



May 2023

Protecting Cross-Border Climate Migrants: Is EU Law Well-Equipped?

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1. INTRODUCTION

Climate change and its adverse impacts will likely reshape migration patterns worldwide. Its influences towards human mobility and immobility are already witnessed in multiple continents: some **Pacific islands** communities are forced to relocate due to coastal erosion; nomadic populations in **East Africa** are altering their traditional migration patterns to cope with increasing desertification; in **Central Asia**, the climate impact on rural livelihood is fueling rural-to-urban migrations¹.

It is, nevertheless, challenging to differentiate when climate change is the main factor triggering migration since, in most cases, environmental factors are closely linked to population growth, underdevelopment, inequality, conflicts, and violence². In other cases, it is physically impossible for individuals to remain in areas affected by severe environmental or climatic modifications, such as the case of coastal erosion.

Looking at what we expect for the upcoming years, a number of studies are trying to estimate the extent of climate-induced migration by 2050, but the results vary widely from hundreds of million to 1.2 billion³ - outlining the difficulties in quantifying and predicting such a multi-faceted phenomenon⁴.

Climate migration⁵ is, in any case, a cause of concern. One of the most cited studies, the **World's Bank** Groundswell report⁶, indicates that 216 million people could be forced to migrate within their own countries due to the worsening effects of climate change. To date, climate migration has been mostly internal and increasingly an urban phenomenon, with many of those displaced and migrating moving to urban areas. However, the accelerating trend of

¹ International Organization for Migration (IOM), *Climate Change and Migration in Vulnerable Countries*, p. 1, 2019, https://publications.iom.int/system/files/pdf/climate_change_and_migration_in_vulnerable_countries.pdf

² Frank Laczko *et al.*, *Migration, Environment and Climate Change: assessing the evidence*, 2009, https://publications.iom.int/system/files/pdf/climate_change_and_migration_in_vulnerable_countries.pdf

³ Institute for Economics & Peace (IEP), *Ecological Threat Register (ETR)*, 9 September 2020, <https://www.economicsandpeace.org/wp-content/uploads/2020/09/Ecological-Threat-Register-Press-Release-27.08-FINAL.pdf>

⁴ See also Migration Data Portal, Environmental Migration, [migrationdataportal.org](https://www.migrationdataportal.org/themes/environmental_migration_and_statistics), updated on 12 October 2022, https://www.migrationdataportal.org/themes/environmental_migration_and_statistics

⁵ The paper will refer to *climate migration*, following the definition provided by the IOM and referring to the movement of a person or groups of persons who, predominantly for reasons of sudden or progressive change in the environment due to climate change, are obliged to leave their habitual place of residence or choose to do so, either temporarily or permanently, within a State or across an international border. Notwithstanding the fact that people displaced as a result of climate change-related impacts are often referred to as *climate refugees*, UN agencies and scholars agree in saying that such terminology should be avoided. Climate refugees is indeed misleading, and fail to recognize a number of key aspects that define population movements in the context of climate change - besides potentially undermining the international legal regime for the protection of refugees.

⁶ Viviane Clement *et al.*, *Groundswell Part 2: Acting on Internal Climate Migration*, World Bank, Washington, DC., 13 September 2021, <https://openknowledge.worldbank.org/handle/10986/36248>

global displacement related to climate impacts is increasing cross-border movements⁷ - and this is particularly true in scenarios where climate change interacts with conflict and violence⁸. In recent years we witnessed a growing global policy awareness toward climate migration. The 2015 **Paris Agreement** created a Task Force on Displacement, developing recommendations for integrated approaches to avert, minimize, and address displacement related to the adverse impacts of climate change⁹. The **Global Compact for Safe, Orderly and Regular Migration** dedicates in its turn a specific section¹⁰ to disasters, climate change, and environmental degradation. It articulates a comprehensive set of potential responses to address drivers of migration through climate change adaptation and mitigation measures, disaster preparedness, disaster risk reduction, and disaster response. Most recently, the **UN Special Rapporteur on the human rights of migrants** issued a Report¹¹ on the relationship between climate change, human rights, and migration, analysing progress being made by States and providing a set of recommendations to address the specific protection needs of migrants affected by climate change.

In any case, existing legal instruments protecting displaced individuals - such as the **1951 Convention relating to the Status of Refugees and its 1967 Protocol** - are limited in scope and do not readily lend themselves to protect climate-displaced individuals that address migration across borders. Scholars are reflecting on a range of possible approaches to fill the gap, including broadening the definition of refugee¹², developing a new dedicated convention¹³, or elaborating an additional protocol to the 1992 **UN Framework Convention on Climate Change (UNFCCC)**¹⁴, among others.

The present paper tries to offer an overview of the legal instrument available in the **European Union** context for the protection of cross-border climate migrants. In particular, it will point out current interpretations of existing regional protection schemes - namely, the **Common European Asylum System (CEAS)** - and replicable national best practices. Before deep-diving into the main subject, and in order to frame the analysis in a more general context, we cannot exempt ourselves from briefly mentioning whether some sort of obligations arises

⁷ The White House, Report on the impact of climate change on migration, 2021, p. 4, <https://reliefweb.int/report/world/report-impact-climate-change-migration-october-2021>

⁸ *Ibid.*, p. 7.

⁹ United Nations Framework Convention on Climate Change (UNFCCC), Task Force on Displacement (TFD), unfccc.int, <https://unfccc.int/process/bodies/constituted-bodies/WIMExCom/TFD>

¹⁰ UN General Assembly Resolution 73/125, *Global Compact for Safe, Orderly and Regular Migration*, lett. (h)-(l), A/RES/73/195, 11 January 2019, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/451/99/PDF/N1845199.pdf?OpenElement>

¹¹ Felipe González Morales, *Report of the special rapporteur on the human rights of migrants*, UN General Assembly, A/77/189, 19 July 2022, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/431/49/PDF/N2243149.pdf?OpenElement>

¹² Sekhar Bandyopadhyay, *Opinion – Updating the 1951 Convention for Refugees*, E-International Relations, 28 May 2020, <https://www.e-ir.info/2020/05/28/opinion-updating-the-1951-convention-for-refugees/>

¹³ David Hodgkinson et al., *Towards a Convention for Persons Displaced by Climate Change: Key Issues and Preliminary Responses*, University of Western Australia, Institute for Advanced Studies, Issue 8, 24 September 2008, <https://www.ias.uwa.edu.au/new-critic/eight/hodgkinson>

¹⁴ Frank Bierman et al., *Protecting Climate Refugees: The Case for a Global Protocol*, Environment: Science and Policy for Sustainable Development, 50:6, 8-17, 28 July 2011, <https://www.tandfonline.com/doi/abs/10.3200/ENV50.6.8-17>

upon States under the international regime, namely international human rights law and international refugee law.

2. EXISTING STATES' OBLIGATIONS UNDER INTERNATIONAL LAW

2.1 *The International Human Rights Law regime and Teitiota v. New Zealand case*

Despite the fact that international human rights law does not provide for a structured protection regime, it does impose on States obligations, standards, and principles having the potential to inform and strengthen regional and national policy-making in the field of climate migration. This is especially true because all international human rights instruments apply to all migrants, and discrimination against them is prohibited based on their nationality or migration status¹⁵. As a result, international human rights law can establish grounds for admission and stay for migrants, which gives effect to international human rights obligations and principles. These include the right to private and family life and the deriving obligation to maintain family unity, the principle of the best interests of the child, the right to health, the principle of equality and non-discrimination, the fundamental principles and rights at work, and the principle of non-refoulement¹⁶.

The principle of *non-refoulement* is of particular interest to our field of study. *Non-refoulement*, now considered customary international law, has since been expanded to provide protection to persons on the move beyond just those who fall under the definition of refugee, therefore also covering any persons who, upon return or deportation, may face irreparable harm¹⁷. Indeed, environmental and climate-related disasters might reach the threshold required under such an obligation, as they might cause intense suffering and harsh living conditions in the country of origin¹⁸. A clear example of such interpretation is provided by the **UN Human Rights Committee (HRC)** in the *Teitiota v. New Zealand* case, according to which “[b]oth sudden-onset events (such as intense storms and flooding) and slow-onset processes (such as sea-level rise, salinization, and land degradation) can propel the cross-border movement of individuals seeking protection from climate change-related harm. The Committee is of the view that without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant¹⁹, thereby triggering the non-refoulement obligations of sending states”²⁰.

¹⁵ González Morales, *supra* note 13, para. 17.

¹⁶ *Ibid.*, para 18.

¹⁷ Office of the United Nations High Commissioner for Human Rights (OHCHR), *The Principle of Non-Refoulement under International Human Rights Law*, Geneva, Switzerland, <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>

¹⁸ Francesco Negrozio *et. al.*, *Analysing National Responses to Environmental and Climate-Related Displacement, Quarterly on Refugee Problems*, 2022, Vol. 61, Issue 1, 53-70, <https://doi.org/10.57947/qrp.v61i1.22>

¹⁹ International Covenant on Civil and Political Rights, adopted by the UN General Assembly 16/12/1966, entered into force on 23/3/1976.

²⁰ *Ioane Teitiota v. New Zealand (advance unedited version)*, CCPR/C/127/D/2728/2016, para. 9.11, UN Human Rights Committee (HRC), 7 January 2020, <https://www.refworld.org/cases,HRC,5e26f7134.html>

Even though Mr. **Teitiota**'s removal from **New Zealand** was ultimately considered lawful by the Committee²¹, the decision took the landmark step of affirming that states do have, in certain circumstances, non-refoulement obligations in the context of climate migration²².

2.2 The International Refugee Law and the 1951 Convention

In international refugee law, the 1951 **UN Convention Relating to the Status of Refugees (1951 Convention)** and the corresponding 1967 **UN Protocol** (1967 Protocol) amendment define a refugee as any person who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion²³.

International refugee law was not conceived to protect persons displaced across borders by the effects of climate change, even though they flee particular dangers and, therefore, may find themselves in a refugee-like situation. This category of migrants might be protected under international refugee law only if peculiar and additional circumstances are met. This would be the case, for instance, when: (a) national authorities' denial of protection from the adverse effects of climate change amounts to persecution; (b) national authorities use the negative impacts of climate change to persecute particular groups or individuals; or (c) serious human rights violations or armed conflict triggered by climate change causes people to flee based on a well-founded fear of persecution²⁴. As a result, the recognition of international protection for these individuals would relate to the behaviour of national authorities and not to the danger posed by climate change-related harms.

Assessing claims for international protection made in the context of the adverse effects of climate change and disasters present evident challenges, especially regarding our limited understanding of the effects of climate change and disasters and the complexities in applying refugee definitions²⁵. In any case, the **UNHCR** warns Governments that the assessment of such claims should not focus narrowly on the climate change event or disaster as solely or primarily natural hazards²⁶. Such a narrow focus might fail to recognize the social and political characteristics of the effects of climate change and represent a risk that decision-makers may decide that refugee law is inapplicable even in cases where a ground for protection might be established.

²¹ The Committee held that Mr. Teitiota had failed to demonstrate that the risks faced upon being deported reached the threshold required to violate the right to enjoy life with dignity. See *supra* note 20, para. 9.14.

²² See also Mari Galloway, *Teitiota v New Zealand, Climate Migration and Non-refoulement: A Case Study of Canada's Obligations under the Charter and the ICCPR*, 13 September 2022, 45:2 Dal LJ 385, <https://digitalcommons.schulichlaw.dal.ca/dlj/vol45/iss2/5/>

²³ Convention Relating to the Status of Refugees, 28 July 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 art. 1, § (A)(2); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, art. 1, § (A)(2).

²⁴ González Morales, *supra* note 13, para. 19.

²⁵ UN High Commissioner for Refugees (UNHCR), *Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters*, 1 October 2020, <https://www.refworld.org/docid/5f75f2734.html>

²⁶ *Ibid.*

Some already existing regional instruments contain a wider refugee definition, namely the **Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa** (OAU Convention)²⁷ and the **Declaración de Cartagena Sobre los Refugiados** (Cartagena Declaration)²⁸ in Latin America. Those instruments refer to people fleeing armed conflicts, generalized violence, and events seriously disturbing public order - the latter being broad enough to cover most cases falling under the climate displacement scenario. However, as pointed out by **Erikson**²⁹, regional laws that grant refugee status to certain displaced persons are not always binding, and protections afforded to refugees are limited to particular regions.

As suggested by some commentators, one possible avenue in the context of refugee law to protect climate migrants would be to broaden the definition of refugee itself³⁰. However, in accordance with the **UNHCR** position, it appears more likely that such a revision of the 1951 **Geneva Convention** might have the negative side effect of lowering protection standards for refugees and even undermining the international refugee protection regime altogether.

3. THE EUROPEAN UNION CONTEXT

3.1 *The Common European Asylum System (CEAS) and the subsidiary protection*

In 2020, the **European Parliament's Committee on Civil Liberties, Justice, and Home Affairs** commissioned a study examining legal and policy responses to environmental migration and displacement³¹ to expand discussions and policy development. The document shows that within the **EU International Protection harmonized regime**, complementary forms of protection deriving from the Qualification Directive (QD)³² and Temporary Protection Directive (TPD)³³, as well as protection from *non-refoulement* in the Return Directive (RD.)³⁴, could provide some protection alternatives. In practice, room for protection under these instruments is minimal.

²⁷ OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session, Addis-Ababa, 10 September 1969.

²⁸ Declaración de Cartagena sobre Refugiados, Adoptado por el "Coloquio Sobre la Protección Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y Humanitarios", 22 November 1984.

²⁹ Kimberly A. Erickson, Filling the Protection Gaps for Climate Change and Disaster-Induced Migrants, Human Rights Brief: Vol. 25: Iss. 2, Article 13, <https://digitalcommons.wcl.american.edu/hrbrief/vol25/iss2/13>

³⁰ Bandopadhyay, *supra* note 14.

³¹ Albert Kraler *et al.*, *Climate Change and Migration: Legal and policy challenges and responses to environmentally induced migration*, European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, 2020, [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655591/IPOL_STU\(2020\)655591_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655591/IPOL_STU(2020)655591_EN.pdf)

³² 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 protection, and for the content of the protection granted.

³³ 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.

³⁴ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

International Protection in the **EU** is regulated by a set of rules jointly referred to as the **Common European Asylum System (CEAS)**. Central to this architecture is the already mentioned Qualification Directive³⁵, which sets common standards on how to designate a person as needing international protection. The QD follow the refugee definition of the 1951 **Geneva Convention** with minor modifications but establishes a complementary human rights-related protection known as subsidiary protection.

The latter provides “*protection of 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 [...] would face a real risk of suffering serious harm [...] and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country*”³⁶ - the serious harm being consisted of: (a) the death penalty or execution; (b) torture or inhuman and degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflicts.

Serious harm under art. 15 letters (a) and (c) do not offer leeways to protect environmentally-displaced individuals. On the other hand, the risk of torture or inhuman and degrading treatment under letter (b) entails potentially positive interpretation when linked with the **European Convention on Human Rights (ECHR)** and the principle of *non-refoulement*. As a matter of fact, the prohibition of torture and inhuman and degrading treatment from the subsidiary protection corresponds in essence,³⁷ to art. 3 of the **ECHR** (Prohibition of torture). Since the landmark decision *Soering vs. the UK*³⁸ by the **European Court of Human Rights (ECtHR)**, the protection obligations that art. 3 **ECHR** contains, have been extended to the prohibition of returning a person if their life or physical integrity is arbitrarily endangered in the country of origin, developing further the *non-refoulement* principle. As a result, a State is not only obliged not to torture but is also prohibited from returning a foreigner to their country of origin if torture or inhuman or degrading treatment awaits them there, constituting an extraterritorial effect of Art 3 **ECHR**³⁹.

At this point, a question arises as to whether every person falling within the scope of Article 3 **ECHR** needs to be automatically granted subsidiary protection under art. 15 lett. (b). Unfortunately, two decisions by the **Court of Justice of the European Union (CJEU)** point in the opposite direction.

³⁵ *Ibid.*, *supra* note 37.

³⁶ *Ibid.*, art. 2 (f).

³⁷ Court of Justice of the European Union, *Elgafaji v Staatssecretaris van Justitie*, C-465/07, 17 February 2009.

³⁸ European Court of Human Rights, *Soering vs. UK*, Application no. 14038/88.

³⁹ Matthew Scott, M., *Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights*, *International Journal of Refugee Law*, Vol. 26, No. 3 (2014), pp. 404-432; p. 412.

First of all, in *Elgafaji v Staatssecretaris van Justitie* the **CJEU** points out that persons falling within the scope of Article 3 **ECHR** cannot be automatically granted subsidiary protection: “[a]rticle 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”⁴⁰.

The court further elaborates in *Mohamed M’Bodj v État Belge*⁴¹ that “[a]rticle 15(b) [...] must be interpreted as meaning that serious harm [...] does not cover a situation in which inhuman or degrading treatment [...] to which an applicant suffering from a serious illness may be subjected if returned to his country of origin, is the result of the fact that appropriate treatment is not available in that country, unless such an applicant is intentionally deprived of health care”⁴².

From this reasoning, it appears that the severe harm must take the form of conduct on the part of a third party and that it cannot, therefore, simply be the result of general shortcomings in the health system of the country of origin⁴³. Applied to climate migration, this interpretation makes the definition of serious harm to climate change-related effects unlikely applicable, preventing the recognition of the subsidiary protection to environmental-based asylum claims.

Although both the **CJEU** nor the **ECtHR** have not (yet) had to answer any claim solely based on climate change and natural disasters in the context of migration, **Delval**⁴⁴ leaves the door open to a possible positive outcome. In particular, the **ECtHR** extensive interpretation of Article 3 of the **ECHR** might produce, in future cases, similar reasoning than the **UN Human Rights Committee** in the already mentioned *Teitiota v. New Zealand* case⁴⁵.

The **Common European Asylum System (CEAS)** leaves a certain gap concerning cases at the interface between subsidiary protection and non-refoulement as derived from Art 3 **ECHR**. In this intersection, EU Member States may develop national protection statuses provided they do not undermine the minimum standards deriving from the common system. The **European Migration Network (EMN)** reports⁴⁶ that 20 countries have implemented at least one national protection status, some specifically mentioning environmental change and natural disasters.

3.2 The Swedish and Finnish experience

⁴⁰ *Elgafaji v Staatssecretaris van Justitie*, *supra* note 47, para. 28.

⁴¹ Court of Justice of the European Union, *Mohamed M’Bodj v État Belge*, C-542/13, 18 December 2014.

⁴² *Ibid.*, para. 41.

⁴³ *Ibid.*, para. 35.

⁴⁴ Eugénie Delval, *From the U.N. Human Rights Committee to European Courts: Which protection for climate-induced displaced persons under European Law?*, EU Migration Law Blog, 8 April 2020, <https://eumigrationlawblog.eu/from-the-u-n-human-rights-committee-to-european-courts-which-protection-for-climate-induced-displaced-persons-under-european-law/>

⁴⁵ See *supra*, para. 1.2.

⁴⁶ European Migration Network (EMN), *Comparative Overview of National Protection Status in the EU and Norway – EMN Synthesis Report for the EMN Study 2019, 2020*, https://emn.ie/wp-content/uploads/2020/05/emn_inform_nat_prot_statuses_final.pdf

Sweden and **Finland** stood out as some of the few States in the world to establish a protection regime with explicit reference to environmental disasters. Unfortunately, both provisions were repelled in 2016, when Europe faced a massive migration flow that ultimately brought 1 million people from Africa and the Middle East to the continent.

The 1994 **Cairo Conference on Population and Development** inspired the Swedish disaster displacement provision, among other international processes. During the Conference, Governments were encouraged to consider requests for migration from countries whose existence, according to available scientific evidence, is imminently threatened by global warming and climate change⁴⁷. The Swedish Government responded to this call to action by developing amendments to the 1989 Aliens Act, and in particular by elaborating the provision contained in Chapter 4, section 2a (2): *“A person otherwise in need of protection in this law is a non-citizen who in other cases than those set out in 1 or 2 §§ finds herself outside the country that she is a citizen of because he or she (1) needs protection because of an external or internal armed conflict or because of other serious tensions in the home country feels a well-founded fear of being exposed to serious harm or (2) is unable to return to her home country because of an environmental disaster”*⁴⁸.

The provision was framed as an alternative to international protection, applicable to individuals who would not satisfy the requirements to be eligible for refugee status or subsidiary protection.

While being a pioneering means of protection on paper, the application of the Swedish provision did not satisfy the public expectation⁴⁹. Firstly because of its practical limitation, due to the fact that its application was limited to sudden-onset environmental disasters - leaving slow-onset disasters outside the scope of the norm. Furthermore, the protection might have been invoked only when a safe internal migration alternative was not available in the country of origin⁵⁰.

In its turn, **Finland** included in its Alien Act (301:2004) a national protection status called “humanitarian protection” which can be granted to an alien residing in **Finland** *“if there are no grounds under section 87 or 88 for granting asylum or providing subsidiary protection, but he or she cannot return to his or her country of origin or country of former habitual residence as a result of an environmental catastrophe or a bad security situation which may be due to an international or internal armed conflict or a poor human rights situation”*. The

⁴⁷ United Nations, *Report of the International Conference on Population and Development*, a/conf.171/13/Rev.1, www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/icpd_en.pdf

⁴⁸ Alien Acts (2005:716), Chapter 4, section 2a (2).

⁴⁹ Matthew Scott *et al.*, *Nordic Norms, Natural Disasters, and International Protection*, *Nordic Journal of International Law*, 91(1), 101-123, https://brill.com/view/journals/nord/91/1/article-p101_6.xml

⁵⁰ Emily Hush, *Developing a European Model of International Protection for Environmentally-Displaced Persons: Lessons from Finland and Sweden*, *Columbia Journal of European Law*, September 7, 2017, <http://cjel.law.columbia.edu/preliminary-reference/2017/developing-a-european-model-of-international-protection-for-environmentally-displaced-persons-lessons-from-finland-and-sweden/>

specific inclusion of disaster displacement was added in 1999. However, this category was implicit in the general concept of a person needing protection, reflected in section 31 of the 1991 Aliens Act⁵¹.

As mentioned earlier, both provisions were repelled in 2016 in the aftermath of the European refugee crisis, allegedly for fear of receiving a disproportionate number of refugees compared to other Member States⁵².

In any case, during their life cycle, not a single residency permit was issued to protect climate migrants under both the Swedish and Finnish provisions. **Scott** points out that part of this unsatisfactory non-application was due to the conceptual confusion generated by the attempts to formulate a new category of international protection for people displaced across borders in the context of disasters and climate change, together with the lack of timely and detailed country of origin information to be used to apply the relevant law⁵³.

3.3 The Italian national protection and the residence permit for calamity

Out of the 27 EU Member States, **Italy** is currently the only one to provide multiple and explicit protection to climate-related displaced individuals⁵⁴. As a matter of fact, climate migrants might find protection in **Italy** under both a national complementary protection regime called “*special protection*”, and an ad hoc provision for environmental and climate-displaced people known as a “*residence permit for calamity*”⁵⁵.

The first represents an evolution of the former “humanitarian protection” provision in force in Italy until 2018. In its current wording (amended in 2020 by Decree-Law no. 130/2020) special protection is granted against the *refoulement* of a third-country national when there are reasonable grounds for believing that their removal may expose them to: a) a risk of torture, inhuman or degrading treatment; or b) systematic and gross violations of human rights, including the right to private and family life.

Italian courts have already demonstrated that, in some scenarios, dire environmental stressors might exacerbate an applicant’s vulnerability in his country of origin, fulfilling the mentioned threshold to prohibit the *refoulement* and granting special protection. It is the 2020 case of a Bangladeshi citizen whose house was destroyed by the flooding that hit large parts of **Bangladesh** in 2012 and 2017. The **Court of Cassation** noted that this situation “*affects the vulnerability of the applicant if accompanied by adequate allegations and evidence relating to*

⁵¹ Scott, *supra* note 55.

⁵² Hush, *supra* note 56.

⁵³ Scott, *supra* note 55.

⁵⁴ Chiara Scissa, *The climate changes, should EU migration law change as well? : insights from Italy*, European journal of legal studies, 2022, Vol. 14, No. 1, pp. 5-23, <http://hdl.handle.net/1814/74753>

⁵⁵ Francesco Negozio, *What Legal Options for Environmental and Climate-Displaced People under the Italian Protection System? Complementary protection on humanitarian grounds v. ad hoc regimes*, 30 September 2022, Refugee Law Initiative, Blog on Refugee Law and Forced Migration, <https://rli.blogs.sas.ac.uk/2022/09/30/what-legal-options-for-environmental-and-climate-displaced-people-under-the-italian-protection-system/>

the possible violation of primary human rights, which may expose the applicant to the risk of living conditions that do not respect the core of fundamental rights that complement dignity”⁵⁶. The Decree-Law number 113 of 4 October 2018, by introducing the new article 20-bis to the **Consolidated Act on Immigration**⁵⁷, provided a new *ad hoc* protection instrument for asylum seekers whose country of origin was in a situation of “*serious calamity*” that did not allow for a safe return. The wording is intended to potentially cover both man-made and natural environmental disasters⁵⁸.

Unfortunately, the exact number of residence permits issued on environmental grounds (both under the special protection regime and the *ad hoc* residence permit) is not available, and there is very little jurisprudence produced so far. **Negozio**⁵⁹ points out that there is only one judicial decision related to the residence permit for calamity known to date, granted to an Albanian citizen who lost her home following the 2019 seismic event in **Albania** and, according to the Judge, “*in the event of a return to her country of origin, she would [have been] exposed to a serious survival situation*”⁶⁰.

In any case, the few available cases demonstrate that Italian law is potentially equipped to provide protection to environmentally displaced individuals who would be otherwise left without protection.

4. CONCLUDING REMARKS

In response to the question posed by the very title of this paper, it might be argued that the **EU** context in its regional and national dimensions seems poorly equipped to provide a legal protection framework for climate migrants.

Having noted that an environmentally-displaced-based claim might lead to the recognition of the refugee status only if peculiar and additional circumstances are met⁶¹, the paper investigated whether the vulnerable situation of environmentally-displaced individuals might trigger a *non-refoulement* scenario under art. 15, letter b) of the Qualification Directive⁶², granting the applicant subsidiary protection. This option needs to be dismissed as well, at least in light of the **Court of Justice of the European Union (CJEU)** interpretation, which makes unlikely applicable the definition of serious harm to climate change-related effects.

At the national **EU** Member States level, although **Sweden** and **Finland** stood out as some of the few States in the world to establish a protection regime with explicit reference to environmental disasters, both their provisions were repelled in 2016. As a result, **Italy** is

⁵⁶ Court of Cassation, I Civil Section, Order of 4 February 2020, n. 2563.

⁵⁷ Subsequently amended by the Decree-Law number 130 of 21 October 2020.

⁵⁸ Scissa, *supra* note 67, pag. 19.

⁵⁹ Negozio, *supra* note 68.

⁶⁰ Judge of the Peace of Bari, Order of 30 June 2021, n. 450.

⁶¹ See *supra*, para. 2.2.

⁶² Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

currently the only one to provide multiple and explicit protection to climate-related displaced individuals, which seems to be effective in protecting climate migrants. Firstly because of the existence of an *ad hoc* protection option offered by the residence permit for calamity. In addition, the approach of the Italian courts when applying the special protection regime to environmental-related applications demonstrates that an expansive interpretation of existing norms might lead to effective protection too. As pointed out by **Scissa**, the Italian case law also “*unveils ground-breaking scenarios where intentional human misconduct damaging the environment can also amount to profound human rights violations, legitimizing the need for protection*”⁶³.

This lesson can arguably be extended to other national systems as well as to the **European Union** framework. Using **Negozio**’s words ⁶⁴, rather than proposing ad hoc protection regimes by adopting new international protocols, conventions or guidelines on environmental and climate displacement, which could prove useless or counterproductive, an evolutive interpretation of current international legal tools should be consolidated, extending their personal scope to new vulnerabilities emerging from climate change and environmental degradation.

⁶³ Scissa, *supra* note 67, p. 23

⁶⁴ Negozio, *supra* note 68.