). *A guide to international refugee protection and building state asylum systems.* Handbook for Parliamentarians N° 27.
[195] UDHR, Article 3.
[196] ICCPR, Article 6.

should commit to protect and promote such right, as well as to take effective measures against loss of life caused by natural factors.

In addition to that, Article 37 of the European Charter of Fundamental Rights [197] stipulates that: *"A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development".* This article basically compels EU legislators to take into account environmental protection and sustainability goals in all policies and legislations, which is valid also in matters related to migration.

According to the fourth assessment report of the Intergovernmental Panel on Climate Change (IPCC),[198] extreme weather events caused especially by climate change such as storms, heatwaves, fires and droughts have the potential to increase people's suffering from death and injury. According to the World Health Organisation (WHO), globally, natural disasters result in over 60 000 deaths, mainly in developing countries.[199] In the context of climate change, extreme weather events and the risk they pose to the enjoyment of the right to life may be the most visible and dramatic proof of how environmental disasters can affect human rights. However, there exist several rights which are closely linked to the right to life, and which are all threatened by environmental disasters and climate change, namely the right to adequate food, housing, health and drinking water.

The first two rights are to be derived from Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which states *that "the States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions"*. [200] The IPCC's fourth assessment report foresees that, at lower latitudes, the risk of food insecurity in poorer regions of the world is likely to increase, as a consequence of a decrease in food production.[201] Environmental events, especially climate change related ones, are those which the most have the potential to undermine the right to housing and, altogether, worsen individuals' living status. Under the International Covenant on Economic, Social and Cultural Rights, States have the fundamental obligation to progressively achieve the full realisation of the right to adequate housing.[202]

[197] Charter of Fundamental Rights of the European Union (2007/C 303/01).
[198] IPCC, (2007). Climate Change 2007. Impacts, adaptation and vulnerability. Fourth Assessment Report.
[199] WHO, 2018. Climate Change and Health.
[200] ICESCR, Article 11.
[201] IPCC, (2007). Climate Change 2007. Impacts, adaptation and vulnerability. Fourth Assessment Report.
[202] United Nations High Commissioner for Human Rights, (UNHCHR), The Right to Adequate Housing. Fact Sheet No. 21/Rev.1

The right to the enjoyment of the highest attainable standard of physical and mental health is identified by Article 12 of the ICESCR, and is inevitably also connected to the above-mentioned rights. The right to health poses above States an obligation to physical accessibility, meaning non only physical availability of goods and facilities to everyone in a non-discriminatory manner, but also financial accessibility.[203] According to the WHO, climate change is going to dramatically amplify health disparities, except from being responsible for 150,000 deaths every year in developing countries by increasing causing malnutrition and other illnesses.[204]

Finally, the right to water, recognised as the most essential condition for the full enjoyment of life,[205] is not explicitly mentioned in the ICESCR. However, General Comment No. 15 of the Committee on Economic, Social and Cultural Rights states that *"the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses"*.[206] It has been stated that climate change is, and will continue to be, the most exemplary cause of the reduction of water resource, which will alter water distribution at a global level. [207]

Although to different degrees, all the above mentioned fundamental human rights are affected by environmental disasters, especially those triggered by climate change. Except from being intrinsically connected with the broader right to life, as well as absolute conditions for the fulfillment of the latter, these rights are also closely intertwined with one another. Despite this awareness, as well as that concerning the number of people which continue to be displaced by environmental disasters, few concrete steps have been taken to bring a human rights perspective to climate negotiations.[208]

The 1948 Universal Declaration of Human Rights does not include a right to environmental protection, and neither do the 1966 Covenants on Civil and Political Rights and on economic social and cultural rights. Still to this day, The fundamental UN human rights treaties do not include the human right to a healthy environment at the global level. The reason why this is the case lays in the above-mentioned instruments being drafted before the birth of the modern environmental movement, which occurred in the late 1960s. Over one million

[203] World Health Orgranisation, Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 31. The Right to Health.
[204] WHO, (2021). The health and environment linkages initiative.
[205] United Nations General Assembly, 64/292: The human right to water and sanitation (2010), Art. 1.
[206] United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 15 (New York: United Nations, 2002), Art. 2.
[207] UNCESCR, General Comment No. 15, Art. 1.
[208] McAdam, J., Limon, M., (2015). *Human Rights, Climate Change and Cross-Border Displacement. the role of the international human rights community in contributing to effective and just solutions*. Universal Rights Group.

children die every year as a result of air and water pollution because of their exposure to unsafe environmental conditions. In addition to that, climate change and the loss of biodiversity act as a huge threat, worsening the consequences for future generations.[209]

Adopted twenty years apart, the two instruments that are to this day considered as the major milestones in the evolution of international environmental law are the Stockholm and Rio Declarations.[210] The two documents are outputs of the first and second global environmental conferences, respectively the 1972 United Nations Conference on the Human Environment in Stockholm, and the 1992 United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro. These two Declarations marked what has been called the 'modern era' of international environmental law. [211]

The 1972 Conference, which then saw the birth of the Stockholm Declaration, affirmed for the first time the seriousness of environmental degradation and the need for States to address it through international, regional and national policies, as well as regulations aimed at preventing the main causes of pollution of natural resources.[212] Another success of the Stockholm Conference was the establishment of the United Nations Environment Programme (UNEP), based in Nairobi, Kenya; it was the first international body of universal character endowed with specific competences in the field of environmental policy. The fundamental task of the UNEP is to monitor the state of the global environment and to collect and disseminate information on this issue.[213] In addition, the Programme is entrusted with the adoption of non-binding acts (recommendations and guidelines) as well as with the drafting of environmental conventions which are then submitted to ratification by states.[214]

Both the Stockholm and the Rio Declarations are generally regarded as advisory statements of purpose, namely instruments of 'soft law', in contrast to binding or 'hard' legal obligations contained in bilateral or multilateral treaties.[215] Notwithstanding this, the principles

[209] Knox, J. H., (2018). *It is time for the United Nations to recognise the human right to a healthy environment.* Blog post, Contemporary and emerging human rights issues.
[210] Declaration of the United Nations Conference on the Human Environment, adopted June 16, 1972, U.N. Doc. A/CONF.48/14; Rio Declaration on Environment and Development, adopted June 14, 1992, U.N. Doc. AICONF.1515/Rev. 1 (1992).
[211] Sand, P. H., (2007). *The Evolution of International Environmental Law*, D. Bodansky, J. Brunnée & E. Hey, eds., The Oxford Handbook of International Environmental Law 29, pp- 33-35.
[212] Montini M., (2001). *L'ambiente nel diritto internazionale*, Manuale di diritto ambientale a cura di Mezzetti L., Bologna.
[213] Pineschi L., (1993). *Tutela dell'ambiente e assistenza allo sviluppo dalla Conferenza di Stoccolma (1972) alla Conferenza di Rio (1992*), Riv. Giur. Amb.
[214] Cordini G., Flois P., Marchisio S., (2005). *Diritto Ambientale. Profili Internazionali Europei e Comparati.* Torino, G. Giappichelli, 7.
[215] Wirth, D. A. (1995). *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa.* " Georgia Law Review 29, (1995): 599-653.

of the two Declarations – 26 at Stockholm and 27 at Rio – placed environmental issues at the forefront of international concerns. It has to be noted, however, that today the link between human rights and environmental changes, especially related to climate change, is being increasingly acknowledged. A further institutional recognition came in 2008, during the 7th session of the UN Human Rights Council, where several countries called on the Council to address the human rights dimension of climate change issues. In the same year, UN resolution 7/23 on human rights and climate change was adopted, explicitly stating that "*climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights"*.[216]

In October 2014, the UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein, spoke at a conference about *"stark and vital"* implications of climate change for the full enjoyment of human rights. He also drew attention to the *"multiple implications" of climate change "for displacement, statelessness, land-rights, resources, security and development*" [217]

On a more operative level, significant instruments which are worth mentioning are the Cancún Agreements.[218] They represent one of the key steps forward in fostering reduction of greenhouse gas emissions, and in helping developing countries protect themselves from climate impacts. The Agreements call for the adoption of *"measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at national, regional and international levels."*[219] This paragraph helped provide a framework identifying not only three types of mobility (climate change-induced displacement, migration and planned relocation), but also three types of actions (understanding, coordination and cooperation) to be carried out on three levels (national, regional and international).[220] It therefore offers an interesting stepping stone for future legislation protecting people affected by environmental or climate cross-border displacement.

[216] Human Rights Council, (2008). Resolution 7/23, Human rights and climate change.
[217] Press Conference by United Nations High Commissioner for Human Rights, Zeid Ra'ad Al Hussein (16 October 2014). See also McAdam, J., Limon, M., (2015). *Human Rights, Climate Change and Cross-Border Displacement. the role of the international human rights community in contributing to effective and just solutions.* Universal Rights Group.
[218] The agreements were reached on December 11 in Cancun, Mexico, at the 2010 United Nations Climate Change Conference.
[219] United Nations Framework Convention on Climate Change, (2001). Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010. FCCC/CP/2010/7/Add.1.
[220] António Guterres, United Nations High Commissioner for Refugees, (2012). Migration, Displacement and Planned Relocation.

5.2 Right to a healthy environment

The right to a healthy environment is at the core of the international approach to human rights and climate change. In principle, such right includes clean and balanced ecosystems, rich biodiversity and a stable climate, and it recognises that nature is a keystone of a dignified human existence. It has been argued that legally accepting the existence of this right can act as a pathway and as a basis to protect the natural world on which human beings' life and livelihood depend.[221]

The Stockholm and the Rio Declarations are the two instruments that came closest to including a right to a healthy environment. However, while Principle 1 of the Stockholm Declaration does refer to a 'fundamental right*'*, and recognises the necessity for an environment of acceptable quality, all proposals referring to a direct and unambiguous environmental human right were rejected at the Conference.[222] More precisely, Principle 1 declares that "*man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."* According to many,[223] this statement could have provided the basis for subsequent elaboration of a proper human right to a healthy environment; however, also the document agreed upon at Rio avoids making a clear connection with human rights. Principle 1 of the Rio Declaration merely stipulates that human beings "are *entitled to a healthy and productive life in harmony with nature".* While the wording 'they are entitled to', may be linguistically equivalent to 'they have a right to', the link is not explicit enough. [224]

In so doing, at Rio, the notion of a right to a healthy environment was implicitly rejected. Instead of a right to environment, Principle 3 of the Rio Declaration identifies a 'right to development', that *"must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations"*.[225] This statement, together with the first sentence of Principle 1, which emphasises the central character of human beings in all

[221] Wirth, D. A. (1995). *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa.* Georgia Law Review 29, (1995): 599-653.
[222] See *supra* note 48.
[223] Sohn, L. (1973). *The Stockholm Declaration on the Human Environment*, 14 Harvard International Law Journals, pp. 451-5; Ahmed, A., Mustofa, J. Md., (2016). *Role of soft law in environmental protection.* Global Journal of Politics and Law Research Vol.4, No.2, pp.1-18; Handl, G., (2012). *Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992.* United Nations Audiovisual Library of International Law.
[224] Knox, J. (2014). Unitar-Yale Conference keynote speech.
[225] Cfr. Rio Declaration, Principle 3. Wirth, D. A. (1995). *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa.* " Georgia Law Review 29, (1995): 599-653.

decisions about sustainable development,[226] renders the Rio Declaration much more anthropocentric than its predecessor.[227] Even at the European level there has been a consistent rejection of proposals for an environmental protocol to be added to the European Convention on Human Rights.[228]

Even though the objective of securing a right to environment to all human beings was not yet attained, since the Stockholm Conference, the idea that human rights and the environment are relevant to one another never disappeared, and the need to include a proper right to a healthy environment in international legal provisions started to be widely debated and considered.

At the international level, an increasingly large number of instruments in recent years articulate an individual right to environment. With the adoption of the ASEAN Human Rights Declaration in 2012, the right has now been recognised in treaties or declarations in Africa, Europe, Latin America, the Middle East and South-East Asia. In 2009, the Office of the High Commissioner on Human Rights (OHCHR) highlighted in a report that even though a specific right to a healthy environment is not referred to in universal human rights treaties, the link between *"the environment and the realisation of a range of human rights, such as the right to life, to health, to food, to water, and to housing"* is recognised by all UN treaty bodies.[229]

In the European context, the Manual on Human Rights and the Environment adopted by the Council of Europe in 2005 [230] explains that although the European Convention on Human Rights does not expressly guarantee a right to a healthy environment, the document indirectly links human rights matters to environmental factors, therefore offering some degree of protection. This is demonstrated by case law of the Court in the field. The Court has indeed found in multiple instances that severe environmental pollution can significantly affect people's well-being and prevent them from enjoying their right to life as settled by Article 8 of the European Convention on Human Rights.[231] More specifically, the Court ruled that breaches

[226] Principle 1 of the Rio Declaration states that: "Human beings are at the centre of concerns for sustainable development"
[227] Wirth, D. A. (1995). *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa.* " Georgia Law Review 29, (1995): 599-653.
[228] Boyle, A. (2012). *Human Rights and the Environment: Where Next?* The European Journal of International Law Vol. 23 no. 3.
[229] *Ibid.*
[230] Council of Europe, (2005). Final Activity Report on Human Rights and the Environment, DH-DEV 006 rev, 10 Nov. 2005, App. II ('Council of Europe Report').
[231] The provision in question states that: *"everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

of the right to life may also result from intangible sources such as noise, emissions, smells or other similar forms of interference.[232]

The 2005 Manual on Human Rights and the Environment claims that case law shows how the right to life can be used to compel governments to regulate environmental risks and enforce environmental laws.[233] In addition to a prohibition on government interference, case law also shows how governments have a positive duty to take action in order to ensure that the right to life is guaranteed. In *Öneryildiz v. Turkey*, for instance, the applicants relied mainly on Article 2 of the ECHR[234] in submitting that the national authorities were responsible for the deaths of their close relatives and for the destruction of their property resulting from a methane explosion at a municipal rubbish tip in the area of Kazım Karabekir in Ümraniye (Istanbul). In this instance the Court ruled that Article 2 is to be interpreted as entailing an obligation by the State to conduct an official investigation in virtue of the fact that *"often, in practice, the true circumstances of the death are, or may be, largely confined within the knowledge of State officials or authorities".*[235] The Court also highlighted that this obligation is even more relevant in this regard, given *"the level of the potential risk to human lives".*[236] At the national and regional level, the constitutions of more than 10 States explicitly include an individual right to a clean and healthy environment, and even more states recognise such a right in regional human rights agreements.[237]

In 2012, the United Nations Human Rights Council took into account all the developments at the European, national and regional levels which aimed to bring human rights and the environment together, and decided to appoint an independent expert on human rights and the environment.[238] The expert was to hold two main tasks: 1) to clarify the human rights obligations relating to the enjoyment of a safe clean healthy and sustainable environment; and

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[232] *Moreno Gómez v. Spain* (2004), 572., at para. 53; *Borysiewicz v. Poland* (2008), European Court of Human Rights, Application no. 71146/01, at para. 48; *Giacomelli v. Italy* (2006), European Court of Human Rights, Application no. 59909/00, at para. 76. *Hatton and Others v. the United Kingdom [GC]* (2003), European Court of Human Rights, Application no. 36022/97, at para.96; *Deés v. Hungary* (2010), European Court of Human Rights, Application no. 2345/06.

[233] In *López Ostra vs. Spain*, for instance, the European Court of Human Rights ruled that the Spanish State was responsible for violating the right to respect for the home and private life, since serious pollution can impact an individual's well-being and prevent him or her from enjoying his or her home in such a way that his or her private and family life is damaged. Boyle, A. (2012). *Human Rights and the Environment: Where Next?* The European Journal of International Law Vol. 23 no. 3.

[234] Article 2 of the ECHR holds that: *"Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."*

[235] *Öneryildiz v. Turkey*, at para 93.

[236] *Ibid*. at para 90.

[237] Knox, J. H., (2018). *It is time for the United Nations to recognise the human right to a healthy environment.* Blog post, Contemporary and emerging human rights issues.

[238] Resolution 19/10 (March 2012).

2) to identify, promote and exchange views on best practices relating to the use of human rights obligations and commitments to inform, support and strengthen environmental policymaking.[239]

However, the most recent and straightforward development towards a formal recognition of a right to a healthy environment was made in 2018, when John H. Knox, the Special Rapporteur on Human Rights and the Environment, proposed 16 Framework Principles on Human Rights and the Environment, codified in Report A/HRC/37/59 of the UN General Assembly.[240] In its Report, Knox emphasised that, while the right to a healthy environment had been recognised in several national constitutions and regional agreements, it has not been formally adopted in a human rights agreement of global application,[241] and he claims that "*States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights."*.[242] Knox's Framework Principles, providing a sound basis for understanding and implementing human rights obligations relating to the environment,[243] also make reference to the possibility of forced displacement resulting from a lack of protection of a right to a healthy environment. In this regard, Principle 14 posits that *"States should take additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risks and capacities."*[244] In commenting this principle, Knox referred to displacement and stated that natural disasters and environmental harm in general can cause transboundary migration. Thus, the Special Rapporteur implicitly referred to environmental migrants as part of the category of vulnerable people that Principle 14 aims to protect. In addition to that, several human rights bodies have repeatedly held that environmental harm can interfere with the right to life, health and an adequate standard of living in direct or indirect manners;[245] one of the indirect causes of environmental harm interfering with fundamental human rights is forced displacement.

5.3 International and European human rights law

[239] Knox, J. (2014). Unitar-Yale Conference keynote speech.
[240] United Nations General Assembly, Human Rights Council (2018). Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/37/59.
[241] United Nations Human Rights Office of the High Commissioner, (2018). *UN expert calls for global recognition of the right to safe and healthy environment, press release.*
[242] *Supra* note 74, Principle 1.
[243] See *supra* note 240.
[244] See *Supra* note 74, Principle 14.
[245] Knox, J. (2014). Unitar-Yale Conference keynote speech.

The clear and tight relationship between the refugee problem and the issue of human rights is undisputed, exemplified also by the fact that violations of human rights are among the major causes of mass exoduses. Asylum-seekers, in fact, are daily exposed to restrictive measures, which sometimes deny them access to a safe territory, oblige them to be returned to their country of origin or even detain them. Several human rights principles have indeed been applied over time with the objective of enhancing refugee protection.

A human rights perspective to refugee protection is vital in order to ensure to safeguard those people who flee because their rights have been violated; this is strictly linked to what explained in the previous section, namely guaranteeing the existence of a human rights perspective to environmental issues which cause rights violation. It is important to note that asylum seekers and refugees are entitled to all the rights and fundamental freedoms that are spelled out in international human rights instruments. The UNHCR has clarified that the principles of human rights are applicable to all phases of the cycle of displacement, namely: 1) the causes of displacement; 2) determining eligibility for international protection; 3) ensuring adequate standards of treatment in the country of asylum; and 4) ensuring that solutions are durable.[246] The focus of this thesis, however, remains on the second point and, partly, on the first.

International law instruments

The main global instrument containing the fundamental human rights to which all individuals are entitled is the 1948 Universal Declaration of Human Rights, a non-binding document accompanied by a legally binding covenant. The initiative, adopted after the end of the Second World War, exemplified the desire of the international community as a whole to promote universal respect for the dignity and fundamental freedoms of all members of the human race. The central aim of the Declaration is, in fact, to recognise the inherent dignity and equal and inalienable rights of all human beings.

To this day, the Declaration has served as a foundation for the codification of human rights not only at the global level, but also at the regional and national one. It is regarded as the central piece of political – rather than legal – nature, expressing the rights to which every human being is entitled. Although the Declaration itself is a non-legally-binding instrument, many of its provisions enjoy undisputed recognition, and therefore are universally obligatory. In addition to that, many principles included in the document have so far been incorporated in

[246] UNHCR, (2005). *An Introduction to International Protection. Protecting persons of concern to UNHCR.*

legally-binding treaties, and some others have gained the status of customary international law. The EU has fully embraced the Declaration's significance, using it to set standards in its internal legislation and international agreements, and to guide its external policy. [247]

Regarding obligations relating to asylum, Article 14 of the UDHR grants everyone the right to seek and enjoy asylum from persecution. More specifically, the provision states that: *"everyone has the right to seek and to enjoy in other countries asylum from persecution"* and that *"this right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."* Furthermore, also the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides an important degree of protection to asylum-seekers and refugees. Namely, the Convention prohibits torture and other forms of mistreatment that give rise to many refugees' applications for international protection.

European Union law instruments

At the European level, two of the main instruments detailing human rights law are the 2007 Charter of Fundamental Rights of the European Union (CFR) – also widely referred to as 'the Charter' – and the 1957 Convention for the Protection of Human Rights and Fundamental Freedoms (or European Convention on Human Rights (ECHR)). The instrument that most refers to the question of refugees and asylum-seekers is the Charter, which, adopted in 2007, has equal legal footing to that of the EU's founding treaties, as explicitly recognised in Article 6 Treaty on the European Union.[248]

Furthermore, also the Charter makes reference to the Geneva Convention in detailing the right to asylum within the EU legal order. Article 18 of the Charter indeed posits that the said right has to be guaranteed with due respect for the Geneva Convention.[249] The document includes provisions on the right to protection from removal, expulsion or extradition to a zone where there is supposed to be serious risk of being subject to the death penalty, torture or other inhuman or degrading treatment. The Charter codifies the fundamental rights of the individual

[247] European Parliament, (2018). *The Universal Declaration of Human Rights and its relevance for the European Union.*

[248] The provision states that: *"the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."*

[249] The Article states that: *"the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties')*". See M den Heijer, *Article 18* in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights* (Hart Publishing 2014) 519-541.

protected in the legal order of the European Union. Initially neglected, these rights have, since the 1970s, been identified by the Court of Justice in an extensive body of case law which, in turn, has referred to the constitutional traditions common to the Member States.[250]

Article 18 of the Charter states that: *"The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union".* This provision creates an autonomous right of asylum in the legal order of the European Union. The specification is particularly important inasmuch as in the ECHR system there is no right to asylum as such but it has been deduced, through the case law of the European Court of Human Rights (ECtHR), from the prohibition of torture, inhuman and degrading treatment in Article 3 ECHR.[251]

The Charter also explains that the legal text is based on Article 78 (1) TFEU, which states that "*The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.".* Thus, it seems reasonable to state that both Article 18 of the Charter and Article 78 TFEU point to the Geneva Convention as an external constraint on the validity of legislative acts enacted in pursuit of common asylum policies.

As mentioned above, another fundamental legal instrument within the framework of European human rights law is the European Convention on Human Rights, drafted in 1950 and entered into force in 1953. The document most importantly lays down the right to life and not to be subjected to torture or inhuman or degrading treatment. Essentially, from this provision, it follows that a State which takes an expulsion measure to a State where there is a risk that the individual's life may be in danger is in breach of Article 2 of the Convention. If, on the other hand, the expulsion measure exposes the person concerned to the risk of being subjected to torture or other inhuman and degrading treatment, there is a breach of Article 3 of the Convention.

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[250] *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1970). Court of Justice, case 11/70; *Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities* (1974), case 4/73, J.

[251] Carpanelli, E. et al (2020). *Manuale breve su Il quadro giuridico internazionale ed europeo in materia di immigrazione e asilo: il ruolo delle corti nazionali nell'applicazione della Carta europea dei diritto fondamentali.* Centro Studi in Affari Europei e Internazionali.

5.3.1 The principle of non-refoulement

Non-refoulement is a fundamental principle of international law that, as I mentioned above, [252] forbids a country receiving asylum seekers from returning them to a country in which they would likely be in danger of human rights violations including inhuman or degrading treatment.[253] In human rights law, he principle of *non-refoulement* is enshrined, *inter alia*, in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[254] the International Convention for the Protection of All Persons from Enforced Disappearance,[255] in addition to being interpreted as an implicit prohibition in the European Convention of Human Rights. *Non-refoulement* is also considered a norm of customary international law, both as a foundational element of the absolute prohibition of torture or inhuman or degrading treatment and as a core principle of international migration law.[256]

Unlike the provision contained in the Geneva Convention, the prohibition of *refoulement* under international human rights law is absolute, and no derogation from it is permitted. It is applicable to any sort of return of persons, irrespective of their citizenship or migration status, whenever there are substantial grounds for believing that the returnee would be at risk of serious harm upon removal on account of torture, degrading treatment or other serious breaches of human rights obligations. In this respect, the scope of this principle is broader than that contained in international refugee law. Under human rights law, the principle of non-refoulement operates without restrictions in terms of reasons why human rights have been violated. Instead, the principle operates as an absolute prohibition in the context of torture, or cruel, inhuman, degrading treatment or punishment. [257]

The prohibition of *refoulement* has been interpreted to apply to a range of serious human rights violations. A General Comment of the UN Human Rights Committee on the International Covenant on Civil and Political Rights highlighted the obligation included in the Covenant not to remove a person from a State's territory where there are substantial grounds

[252] See *supra* note 97.
[253] Trevisanut, S., (2014). *International Law and Practice: The Principle of Non-Refoulement And the De-Territorialization of Border Control at Sea*. Leiden Journal of International Law. 27 (3): 661.
[254] Article 3 (1) states that: *"no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture*".
[255] Article 16 states that: **"***no State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance".*
[256] Caskey, C., (2020). *Non-Refoulement and Environmental Degradation: Examining the Entry Points and Improving Access to Protection*. Global migration research paper n.26.
[257] Chetail, V., (2019). *International Migration Law*, Oxford University Press, 198.

for believing that the individual in question would be exposed to 'irreparable harm' such as violations of the right to life, or to the possibility of torture or cruel, inhuman or degrading treatment or punishment.[258] In addition to that, the ECtHR has held that returning an individual to a country where she or he would face degrading living conditions falls within the scope of the prohibition of *non-refoulement*.[259]

With regard to environmental displacement, it is interesting to investigate whether displaced persons arriving in Europe could rely on the fundamental principle of non-refoulement in order to protect them against return, either invoking the right to life, or the prohibition of inhuman or degrading treatment. Until now, the principle of *non-refoulement* has not been accepted by Courts in cases of displacement triggered by environmental factors. However, the absolute character of this provision leaves some open doors to it being applied also in environmental contexts. In practice, the obligation has been called into action in the case of the 2004 Tsunami in the Indian Ocean, where the UNHCR called for the suspension of returns to the affected regions. The question is whether such practice can actually lead to legal provisions.

The right to life

As discussed at the beginning of this chapter, the right to life is widely impacted by environmental conditions, especially resulting from climate change. As expressed by Article 3 of the Universal Declaration of Human Rights, *"everyone has the right to life, liberty and security of person"*.[260] Article 2 adds that this right has to be granted without distinction or discrimination of any kind, and equal and effective access to remedies should be accessible to everyone who sees this right violated.[261] The human right to life is also enshrined in Article 6 of the International Covenant on Civil and Political Rights, which also adds that *"this right shall be protected by law"* and that *"no one shall be arbitrarily deprived of his life".* At the European level, the ECHR states the right to life in Article 2, claiming that *"no one shall be deprived of his life intentionally"*.[262]

Concerning the link between environmental change and the right to life, it is worth examining case law on the matter. Namely, the ruling *Teitiota v. New Zealand*,[263] is one of the

[258] Human Rights Committee, General Comment No. 31, at para. 12.
[259] *MSS v Belgium and Greece* (2011), 30696/09.
[260] Universal Declaration of Human Rights, Article 2.
[261] Universal Declaration of Human Rights, Article 3.
[262] European Convention on Human Rights, Article 2.
[263] UN Human Rights Committee (HRC), *Ioane Teitiota v New Zealand (2016).* UN Doc CCPR/C/127/D/2728/2016.

most influential ones at the international level. The Teitiota case is a recent landmark judgement of the United Nations Human Rights Committee, where it was found that people displaced in the context of climate change, rather than, more broadly, because of every kind of natural disasters, cannot be returned to countries where their right to life is threatened precisely by climate change. This therefore meant that in certain cases climate conditions can trigger the *non-refoulement* obligation.

The case concerned a national of Kiribati – one of the countries most threatened by climate change in terms of rising sea levels[264] – who applied for a refugee status in New Zealand on grounds of climate problems rendering living conditions unbearable. Mr Teitiota's asylum application was upheld on appeal and rejected by the High Court,[265] Court of Appeal[266] and Supreme Court;[267] he was therefore forcibly returned to his home country in 2015. The applicant subsequently filed an individual communication with the UN Human Rights Committee under the Optional Protocol [268] affirming that New Zealand had violated his and his family's right to life under Article 6 of the ICCPR by removing them back to Kiribati. The Committee's decision[269] did not go against that of the Courts, confirming therefore that the applicant's return had not violated his right to life because he was not able to provide sufficient evidence demonstrating his life-threatening living conditions In Kiribati, and also because the risk was not found to be 'imminent'.

Nevertheless, this case still represents a jurisprudential development in the context of environmental displacement, since, on that occasion, it was held that States indeed do have a general obligation not to forcibly return individuals to places where climate changes poses a real risk to their right to life. [270] It was indeed recognised that in cases where the right evidence

[264] Union of Concerned Scientists, (2011). Climate Hot Map, global warming effects around the world. Republic of Kiribati..
[265] Teitiota v Chief Executive of the Ministry of Business Innovation and Employment [2013] NZHC 3125 (26 November 2013), CIV-2013-404-3528 [2013] NZHC 3125. Available at: http://www.nzlii.org/nz/cases/NZHC/2013/3125.html.
[266] Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment [2014] NZCA 173 (8 May 2014). CA50/2014 [2014] NZCA 173. Available at: http://www.nzlii.org/nz/cases/NZCA/2014/173.html.
[267]Teitiota v Ministry of Business Innovation and Employment [2015] NZSC 107 (20 July 2015). SC 7/2015 [2015] NZSC 107. Available at: http://www.nzlii.org/nz/cases/NZSC/2015/107.html.
[268] Optional Protocol to the International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976. Available at: https://www.ohchr.org/en/professionalinterest/pages/opccpr1.aspx.
[269] Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016. Available at: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200107_CCPRC127D27282016-_opinion.pdf.
[270] Human Rights Committee's decision, at para. 9.3.

is found, governments must refrain from sending people back to risk areas, applying the principle of *non-refoulement* also to cases of environmental change.

This ruling also confirms that this category of displaced persons can actually find protection on the basis of a human rights approach. More specifically, the Committee held that this newly-set obligation might also require a government to grant protection to environmental displaced people in terms of refugee status or of "*other individualised or group status determination procedures that could offer them protection against refoulement*.", be it under human rights law or refugee law.[271]

Something else which is worth noting in this regard is that also the Supreme Court acknowledged that, while the possibility to give protection to the applicant was not offered in the specific case, there is a possibility that *"the effects of climate change or other natural disasters could provide a basis for protection"*. [272] Not only the Court expressly recognised that such possibility in the future could indeed arise, but that it did not need to result from climate change related disasters, instead it could come from any other kind of extreme natural event. The Human Rights Committee noted in para. 9.12 of its decision that the Republic of Kiribati has, according to predictions, enough time to adopt *"affirmative measures to protect and, where necessary, relocate its population"*. This claim seems to be a warning to States, as it seems to imply that, should the government not be able to prevent a climate change disaster or protect people from it, then the citizens of Kiribati will have to be granted international protection and states will have to refrain from returning them under human rights law. [273]

It is relevant to mention that since the decision of the Human Rights Committee is based on the ICCPR, which is binding, it is possible that the same reasoning will be adopted in the future by European courts on the basis of Article 2 ECHR, stating the right to life.

Another judgement of a European national court which is worth mentioning is the ruling 5022 of the Italian Court of Cassation, [274] where in February 2021 it was decided that environmental disasters may also constitute one of the grounds for granting humanitarian protection. More specifically, the principle of full equivalence of environmental disaster with armed conflicts was affirmed. Recalling the Teitiota judgement discussed above, the Italian Court agreed with the Human Rights Committee on the point that climate change and unsustainable development constitute some of the most serious and urgent threats to the lives

[271] *Ibid.*
[272] *Supra* note 248 at para. 9.6.
[273] Delval, E., (2020). *From the U.N. Human Rights Committee to European Courts: Which protection for climate-induced displaced persons under European Law?*
[274] Cass. civ. Sez. III, Ord., (ud. 13-01-2021) 17-05-2021, n. 13171.

of present and future generations, and can adversely affect an individual's well-being and thus cause a violation of their right to life. In addition to that, the Court agreed with the Teitiota ruling in that the principle of *non-refoulement*, which prohibits the return of an asylum seeker to a territorial context where there is a substantial risk of irreparable harm to his or her personal safety or that of his or her family members, applies to all conditions of danger, including disastrous environmental conditions.

Indeed, the Court asserted the concept of an 'ineliminable core constituting the statute of personal dignity' identified by previous case law of the same Court,[275] which represents the minimum essential limit below which the individual right to life and to a dignified existence is not respected. This limit is to be assessed not only with specific reference to the existence of a situation of armed conflict, but with regard to any context which it is, in concrete terms, likely to expose the fundamental rights to life, liberty and self-determination of the individual to the risk of being reduced below the aforementioned minimum threshold, including in cases of environmental disaster, such as climate change and unsustainable exploitation of natural resources.[276]

Both judgements provide evidence of the fact that, while the principle of *non-refoulement* is enshrined in both refugee law and human rights law, the latter arguably offers broader protection also because it operates as an absolute prohibition. Although it is also interesting to recognise the limits of the Teitiota judgement, namely that notwithstanding the objective disastrous climatic situation of Kiribati, the applicant was not granted protection, it still represents a first step and to some extent narrows the legal protection gap to which environmental migrants are subject.

The prohibition of inhuman or degrading treatment

The prohibition of torture or cruel, inhuman or degrading treatment or punishment is strictly linked to the principle of *non-refoulement*, as well as to the right to life, and it is reflected as an absolute prohibition in numerous universal and European human rights instruments, namely the UDHR (Art.5), the International Covenant on Civil and Political Rights (Art. 7), the ECHR (Art. 3).

Let us analyse this obligation departing from the provsion contained specifically in Article 3 of the ECHR. This absolute provision stipulates that States may not transfer an

[275] See Cass. Sez. 1, Judgement no. 4455 of 23/02/2018, Rv. 647298; Cass. Sez. U., Judgment no. 29459 of 13/11/2019, Rv. 656062-02; Cass. Sez. 1, Order no. 17130 of 14/08/2020, Rv. 658471.

individual to a country in respect of which there is a real risk that the expelled person would be in danger of death [277] or be subjected to torture or inhuman or degrading treatment.[278] Here, the Convention is setting an indirect absolute protection, which the European Court of Human Rights has linked respectively to Article 2 ('right to life') and Article 3 of the European Convention on Human Rights ('prohibition of torture and inhuman or degrading treatment'). This absolute character has also been endorsed by the ECtHR in *Chahal v. United Kingdom*[279] and it comes from the fact that it is not subject to any express limitation by reference to saving clauses, for instance those of *"war or other public emergency threatening the life of the nation"* referred to in Article 15. [280] Thus, the Convention is violated whenever a foreigner is subject to a removal order to a State (whether of origin or of transit) where there is a real risk that he will be subjected to conduct prohibited by Articles 2 and 3 of the Convention, regardless of whether the individual will then suffer an actual violation of his rights. [281]

The non-derogable character of the prohibitions contained in Article 3 constitute an obligation *erga omnes,* and it is also been stated that they are part of *jus cogens* in the normative hierarchy of international law.[282] Given the extremely open style in which the provision is written, it is not straightforward to realise what types of mistreatment are included, and whether harm resulting from environmental disasters can be categorised as such. One of the most relevant definitions of inhuman and degrading treatment coming from the doctrine is the one given by Cassese.[283] He stated that three criteria have to be met for inhuman treatment to take place: (i) the intent to ill-treat; (ii) a severe physical or psychological suffering; (iii) the absence of justification for such suffering. What strikes the attention in this definition, is the intentional character that has to characterise the act in question, which also seems to imply that an actor has to be present.

[277] For instance, when an individual is condemned to death penalty. See European Court of Human Rights, Bader and Kanbor v. Sweden, 8 November 2005, paras. 42-43.
[278] E.g. European Court of Human Rights, Corte, Soering v. United Kingdom, 14038/88, 7 July 1989, from par. 90.
[279] *Chahal v. United Kingdom* (1996), European Court of Human Rights (ECtHR), Application No. 22414/93.
[280] Article 15 (1) ECHR.
[281] Carpanelli, E. et al (2020). *Manuale breve su "Il quadro giuridico internazionale ed europeo in materia di immigrazione e asilo: il ruolo delle corti nazionali nell'applicazione della Carta europea dei diritto fondamentali".* Centro Studi in Affari Europei e Internazionali.
[282] Human Rights Committee, General Comment 29, CCPR/C/21/Rev.1/Add.11. See also Arai-Yokoi, Y., (2003). *Grading scale of degradation: identifying the threshold of degrading treatment or punishment under article 3 ECHR.* Netherlands Quarterly of Human Rights, Vol. 21/3, 385-421, 2003.
[283] Cassese, A. *Prohibition of Torture and Inhuman or Degrading Treatment or Punishment* in: MacDonald, R.J., Matscher F., and Petzold, H., (eds.), The European System for the Protection of Human Rights, Dordrecht, Martinus Nijhoff, 1993, Ch. 11.

Notwithstanding this definition, the Court's approach has been more flexible in this regard, namely the question of intent, or even 'premeditation' has often been interpreted progressively and extensively. For instance, in *Ireland v. United Kingdom*, the Court made no findings of deliberate ill-treatment, and ruled that, whenever there is a lack of an intention to 'hurt or degrade', the ill-treatment can indeed amount to inhuman and degrading treatment. More specifically, it was held that it was considered as inhuman treatment precisely because there was a lack of intent, otherwise it would have been referred to as torture.[284] The Court even noted that it was the intention of the ECHR to make a clear distinction between torture and inhuman or degrading treatment, and that the underlying idea was to attach the intentional character to the former, and not to the latter. This, the Court stated,[285] seems to be the thinking lying also behind Article 1 in Resolution 3452 adopted in 1975 by the General Assembly of the United Nations, which declares that *"torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment"*.[286]

Furthermore, even interpreting the provision of Art. 3 restrictively, and requiring the intentional character to be present, can a lack of protection or prevention by the State be considered as an intentional act? Indeed, the Court has found that not only States have the obligation to refrain from committing any act of torture or cruel, inhuman and degrading treatment, but they also have to protect persons under their jurisdiction from being subject to these acts by State or non-state actors.

For instance, the European Court of Human Rights held that a State was in breach of its obligations under article 3 of the ECHR because it did not take sufficient measures to prevent acts of inhumane and degrading treatment to be administered by a non-state actor.[287] In addition to that, it is worth noting that the Human Rights Committee, in a General Comment No. 20 on Article 7 [288]of the International Covenant on Civil and Political Rights,[289] prohibiting torture and cruel, inhuman and degrading treatment, stated that: "*it is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against*

[284] *Ireland vs United Kingdom* (1978). A 25, para. 167.
[285] *Ibid.*
[286] UN General Assembly, *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 9 December 1975, A/RES/3452(XXX).
[287] *Z and others v. United Kingdom* (2001), European Court of Human Rights, (Application no. 29392/95). *DP et JC v. United Kingdom* (2002), European Court of Human Rights, Application no. 38719/97.
[288] Article 7 stipulates that ***"****no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."*
[289] Human Rights Committee, CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment).

the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity".

Although there are no cases from the European Courts which directly concern the protection of environmentally displaced persons, a broad and progressive interpretation of Article 3 and the concept of inhuman or degrading treatment has been offered in multiple instances.[290] *D v. UK,*[291] for instance, concerned an AIDS sufferer, who resisted his removal to St Kitts arguing that once removed, he would be subject to lack of medical treatment, of social network, of a home and of prospect for income, which would hasten his death. In this circumstance, it was held that, indeed, the deportation of a convicted person suffering from AIDS to a country with less care facilities amounted to inhuman or degrading treatment.

Since, in this instance, the sources of risk of inhuman or degrading treatment could not be imputed to an actor at all, this constitutes a rather progressive interpretation which has the potential to open doors in the future also to environmental migrants who will be able to prove that the living situation in their home country is unbearable. In that occasion, the Court also clarified that Article 3 could be applied in new contexts which might arise in the future, indeed the ECtHR reserved to itself *"sufficient flexibility to address the application of Article 3 of the ECHR in other contexts which might arise".* It is crucial to note that, in this case, an even more progressive – although exceptional – interpretation was offered. The Court indeed judged that basing such a claim on Article 3 is allowed also in cases where *"the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country".*

Even though, as hinted to above, this interpretation is considered as exceptional, and subsequent case law refrained from interpreting Article 3 in such a progressive manner, opinions from two judges in a relevant case suggest that some degree of openness in this regard still can be expected. Namely, while in Bensaid v. UK[292] the applicant suffering from schizophrenia was not protected against return to Algeria, the above-mentioned opinion clarified that there still exist *"powerful and compelling humanitarian considerations in the present case which would justify and merit reconsideration by the national authorities of the decision to remove the applicant to Algeria."*

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[290] *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* (2009), Reference for a preliminary ruling: Raad van State – Netherlands, Case C-465/07, at para. 28.
[291] *D. v. the United Kingdom* (1997), European Court of Human Rights, 30240/96.
[292] *Bensaid v. United Kingdom* (2001), European Court of Human Rights, Application No. 44599/98.
. See also e.g. *S.C.C. v. Sweden* (2000), European Court of Human Rights, Application. No. 46553/99.

Furthermore, the Court has revealed to be open to interpret future instances on a case-by-case basis, taking into consideration all relevant factors which may increase the risk of ill-treatment contrary to article 3. More precisely, the Court noted in NA. v. The United Kingdom that *"due regard should also be given to the possibility that a number of individual factors may not, when considered separately, constitute a real risk; but when taken cumulatively […] may give rise to a real risk."* [293] On the basis of this judgement, it may well be argued that sometimes environmental migrants are displaced not only because of natural disasters, but because a disaster may cause conflicts and poverty, the accumulation of such factors may then, according to this interpretation, amount to inhuman or degrading treatment.

In addition to that, in *Tarakhel v. Switzerland*, the Court found that 'living conditions' may meet the threshold of inhuman and degrading treatment.[294] In this and other instances,[295] the Court held that in order to fall within the scope of Article 3 ECHR, the type of mistreatment must attain 'a minimum level of severity'. However, it was specified that the assessment of this minimum is relative, depending on all the circumstances of the case[296], suggesting that flexible and extensive interpretations are possible.

The constant evolution of the threshold has also been discussed by the ECtHR. The Court indeed held that the European Convention on Human Rights is a *"living instrument which must be interpreted in light of the present-day conditions"*.[297] In light of this considerations, the Court takes the view that hat "*the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies"*, also specifying that *"certain acts which were classified in the past as "inhuman and degrading treatment"* as opposed to *"torture"* could be classified differently in the future. [298]

A view according to which some degree of protection could be granted to environmental migrants on the basis of human rights instrument is confirmed by the UNHCR. Indeed, UNHCR Executive Committee has argued in the past that return of individuals who

[293] *NA. v. The United Kingdom* (2008), European Court of Human Rights Application No. 25904/07, at para. 130.
[294] European Court of Human Rights (ECtHR), Tarakhel v. Switzerland (Judgment), (2014), Application No. 29217/12, paras. 111, 122.
[295] Inter alia, Kudła v. Poland [GC], no. 30210/96, § 91, ECHR 2000-XI;
[296] ECtHR, Tarakhel v. Switzerland (Judgment), (2014), Application No. 29217/12.
[297] ECtHR, Case of Tyrer v. the United Kingdom (Application no. 5856/72); ECtHR, Case of Soering v. the United Kingdom. (Application no. 14038/88).
[298] *Ireland v. The United Kingdom*, 5310/71, Council of Europe: European Court of Human Rights, 13 December 1977, para 162; see also *Selmouni v. France*, 25803/94, Council of Europe: European Court of Human Rights, 28 July 1999, para 101.

have fled natural or ecological disasters might, in exceptional circumstances, reach a level of severity that could amount to inhumane treatment, which consequently gives rise to protection from *refoulement* under human rights instruments.[299]

6. Assessment and results

Chapters 4 and 5 had as their objective to analyse the current international and European legal framework in the field of refugee law and human rights law, in order to answer the following research questions:

RQ 1. *How are environmental migrants legally protected in the European Union, and how could EU legislation adapt to protect the position of environmental migrants and human security within the EU?*

> RQ 1.1. *From which legal sources do environmental migrants derive their rights, and have these been sufficiently implemented in EU law?*
>
> RQ 1.2. *To what extent does Member States legislation offer protection for environmental migrants?*

As a general finding, it is relevant to note that it has been shown how environmental migrants fall in what has been referred to as a 'protection gap', therefore they do not overall enjoy a high degree of protection in the European Union. This huge gap derives from a lack of reference to this category of displaced people both in international instruments and in EU instruments. Notwithstanding this, it has been found that two main legal avenues exist, which constitute opportunities for an expansion in protection conditions, namely national legislation and human rights law. National legislation, indeed, although not homogeneously, seems to accord a higher degree of importance to environmentally-displaced people than supranational legislation, offering better standards for protection. However, let us more deeply look into each instrument and assess its validity in serving the purpose of legally protecting environmentally-displaced people, as well as the gaps they entail.

[299] UNHCR, (2007) *Asylum in the European Union. A study on the implementation of the Qualification Directive.* See also European Migration Network, (2010). *The Practices in Sweden Concerning the Granting of Non-EU Harmonised Protection Statuses*.

6.1. Legal gaps

Türk and Dowd define protection gaps as *"inadequacies in the protection afforded to refugees and other forcibly displaced persons where existing provisions of international law, notably international refugee law, are either not applicable, non-existent, or inadequate in scope, or are not interpreted and/or applied in an appropriate manner."*[300] The current lack of a common and accepted definition for people displaced due to extreme weather events constitutes, in itself, a major legal gap, together with representing an obstacle for the protection of their rights. Such a lack also challenges implementation of standards both at an international and at a local level.

6.1.1. International refugee law instruments

The main legal instrument of international refugee law, and the only one analysed in this research, is the 1951 Geneva Refugee Convention. Environmental migrants, however, are not included in the scope of this Convention, whose Article 1.A(2) grants protection exclusively to people fleeing persecution from discrimination based on very specific grounds, namely: (i) race; (ii) religion; (iii) nationality; (iv) membership of a particular social group; (v) political opinion. According to the Geneva Convention, people meeting these criteria will be awarded the status of refugee under international law.

Although we find that the Geneva Convention is well implemented in the European legal order, as it has been widely identified by scholars, this definition cannot be applied to the category of environmentally-displaced people. The first reason why this is so, is that they cannot be said to be fleeing persecution within the meaning of the definitions cited above. Secondly, even if environmental migrants could be said to be victims of persecutions, they certainly would not be so in virtue of any of the reasons named in Article 1.A(2).

On the other hand, however, it has been noted that the Refugee Convention does not give a definition of the concept of 'persecution', which provides scholars and courts with a certain degree of flexibility in interpretation. In practice, courts have indeed interpreted this concept widely, including in the meaning of the term forms of harm that were not originally included in the document. However, all the grounds found to be amounting to persecution according to case law, are not related to environmental displacement, and they all contain the character of intentionality of the act: the act needs to be carried out intentionally in order to be classified as persecutory. However, a potentially slightly more open door is represented by the

[300] Türk, V., Dowd, R., (2014). *Protection Gaps* 283, 284.

fact that governments and individuals holding power have been in the past regarded by courts as responsible for certain environmental disasters, and therefore responsible for violating fundamental human rights of people.

Although the persecutory character of an act is very much based on degrees and proportion, therefore each assessment is carried out on a case-by-case basis, it is controversial to classify impacts of environmental change on the lives of individuals as persecutory events. Indeed, apart from what has been said above about the recent initiative of the Prosecutor of the International Criminal Court,[301] events involving environmental disasters are not currently understood as persecution in international law. Even though it is true that they are harmful to the human rights of individuals (e.g. the right to life), they do not happen on account of an individual's race, religion, nationality, political opinion, or membership of a particular social group. Nevertheless, it is possible to argue in two directions in order to make an effort to classify environmental occurrences as persecutory.

Namely, one could hold that the international community of industrialised countries can be considered the 'persecutor', as a consequence of their failure to cut greenhouse gases has led to an exponential increase of extreme weather events. [302] Alternatively it can be argued that, since some countries or regions are more adversely and easily affected by climate change in virtue of their resources or geographical position, individuals living in those areas can be regarded as a 'particular social group'. However, both links are difficult to establish. The matter of responsibility is an extremely controversial one, which also falls beyond the purely legal or political domains, into an ethical question. Similarly, the 'particular social group' link is also a delicate one, since the law requires that the group be connected by a fundamental, immutable characteristic other than the risk of persecution itself.[303]

To conclude, we can assert that the Geneva Convention does not represent a good instrument to provide environmentally-displaced people with international protection. Indeed, it constitutes a normative gap in terms of its restrictive scope and definition, which leaves little room to interpretation.

6.1.2 European Union refugee law instruments

[301] See *supra* note 109.
[302] See IPCC, *Climate Change: The IPCC Scientific Assessment*, note 8 above, 8 (fn omitted); IPCC, *Climate Change 2007: Synthesis Report*, note 8 above, 5; 6; 12; 13.
[303] Goodwin-Gill and McAdam, 79–80; *Applicant A v. Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 341 (Dawson J).

As hinted to above, the European Union has fully implemented the Geneva Convention in its secondary norms, and EU legislation refers to it as a normative or interpretative source, and as a benchmark of legitimacy for future legislation. However, European instruments have to some extent widened the standards of protection offered by the Convention. The two pieces of legislation which are devoted to granting international protection to migrants and asylum-seekers are the Qualification Directive and the Temporary Protection Directive.

The Qualification Directive offers two different types of protection to asylum-seekers, refugee status and subsidiary protection, based on the characteristics of the individual's threat which caused departure from her or his home country. Conditions for offering refugee status are based on the Geneva Convention, mentioning the same five grounds which can account for persecution, and, again, the act of persecution must be explicitly connected to one of those grounds, a causal link should be present. However, the doctrine has held that in cases in which the State fails to prevent any kind of harm or to protect affected people from it, and the reason of the indifference is linked to one of the Geneva grounds, then refugee status should be granted. According to a broad and humanitarian interpretation, environmental disasters could also be encompassed.

Nevertheless, it still results difficult to grant all kinds of environmentally-displaced people protection and refugee status under the Qualification Directive. Indeed, the only people who would receive protection would be those escaping from a disaster by which they have not, on purpose, been protected by the government, and when the government has chosen not to protect them because of reasons linked to either race, religion, nationality, membership to a particular social group, or political opinion. This is, indeed, an extremely narrow scope, which definitely results in a series of normative gaps. Namely, first of all, the Directive does not refer to large or mass influxes of people. It is clear that, in cases where people are displaced because the State fails to protect them, and this failure is voluntarily linked to a Convention ground, the people concerned are more likely to move in large groups. Secondly, migrants who flee because the State failed to protect them from a disaster, but who cannot be identified as belonging to a specific group, or cannot be said to share any of the grounds referred to at Geneva, still remain without protection.

Subsequently, the Qualification Directive also offers subsidiary protection to asylum-seekers who, in their home countries, are exposed to serious harm. One of the ways to determine whether a person has suffered, or can expect to suffer, serious harm, is to check whether inhuman or degrading treatment is found to be present. Although people displaced because of environmental disasters are, to a certain extent, exposed to a violation of their human

rights which can amount to inhuman or degrading treatment, according to case law, the provision stated in the Qualification Directive cannot be interpreted in absolute terms, and an intentional character is always required. In this sense, therefore, not even the provision of subsidiary protection is yet able to protect environmentally-displaced people.

The second European instrument which details a protection framework is the Temporary Protection Directive. This Directive proposes some interesting solutions, as it encompasses cases of 'mass influx', which means that large groups of displaced people could find a safe refuge in the EU thanks to this instrument. Although, again, environmental migrants are not mentioned as a category deserving this type of protection, people who suffer generalised violations of human rights are included in the scope of the Directive. In this regard, it has been argued that, in situations where fundamental rights, namely the right to life, are violated, such as environmental disasters, and the state does not act to prevent a disaster, or to protect the people affected, migrants can be considered as having suffered a generalised violation of human rights. Some more reasons for which this instrument can be considered promising, are that it is more flexible, allowing for case-by-case assessment, and its implementation to a certain case depends on a Council's decision. In this case, moreover, there is no limit concerning the causal nexus to a Convention ground, which is instead required by the Qualification Directive.

Although all this seems, and is, promising, the gap of the Temporary Protection Directive is constituted precisely in the fact that it only offers temporary protection. Clearly, environmental migration does not necessarily last for a short amount of time. In addition to that, this directive would most likely not be able to provide protection to people displaced by gradual disasters linked to climate change, since they are less likely to cross borders in large groups. Finally, another important point to note is that this directive has never been applied so far. For these reasons, the Temporary Protection Directive constitutes a protection gap, and remains inadequate for protecting people affected by environmental disasters who are forced to displace across borders.

To conclude, both the analysed European instruments part of refugee law are not well equipped in dealing with the problem of environmental migrations, indeed they contain multiple gaps. While the Qualification Directive somehow has the potential to grant protection to the concerned category of migrants, although only on an individual basis, an extensive interpretation has never been given by the Court, and the conditions for the act to amount to serious harm are not absolute. The Temporary Protection Directive grants protection for large groups but only for a limited amount of time, as its name suggests. Natural disasters, instead,

are likely to be permanent, or to require a longer amount of time before the region is habitable again.

6.2. Avenues to legally recognise environmental migrants in EU law

Although it still results challenging to get the EU Member States to endorse environmentally-displaced persons as a legally defined group, there are some reasons to be optimistic, as some legal avenues might potentially opened in the future, on the basis of the following points.

6.2.1. The recognition of environmental migrants in national law

As it has been analysed above, there is a much higher degree of recognition of the phenomenon of environmental migration, and consequently a higher degree of protection, in national legislations, rather than in the European or international one. In this regard, the instruments present in Sweden, Finland and Italy have been analysed, as they represent the only ones in the EU which explicitly grant protection to environmentally-displaced people. The aim of this comparative analysis was to evaluate whether one of the three models examined is more suitable to protect the category concerned, and whether one of them can be taken as an example to be followed at the European level, or even by other Member States.

Although the Swedish Aliens Act explicitly states that the definition of the so-called persons 'otherwise in need of protection' encompasses people who flee their country of origin and are unable to return due to an environmental disaster, it is still a limited provision. First of all, slow-onset disasters are not included within the meaning of the term 'environmental disaster'. This unarguably means that people displaced because the effects of climate change gradually worsen their livelihood in their region, do not deserve protection according to this act; only victims of sudden-onset disasters do.

Secondly, the provision according to which protection can be denied in cases where the Swedish asylum systems is considered not capable to handle an excessive number of applications, gives the government too much freedom in not accepting requests of asylum-seekers who demand for protection in the country. This indeed is a strong limitation, as people escaping a sudden disaster are likely to migrate in large groups, which might easily discourage the government to handle their cases. Finally, the fact that the provision has never been applied to date, and it has even been temporarily repealed, from 2016 to 2021, constitutes a huge limitation.

The Finnish Aliens Act, instead, constitutes a more complete instrument, which even provides for two types of protection, explicitly available for environmentally-displaced people, namely humanitarian protection and temporary protection. This is already a huge element of openness, as migrants can be ensured protection both on an individual basis, and when they flee in contexts of a 'massive displacement'. Furthermore, contrarily to the Swedish instrument, the Finnish one seems to be much less limited in terms of type of events encompassed within its scope, as all types of disasters are included in the humanitarian protection provision, be they sudden, slow, human-induced or purely natural. Finally, another positive note is that the Act does not include limitation provisions in case of a too large number of applications, as it is instead done in Sweden.

The only limitations present in the Finnish Act constitute its practical implementation. Also in Finland, the provisions in question have never been applied, and, just like in Sweden, the government decided to repeal some of the provisions of the document, *inter alia*, the one granting humanitarian protection. However, temporary protection has not been impacted by the repeal, meaning that, to some degree, environmental migrants still can enjoy protection in Finland.

Finally, Italian law also foresees a protection status to be granted to migrants fleeing from countries or regions affected by environmental disasters. Contrarily to Sweden and Finland, the Italian government has not repealed the provision; this, to date, makes Italy the only EU member state to offer explicit protection to environmentally-displaced people. Furthermore, the Italian jurisprudence has already given room to cases of environmental migration, which offer to the provision itself practical application.

Following the comparative analysis carried out in chapter 4, we can conclude that, what we have seen at the national level is by no means very positive, as three legal orders already acknowledge, and legally recognise, the problem of environmental migrants. Even though this type of legislation demonstrates the ability of states to create immigration and asylum policies that ensure a form of legal protection for environmental migrants, their granting of protection depends on the discretion of competent authorities rather than being based on a legal entitlement.[304] For this reason, the models as they are currently conceived do not provide any reliable protection.

[304] United Nations High Commissioner for Refugees (UNHCR), *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*, p 46.

Nevertheless, national legislation constitutes, together with human rights law, a possible entry point of possible extension. While Sweden's protection is very limited, together with having been completely repealed, Finland and Italy offer better and more inclusive standards for environmental migrants to enjoy protection, based on human rights values.

Both Finland and Italy, indeed, can represent an example for other member states. On the one hand, Italy currently offers a higher degree of protection because the provision is still in force, while part of the Finnish thing has been repealed. On the other, the Finnish legislation overall represents a better instrument as it offers different types of protection and is able to encompass a wide range of migrants, and it also offers both permanent and temporary protection. According to each own's contexts and legal systems, more member states could potentially follow these two pioneer countries and also add provisions granting protection to environmental migrants. Furthermore, the fact that in Italy there have already been judgements concerning environmental migration, and that an extensive interpretation has been provided, might as well encourage other member states to interpret European provision more flexibly.

However, the model which should be followed, gradually, at the EU level should, according to this analysis, be the Finnish one. The fact that this system grants two types of protection, encompassing the highest possible number of environmentally-displaced people, indeed leaves room for a possible extension of the Qualification Directive exactly on the basis of the provision detailing humanitarian protection in the Finnish Aliens Act. In addition to that, the Temporary Protection Directive might also see an extension of its scope basing on the Finnish provision of temporary protection, as it could also include environmental disasters as one of the causes for granting this type of limited protection. For this reason, the Finnish model, and to some extent the Italian one, at least in the application sphere, can be considered as a model to be followed by other member states as well as by the EU.

This indeed seems to be a more reasonable and realistic approach than modifying international instruments, at least at an initial stage. This would be part of a bottom-up approach that would see member states as pioneers in changing the interpretation of law, and hopefully pushing the legislators, at a national and then European level, to act in expanding protection possibilities towards including those people who find themselves highly vulnerable to one of the biggest crisis which is affecting the EU and the world nowadays, namely climate change.

6.2.2. The recognition of environmental migrants in human rights instruments

The human rights law framework, both at the international and at the European level, presents instruments that have a better capacity of making sure that individuals affected by environmental disasters who cross European external borders in search for a refuge are granted protection. Under international human rights law, states are prohibited from removing people, inter alia, to places where they face a real risk of being arbitrarily deprived of life, or subjected to torture or other cruel, inhuman, or degrading treatment.

Although no human rights instrument at the international or European level mention environmentally-displaced people nor recognise the problem itself, some degree of protection can be derived from the principle of *non-refoulement* which is enshrined in the main human rights instruments. The principle of *non-refoulement* as provided for in international and European human rights instruments, namely, *inter alia,* the European Convention on Human Rights, is an absolute provision, contrarily to the principle as enshrined in the Geneva Refugee Convention, which is, instead, subject to conditions and derogations. More specifically, the principle of *non-refoulement* can be said to be able to protect environmental migrants when one of the following two conditions is fulfilled: (i) the right to life is violated; or (ii) inhuman or degrading treatment is committed.

The basic assumption in this regard is that environmental disasters and climate change have impacted, and still continue to impact, the enjoyment of the human rights of individuals, and that negative impacts widely lead to displacement. Especially, the right which is the most affected is the right to life, to which a series of other fundamental rights are connected. Case law, both internationally and within the EU, has expressly ruled on the matter of environmental displacement and the consequent question of whether to grant international protection in such contexts. In particular, it was held in multiple instances that the principle of *non-refoulement* is to be applied in circumstances where migrants' right to life would be violated by returning them to their home countries, even when this violation would result from an environmental disaster.

Exactly as the right to life, the prohibition of inhuman or degrading treatment is stated in human rights instruments as an absolute provision, which means that it is not possible to derogate from it. Although mistreatment resulting from environmental disasters is not included in any of the provisions relating to inhuman or degrading treatment, definitions given by the doctrine mostly emphasise that the harm must have an intentional character in order to be considered as mistreatment in this sense. Nevertheless, here again, case law has mostly interpreted the matter in a more flexible and humanitarian manner – even though not specifically ruling on matters of environmental displacement – judging that, whenever there

is a lack of an intention to 'hurt or degrade', the ill-treatment can indeed amount to inhuman or degrading treatment, especially if there is a lack of prevention or protection by the state.

In addition to that, it has also been ruled by the ECtHR that the prohibition of inhuman or degrading treatment can be applied even when an event or a condition cannot be imputed to a state-actor, and even when it cannot be imputed to an actor at all; those definitely represent progressive interpretations. Therefore, although there is less evidence of how helpful this obligation can be in protecting environmental migrants, compared to the right to life discussed above, there is consensus that a future broad and humanitarian interpretation is to be expected, on the basis of past case law, which has confirmed that this category of displaced persons can actually find protection on the basis of a human rights approach. Notwithstanding these promising Court actions, however, which definitely provide for some degree of protection for environmental migrants, the question remains complicated, and it does not seem like this category of people still finds a systematic and reliable protection ground on the basis of human rights law in the European Union.

Given that, as discussed above, also in the Qualification Directive there is a reference to inhuman or degrading treatment as a ground for being possibly entitled to subsidiary protection, it is relevant to highlight the major difference between prohibiting refoulement of migrants who have been affected by natural disaster on the basis of Article 3 ECHR and doing so on the basis of interpreting Article 15 (b) of the Qualification Directive in light of Article 3. This difference lays in the absolute character of the provision contained in Article 3, namely the fact that it does not entail exclusion clauses comparable to those applying in virtue of Article 17 of the Qualification Directive.[305] For this reason, the ECHR is a much more open source of protection for environmental migrants compared to the Qualification Directive.

Although existing jurisprudence does not preclude climate impacts from being recognised as a source of inhuman treatment, it would need to be substantially developed before such harms would fall clearly within the scope of this concept. Notwithstanding the existence of judgements such as those described in this paragraph, there is still no legal provision under human rights law, specifically providing for concrete protection for environmental migrants. Nevertheless, instruments of human rights law can be classified as entry points.

[305] Article 17 (1) of the Qualification Directive posits that *"a third-country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that: (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he or she has committed a serious crime; (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations; (d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present."*

We can conclude that an approach based on human rights law, and specifically, on the concept of 'inhuman or degrading treatment' and the right to life, might be more successful than refugee law in providing protection to this category of displaced people. Under international human rights law, states are prohibited from removing people, *inter alia*, to places where they face a real risk of being arbitrarily deprived of life, or subjected to torture or other cruel, inhuman, or degrading treatment or punishment.

7. Recommendations and conclusions

One of the assumptions of this research work is that it is a globally-shared responsibility to reduce the harmful influence of human activity on the global climate, and thus to respond to the humanitarian crises resulting from it, such as mass displacement. Responses could range from being based on a top-down logic to drawing on a bottom-up approach. While the option of creating a new legally-binding global instrument based on a human rights approach and responsibility, exclusively addressing recognition and protection needs of environmentally-displaced people, has been widely discussed and advocated for by some,[306] it has never become a reality and it is not likely to do so in the future for several reasons. First of all, the creation of a new specific instrument requires a lengthy and cumbersome process that might produce non-fruitful results, as the document might hardly replace regional instruments. Indeed, the connection between the phenomena of environmental change and displacement is still uncertain and widely disregarded. Secondly, such a global treaty might not be able to address the specific needs of environmentally-displaced people.[307] Therefore, there exist several options that would be much more easily implemented than a new convention.

At present, the protection framework offered by the 1951 Refugee Convention does not encompass people who have been displaced because of the effects of environmental disasters, as it is limited to five restrictive grounds of persecution, none of which applies to the category of migrants which is the object of this research. Therefore, one option which has been widely discussed in the literature involves the renegotiation and expansion of the Geneva

[306] Prieur, M., et al., (2008). *Draft Convention on the International Status of Environmentally-Displaced Persons*. Revue Européene de Droit de l'Environnement: 381–393; Docherty, B., Giannini, T., (2009). *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*. Harvard Environmental Law Review, 33. 349–403; see also Resolution No. 1655/2009 and recommendation No. 1862/2009 of the Committee on Migration, Refugees and Populations together with the Committee on Environment, Agriculture and Regional Affairs of the Parliamentary Assembly of the Council of Europe.

[307] McAdam, J.(2011). *Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer*. International Journal of Refugee Law 23, n. 2: 1–27.

Convention and include protection guarantees for people fleeing from environmental disasters. One main advantage of this option lies in its relatively unproblematic implementation, as States Parties to the Convention all already have an operational recognition system at work.[308] Nevertheless, this possibility entails more challenges than opportunities for the international community. According to some, opening the 1951 Convention to environmentally-displaced people may weaken the applicability of the document to those seeking protection on the basis of one of the five Geneva grounds, and therefore weaken refugees' current legal status.[309] According to the United Nations Refugee Agency, an extension of existing obligations may *"place a potentially unbearable strain on current standards and practices"*.[310] In addition to that, there is widespread fear that it might result as unnecessarily time-consuming, and might also reduce the already existing lack of political will of States Parties to implement the Convention.[311] In virtue of the mentioned reasons, it might be more advisable to look for solutions at the regional level, namely letting the European Union act.

7.1. Adapting the Qualification Directive

A solution to the central problem to this research which has been suggested by the literature [312] is to modify the Qualification Directive by adding environmentally-displaced people as a category entitled to subsidiary protection. The legal basis for such modification lays in articles 78 and 79 of the Treaty on the Functioning of the European Union. Relevant portions of the mentioned articles are reported below:

Article 78

1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle

[308] See Grant, H., Randerson, J., Vidal, J., (2009). *UK Should Open Borders to Climate Refugees, Says Bangladeshi Minister*, The Guardian.
[309] Manou, D. (2017), *Climate Change, Migration and Human Rights*, Taylor & Francis.
[310] UNHCR, *Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective* (2009) 6.
[311] Mile, A. (2021). *Protecting Climate Migrants: A Gap in International Asylum Law.* Earth Refuge. See also Suhrke, A. (1994). *Environmental Degradation and Population Flows.* Journal of International Affairs, Vol. 47, No. 2, Refugees and International Population Flows (Winter 1994), pp. 473-496 (24 pages); Castles, S. (2002). Migration and Community Formation under Conditions of Globalization. International Migration Review, Volume 36, Issue 4 (Pages 1143-1168).
[312] Hush, E., (2017). *Developing a European Model of International Protection for Environmentally-Displaced Persons: Lessons from Finland and Sweden*. Columbia Journal of European Law.

of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting inaccordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising: (a) a uniform status of asylum for nationals of third countries, valid throughout the Union; (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection,

Article 79

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

The articles reported above show that the European Union possesses the competence and faculty to integrate within the Qualification Directive a provision granting international protection to people fleeing environmental disasters. A counter-argument to this statement could be constituted by the existence of the principle of subsidiarity, which is defined in Article 5 of the Treaty on European Union. The article stipulates that under the mentioned principle, *"in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."* According to the provision, before the Union can legislate in a certain field, two conditions must be fulfilled: (i) negatively, the objectives of the proposed action cannot be efficiently achieved by the member states on their own; (ii) positively, these objectives can be better achieved at the EU level. Therefore, it is necessary to carry out an assessment of who – whether the EU or its member states – is the best equipped entity to achieve the proposed objectives.

Indeed, policy development in the field of legal migration is a matter of national interest, and this is why expansion in this area has so far only happened at the domestic level. In this view, the question now is: would an approach based on the subsidiarity principle,

therefore leaving space for national initiatives, open up the way to a new solution for regulating international protection? Notwithstanding the limitations in the application of the national legislations protecting environmental migrants, as well as the fact that in Sweden and Finland they have been temporarily repealed, this type of legislation demonstrates the ability of states to create immigration and asylum policies that ensure a form of legal protection for environmental migrants. Might trusting the progress of individual member states in terms of expanding protection conditions for specific groups of asylum-seekers lead to the creation of a more robust framework, based on responses to actual needs, rather than on a top-down imposition? Following this idea, and drawing on the analysis conducted above according to which the Finnish legislation is the domestic EU legislation which grants the best and widest level of protection to environmentally-displaced people, constituting therefore a model for other member states for filling the protection gap at the national level.

Nevertheless, it is clear that, although the common asylum and immigration policy does not constitute exclusive competence for the Union, it is not sufficient to leave this matter to be addressed at national level. Indeed, the national role is and should continue to be residual compared to that of the Union. Given the flaws in the application of member states provision protecting environmental migrants, and the repeals by Sweden and Finland, it has been widely shown that member states are not regulating this matter effectively on their own. Another proof of the fact that member states are not able to well regulate immigration and asylum policy is given by the existence of a Union directive on the matter – the Qualification Directive.

On the practical side, an extension of the Qualification Directive should be based on the principle of *non-refoulement* examined above, as well as on its implications, namely the right to life and the prohibition of inhuman and degrading treatment. Furthermore, drawing on the comparative analysis conducted above, I advocate that the Finnish framework on international protection is taken as a model to expand the directive. Under the Finnish stamp, the Qualification Directive should therefore insert an additional type of protection, namely humanitarian protection, to be granted to environmental migrants.

Furthermore, we should not forget that action in the immigration field should be complemented by action from the climate angle. Indeed, the issue of environmental displacement has at its origin a lack of action at the institutional level to fight climate change. With this in mind, the EU should play a vital role, aiming to eradicate the problem at its roots. Article 191 of the TFEU stipulates that the *"Union policy on the environment shall contribute to pursuit"* the objective of, among others, *"promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate*

change". A real new impetus must therefore be given to what is commanded by Article 191. Although the climate change problem is global, rather than regional, the EU unarguably possesses the capacity of generating a massive input at regional level.

7.2. The role of the courts

Regardless of the degree of development achieved by the international European legislation, the national legal orders ensure an evolution of the system thanks to pressure coming from the jurisprudential side. Indeed, in terms of practical application, courts have provided extensive interpretations of existing legislation in multiple fields.

Since 2016, the International Criminal Court, for instance, includes within its jurisdiction crimes resulting in the 'destruction of the environment', 'illegal exploitation of natural resources' and 'illegal expropriation of land', which are all brought under the category of 'crimes against humanity'. This recognition not only led many to speak about the crime of 'ecocide', but also had the very concrete consequence of pushing a representation of indigenous groups in the Amazon to denounce Brazilian President Jair Bolsonaro at the International Criminal Court, citing him for dismantling environmental policies to protect the rainforest and the consequently violating the human rights of indigenous peoples.

In *D v. UK,*[313] furthermore, it was ruled that removing a person suffering from AIDS to a country with less care facilities amounts to inhuman or degrading treatment. This judgements results to be extremely cutting-edge in that such type of treatment could not be imputed to an actor of persecution; instead, inhumane treatment is, in this case, perpetrated by a general condition of lack of safety.

Another instance which shows how case law is actually well ahead of the legislators in recognising protection to environmental migrants is represented by a ruling by the Court of L'Aquila, Italy, which provided a Bangladeshi citizen with a right to humanitarian protection as a victim of flooding, which also represents a gradual effect of climate change.[314]

In light of the judgments mentioned in this paragraph, we can assert that although it is up to the legislator to fill the identified legal gaps, the courts do play a crucial role. Indeed, in the context of frameworks of international protection, especially within the sphere of

[313] *D. v. the United Kingdom* (1997), European Court of Human Rights, 30240/96.
[314] Tribunale di L'Aquila, Ord. n. R.G. 1522/1 del 18 febbraio 2018. Available at: https://www.dirittoimmigrazionecittadinanza.it/allegati/fascicolo-n-2-2018/umanitaria-3/245-trib-aq-16-2-2018/file.

environmental displacement, the courts offered and will continue to offer valid concrete bottom-up input for the legislator to accelerate action at the supranational level.

7.3. Concluding remarks

The phenomenon of environmental displacement is by no means a controversial one. This thesis proposed to examine the issue from a legal standpoint, regardless of the incidence of the phenomenon itself or of the actual existence of a linkage between environmental disasters and displacement. Notwithstanding this, one of the main reasons why the international and European legal protection framework is not yet adapted to cover people who migrate for environmental reasons is the lack of a proper definition of environmental displacement, which derives from a gap in knowledge of data that would accelerate creation of new policy and legal avenues. Thus, gathering more data and support research on climate-induced displacement would be the first step towards ensuring a higher degree of recognition for this category of migrants, as it would represent an incentive for legislators.

Environmental destruction, especially since the advent of climate change, has been causing millions of people to flee their homes in search of a habitable environment. This thesis has focused on the extent to which environmentally-displaced persons arriving in Europe are entitled to protection under the current legal framework of the European Union. While the international refugee regime based on the 1951 Geneva Refugee Convention has unarguably guaranteed protection overtime to millions of migrants, this regime yet contains fundamental gaps which have impeded to address the protection concerns of many more forcibly displaced persons, which find themselves in a legal limbo. Overall, it has been found that the EU has failed to fill this legal gap left by the international community, as the European regimes fail to create durable and institutionalised recognition and protection of environmentally-displaced persons. Neither international nor European frameworks of complementary protection offer sufficient protection to environmentally-displaced persons to date.

More specifically, it has been outlined that there exist several legal gaps as well as possible avenues concerning the legal protection of environmentally-displaced people in the European Union. In particular, the legal gaps consist in a fundamental lack of recognition and guarantees in both international and EU refugee law instruments, namely the Geneva Refugee Convention, the Qualification Directive and the Temporary Protection Directive. The legal avenues highlighted, instead, are the existence of protection for environmental migrants at a national level in three EU member states – Sweden, Finland and Italy – as well as the possibility

for this category of asylum-seekers to find refuge on the basis of human rights law instruments, namely the principle of non-refoulement, the prohibition of inhuman or degrading treatment and the right to life contained in the Universal Declaration of Human Rights, the EU Charter of Fundamental Rights and the European Convention on Human Rights.

As it can be concluded by the analysis made above, the difficulty, if not impossibility, of quantifying how many environmental migrants arrive in Europe, causes a lack of fixed points on which to base changes to European asylum law. Several questions in the field of protection guarantees for environmentally-induced displacement remain, to this date, unanswered. Nevertheless, it is clear that the fundamental next step in the legal as well as political discourse on the matter, would be to create a comprehensive legal category, agreeing internationally on the terminology, on the causes and effects, and also deciding who to protect and who to exclude in full compliance with human rights. This process should further lead to the implementation of an adequate protection mechanism. Such recognition would stand to signify a long-awaited formal acknowledgement of an ongoing topical phenomenon and the desire to seek legislative solutions.

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