Freedom, Security & Justice: European Legal Studies

Rivista giuridica di classe A

2021, n. 2

EDITORIALE SCIENTIFICA
ES

Rivista quadrimestrale on line "Freedom, Security & Justice: European Legal Studies"
www.fsjeurostudies.eu
Editoriale Scientifica, Via San Biagio dei Librai, 39 - Napoli
CODICE ISSN 2532-2079 - Registrazione presso il Tribunale di Nocera Inferiore n° 3 del 3 marzo 2017

Freedom Security Justice
European Legal Studies

Indice-Sommario
2021, n. 2

numero monografico

VERSO UN QUADRO COMUNE EUROPEO ED UNA NUOVA *GOVERNANCE* DELLA MIGRAZIONE E DELL'ASILO

TOWARDS A COMMON EUROPEAN FRAMEWORK AND A NEW GOVERNANCE OF MIGRATION AND ASYLUM

ENVIRONMENTAL MIGRANTS: UN RECENT AND "SOFT" SENSITIVITY V. EU DEAFENING SILENCE IN THE NEW EUROPEAN PACT ON MIGRATION AND ASYLUM.

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1. Introduction

The International Organization for Migration (hereinafter, also referred to as IOM) considers migration as "an umbrella term, not defined under international law, reflecting the common lay understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons".[1] However, as noted by the same Organization this concept "includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally-defined, such as smuggled migrants; as well as those whose status or means of movement are not specifically defined under international law, such as international students".[2]

This category does not include environmental migrants, albeit they are of growing interest to the international community.[3] The recent climate changes that are affecting all

Double blind peer reviewed article.

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[1] International Organization for Migration, *Glossary on migration*, in *IML Series* No. 34, 2019, p. 132.

[2] *Ivi*.

[3] If international data concerning international migrations flows are taken into account, it is possible to understand how much this migratory phenomenon is greatly expanding its demographic range: at the end of 2019, around 5.1 million people in 95 countries and territories were living in displacement as a result of disasters that happened not only in 2019, but also in previous years. The countries with the highest number of internally displaced persons were Afghanistan, India, Ethiopia, Philippines and Sudan. For additional data, see International Displacement Monitoring Centre, *Global Report on Internal Displacement 2020*, pp.7-63; Stockholm Environment Institute, *Disaster and Climate-Induced Migration and Displacement*, Stockholm Environment Institute, 2019. Moreover, most of the disaster displacements were the result of

the continents of the world have gradually caused serious damage not only to the ecosystems and natural habitats of some areas of the globe but have also significantly impacted some populations particularly affected by this kind of climate disasters. The very habitability of some territories has been questioned, with the evident need of groups of individuals to move for their own survival.[4] This situation highlights the close link between the environmental degradation phenomena attributable *prima facie* to climate changes and the individuals, who are sometimes forced to leave their countries of origin because of the serious and irreversible damage to the surrounding environment in which they live.

This work aims at analysing the case of environmental migrants in relation to the New European Pact on Migration and Asylum adopted in September 2020.[5] First, the international definition and the complex distinction between environmental migrants and environmentally displaced persons will be examined. Environmental migrants' status will be analysed in the perspective both of international migration law and of refugees' protection. Then, the focus will be on the growing role of soft law on the environmental migrants' protection. Indeed, *le droit mou* proposes a new protection regime for people forced to evacuate their homes because of environmental disasters occurring in their own country.

The recent expansion of soft law on this issue seems to be discordant if compared with the lacking references to environmental issues contained in the New European Pact on Migration and Asylum. Unfortunately, also the EU secondary legislation does not contain specific provisions with regard to environmental migrants. Some legal provisions referring to subsidiary protection in relation to categories of persons other than refugees seem to apply to environmental migrants only by way of interpretation in the domestic law of certain EU countries. Indeed, the general inability of EU law to address the issue of environmental migrants seems to be proved by the legislative provisions of some EU member states, which have autonomously developed a body of law that has recognised *ad hoc* measures of subsidiary protection towards environmental migrants.

2. The category of environmental migrants: a background description

Environmental migrants were defined in 2007 by the International Organization for Migrations as those subjects and groups of individuals who "predominantly for reasons

tropical storms and monsoon rains in South Asia and East Asia and Pacific; four countries accounted for more than 17 million new internal displacements due to disaster: India (5 million), the Philippines (4.1 million), Bangladesh (4.1 million), and China (4 million). See International Displacement Monitoring Centre, *Internal displacement 2020: Mid-year update*, pp. 10-49.

[4] On this point see F. PERRINI, *Il riconoscimento della protezione umanitaria in caso di disastri ambientali nel recente orientamento della Corte di Cassazione*, in *Ordine Internazionale e Diritti Umani*, 2021, n. 2, pp. 351-352.

[5] European Commission, Communication from the Commission on a New Pact on Migration and Asylum, COM (2020) 609 final, Brussels, 23.9.2020.

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".[6] The qualification of "sudden or progressive change of the environment" could consist in changes in precipitation, increases in the frequency or intensity of some extreme weather events and sea level rise.[7] These impacts threaten the health of every individual by affecting the availability of natural resources, the scarcity of food, water and the same habitability of the concerned territory.[8] Such consequences will vary based on where a person lives, how sensitive they are to health threats, how much they are exposed to climate change impacts, and how properly they and their respective community are able to adapt to environmental changes. Indeed, people in developing countries may be the most vulnerable to environmental disasters and certain populations, such as children, pregnant women, older adults, and people with low incomes, face increased risks connected to the health impacts of climate change.

The IOM definition of environmental migrant is not meant to create any new legal categories in international law, representing "a working definition"[9] aimed at describing all the different situations in which people move in the context of environmental factors. Therefore, legally speaking, there is no international agreement on a term to be used in order to describe persons or groups of persons that move for environment related reasons.

Some scholars tend to distinguish amidst environmental migrants and environmentally displaced persons: environmental migrants would be primarily voluntary migrants, proactively migrating and "responding to a combination of 'push' and 'pull' factors".[10] On the other hand, the narrower category of environmentally displaced persons considers people who are forced to migrate reactively, "responding primarily to 'push' factors".[11] The distinction between slow and acute onset environmental problems can represent a useful tool for determining whether a movement is proactive, involving migrants, or reactive, involving displaced persons. An acute onset problem - such as the case of a community displaced by floods or other unexpected natural disasters - leads to reactive responses because environmental migrants are rarely able to migrate before the disaster occurs. Nevertheless, this differentiation, although relevant with respect to the socio-environmental characteristics that qualify the migration of the

[6] IOM, *Discussion note: Migrants and the environment*, MC/INF/288, 2007, Ninety-fourth session, pt. 6.
[7] See B.C. MANK, J. JACKSON, *Climate change and displacement: Multidisciplinary perspectives*, in *Human Rights Quarterly,* 2012, vol. 34, n. 1, pp. 267-284.
[8] A.J. MCMICHAEL, J. PATZ, R.S. KOVATS, *Impacts of global environmental change on future health and health care in tropical countries*, in *British Medical Bullettin*, 1998, vol. 54, n. 2, pp. 475-488.
[9] IOM, *Discussion note: Migrants and the environment*, cit., pt. 6. On this point, see the contribution of I. CARUSO, B. VENDITTO, *Il futuro del Mediterraneo. Studio preliminare sui rifugiati ambientali*, in M. VALLERI, R. PACE, S. GIRONE (eds.), *Il Mediterraneo, uno studio e una passione. Scritti in onore di Luigi Di Comite*, 2012, Bari, pp. 252-269.
[10] T. KING, *Environmental Displacement: Coordinating Efforts to Find Solutions*, in *Georgetown International Environmental Law Review*, 2006, vol. 18, n. 3, p. 555; F. PERRINI, *Cambiamenti Climatici e migrazioni forzate: verso una tutela internazionale dei migranti ambientali*, Napoli, 2018, pp. 83-87.
[11] T. KING, *Environmental Displacement: Coordinating Efforts to Find Solutions*, in *Georgetown International Environmental Law Review*, cit., p. 555.

individual, appears to be secondary from a legal point of view. In fact, what matters in international law is the qualification of those migrants who move within a state or rather between the borders of two or more states for environmental reasons.

The distinction between voluntary and forced migration is more likely a continuum between completely voluntary migration, where the "choice and will of the migrants is the overwhelmingly decisive element encouraging people to move",[12] and completely forced migration, in which migrants are faced with death unless they move.[13] In most cases it is not easy to frame a migrant in one of the two profiles, since most of these individuals fall into the middle of the two distinctive features.

Therefore, the following work will refer both to the general category of environmental migrants and to the specific *genus* of environmentally displaced persons.

3. The extremely limited protection of Environmental Migrants in International law

International law has started to be focused on the issue of international migrations only in the last few decades, despite the longstanding phenomenon connected to international migrations.

International migration law has focused on some specific profiles related to migrant status, i.e., smuggled, stateless and trafficked persons, migrant workers and non-documented migrant workers.[14] Furthermore, a little has been done to extensively recognise migrants as such and to confer them a specific set of rights. The situation is even worse as far as environmental migrants are concerned, since no binding rules of international law – neither conventional nor customary – referring exclusively to this category of migrants are in force.[15]

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[12] H. GRAEME, *Environmental Concerns and International Migration*, in *The International Migration Review,*1996, vol. 30, n. 1, p. 106.

[13] T. KING, *Environmental Displacement: Coordinating Efforts to Find Solutions*, cit., p.555. On this point, see also E. BURLESON, *Climate change displacement to refuge*, in *Journal of Environmental Law and Litigation,* 2010, vol. 25, n. 1, pp. 19-36.

[14] If, *inter alia*, the case of migrant workers is taken into account, it is worth mentioning the two main legally binding instruments disciplining the rights of this category of migrants: the ILO Conventions n. 97 and n.143. The first Convention promotes the conclusion of bilateral labour agreements between States where there is a considerable flow of migrant workers. The agreements are aimed at including certain provisions to tackle abusive migrant recruitment practices, promote sound skills and jobs matching, portability of social security entitlements and so on. With regard to Convention n. 144, the text aims at addressing irregular migrations while laying down the general obligation to respect basic human rights of all migrant workers. In this case the fundamental right recognised to all migrant workers is the need to ensure full respect of human rights of all migrant workers, including those in an irregular situation (Convention n.143, Article 1) together with certain rights contained in other eight ILO Conventions, among which it stands: the right to freedom of association and collective bargaining (Conventions n. 87 and n. 98), the prohibition and abolition of forced labour (Conventions n. 29 and n. 105 as well as the 2014 Protocol to the Forced Labour Convention n. 29), the elimination of child labour (Conventions n. 138 and n. 182), as well as the right to equal remuneration and the prohibition of all forms of discrimination in employment and occupation (Conventions n.100 and n. 111).

[15] D. FALSTROM, *Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment*, in *Colorado Journal of International Environmental Law and*

According to international human rights law migrants enjoy the fundamental rights afforded to all persons regardless of their legal status.[16] These rights include: rights to life, equality and non-discrimination, protection against arbitrary arrest and detention, protection against torture or inhuman treatment, prohibition against collective expulsion, family rights, protection against labour exploitation, right to social security, right to highest attainable standard of physical and mental health, freedom of movement and right to enjoy culture in community with others.[17]

Only a very detailed category of migrants, i.e., international refugees enjoy, as it is well known, a better protection established by the Convention relating to the Status of Refugees of 28 July 1951. Article 1 of the Convention gives a precise definition of a refugee as one who fears, with good reason, to be persecuted for reasons of race, religion, nationality, membership of a particular social group or for his political opinions. In this sense, refugees are both those who flee their own country and those who cannot return because they are already abroad. The definition is universal in scope and attempts to link the refugee not to membership in a certain group, but to the notion of "personal persecution".[18] Among the various limits on state sovereignty in favour of refugees (and asylum seekers), the principle of non-refoulement (art. 33 of the UN Refugee Convention) stands out. It consists in the duty of not returning individuals to places where their lives would be threatened - providing access to fair and efficient asylum procedures and ensuring respect for basic human rights. At its core, the principle of non-refoulement is now considered to form part of customary international law.[19]

Policy, 2001, vol. 13, n. 2001, Yearbook, pp. 1-30; D. KEANE, *The Environmental Causes and Consequences of Migration: A Search for the Meaning of Environmental Refugees*, in *Georgetown International Environmental Law Review*, 2004, vol. 16, n. 2, pp. 209-224.

[16] These rights are based on based upon the inherent dignity of every person. See Human Rights Committee, General Comment No. 15*: The position of aliens under the Covenant*, UN Doc. HRI/GEN/1/REV.9 (vol.I), 11 April 1986. In its General Comment the Human Rights Committee stated that, except for Article 25 of the International Covenant on Civil and Political Rights (ICCPR), which refers to political participation, all the rights guaranteed in the ICCPR apply to migrants.

[17] For an interesting contribution on this issue, see International Justice Resource Center, *Immigration and Migrants' rights*, available online at https://ijrcenter.org/thematic-research-guides/immigration-migrants-rights/#Migrant_Worker.

[18] F. MAIANI, *The Concept of "Persecution" in Refugee Law: Indeterminacy, Context-sensitivity, and the Quest for a Principled Approach*, in *Les Dossiers du Grihl*, Les dossiers de JEAN-PIERRE CAVAILLÉ, De la persécution, 2010, available online at http://journals.openedition.org/dossiersgrihl/3896. See also UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1, Geneva, 1992, para. 51.

[19] On this point, see N. COLEMAN, *Non-Refoulement Revised -Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law*, in *European Journal of Migration and Law*, 2003, vol. 5, n. 1, pp. 23-68; K. HAILBRONNER, *Non-Refoulement and Humanitarian Refugees: Customary International Law or Wishful Legal Thinking*, in *Virginia Journal of International Law*, 1986, vol. 26, n. 4, pp.857-896. On this issue, see also A. M. CALAMIA, M. DI FILIPPO, M. GESTRI (eds.*), Immigrazione, diritto e diritti. Profili internazionalistici ed europei*, Padua, 2012, pp. 3-77; S. AMADEO, F. SPITALERI, *Il diritto dell'immigrazione e dell'asilo dell'Unione europea. Controllo delle frontiere, protezione internazionale, immigrazione regolare, rimpatri, relazioni esterne*, Torino, 2019, pp. 53-102.

However, over the past decades, the principle of non-refoulement has been included in many human rights treaties,[20] which entails an absolute prohibition on removing persons to a country where they are at risk of torture or cruel, inhuman and degrading treatment punishment or where they would risk other serious human rights violations such as enforced disappearance, risks to life in the absence of necessary medical care and violations of the rights of the child.[21]

Unfortunately, environmental migrants are excluded from the protection of non-refoulement.[22] In fact, the duty of non *refouler* applies only with respect to the threat of persecution of the individual for his/her race, religion, nationality or membership of a particular social group or political opinion which is not the case for those fleeing from natural disasters.[23] International law does not know the so called "environmental persecution" deriving from degradation of natural habitats. Therefore, environmental migrants are unprotected by the current refugee regime.[24]

However, these conclusions were partially questioned by the recent practice of the UN Human Rights Committee in a recent ruling of 7 January 2020 on the appeal of Mr. Ionane Teitiota, a Kiribati national who claimed that the effects of climate change and sea level rise prevented him from returning to his country.[25] In fact, the Committee recognised for the first time that the forced return of a person to a place where their life would be at risk due to the adverse effects of climate change may violate the right to life under art. 6 of the International Covenant on Civil and Political Rights (ICCPR).[26]

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[20] See, *inter alia*, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 3) and the International Convention for the Protection of all Persons from Enforced Disappearance (art.16). Similar conclusions were drawn by regional human rights courts, in particular the European Court of Human Rights, Grand Chamber, judgment of 7 July 1989, *Soering v. The United Kingdom*, *Application n. 14038/88,* par. 88.

[21] F. LENZERINI, *Asilo e diritti umani: l'evoluzione del diritto d'asilo nel diritto internazionale*, Milano, 2009, p. 84 ss.; F. PERRINI, *Il riconoscimento della protezione umanitaria in caso di disastri ambientali nel recente orientamento della Corte di Cassazione*, cit., pp.353-354.

[22] S. SCHUTTE, J. VESTBY, J. CARLING, *ET AL.*, *Climatic conditions are weak predictors of asylum migration*, in *Nature Communications*, 2021, vol.12, n. 2067, pp.1-10.

[23] Convention related to the Status of Refugees, Geneva, 1951, art. 33, para.1.

[24] On this point, see V. KOLMANNSKOG, *Climates of displacement*, in *Nordisk Tidsskrift for Menneskerettigheter*, 2008, vol. 26, n. 4, pp. 302-320.

[25] Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication, No. 2728/2016*, 7 January 2020.

[26] The applicant, Mr. Teitiota, sought asylum in New Zealand, but the Immigration and Protection Tribunal rejected his application, and this decision was upheld on appeal to the High Court, Court of Appeal and Supreme Court of New Zealand. The rejection decision was upheld by the courts and the applicant was returned to Kiribati in September 2015. Having exhausted his domestic remedies, the Applicant filed a communication with the HRC under the Optional Protocol, claiming that New Zealand violated his right to life under art. 6 of the ICPPR by forcibly returning him to Kiribati. Although the Committee did not refer to this circumstance the possibility, for New Zealand, of determining a violation of the principle of non-refoulement, it seems significant to note the position of the HRC in relation to environmental migrants. The HRC considered the expert evidence put forward that rising sea levels and rapid population growth in Kiribati have significantly compromised the supply of potable water to the extent that 60% of the population obtain fresh water exclusively from rationed supplies. In addition to this, the Committee took into account the validity of the Applicant's argument that many residents' livelihoods depend on subsistence agriculture, which has become considerably more difficult due to the salination caused by rising sea levels.

4. The recent UN "soft" sensitivity towards environmental migrants

The difficulty to develop legally binding rules on the issue of environmental migrants has fostered soft law solutions and the deployment of numerous initiatives and forums for discussion and debate on environmental migrations.

In particular, the United Nations have recently intensified their action through the adoption of several documents that intend to focus the attention on this new and particularly fragile category of migrants.

One cornerstone consists in the Global Compact for Safe, Orderly and Regular Migration (hereinafter, also referred to GCM). The GCM was adopted by the majority of UN Member States at the *Intergovernmental Conference to Adopt the GCM* in Marrakesh of 10 December 2018 and was closely followed by a formal endorsement by the UN General Assembly on 19 December.[27]

The Global Compact for Migration aims at identifying procedures and defining shared commitments by the international community in order to better manage migration phenomena at a global level and to enhance human mobility as an engine for sustainable development processes. Objective 2 - named *Minimize the adverse drivers and structural factors that compel people to leave their country of origin* - considers in its practical dimension the goal of "strengthen[ing] joint analysis and sharing of information to better map, understand, predict and address migration movements, such as those that may result from sudden-onset and slow- onset natural disasters, the adverse effects of climate change, environmental degradation, as well as other precarious situations, while ensuring the effective respect, protection and fulfilment of the human rights of all migrants".[28]

The GCM also aims at favouring the enhancement of resilience adaptation plans to "natural disasters, the adverse effects of climate change, and environmental degradation, such as desertification, land degradation, drought and sea level rise, taking into account the potential implications on migration, while recognising that adaptation in the country of origin is a priority".[29] Last but not least, the GCM urges states to "cooperate to identify, develop and strengthen solutions for migrants compelled to leave their countries of origin

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The Committee's decision highlights the fact that in these areas most threatened by climate change they cannot tackle the problem alone: in this context, greater involvement of the international community is necessary in order to invest in climate adaptation and mitigation efforts to reduce exposure to hazards and increase people's resilience, with a view to minimizing the risk of disasters and consequently, displacement. It is also important to consider the development of innovative migration options, including the use of existing legal pathways for migration and developing new migration pathways for people severely affected by climate change impacts. Point 9.6 highlights that a range of climate-related stressors that prevent people to live with dignity can lead them to move away from harm and claim protection, this considering the inability of Kiribati authorities to develop proper adaptation programs "to take programmatic steps to provide for the basic necessities of life, in order to meet its positive obligation to fulfil the author's right to life". Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication*, cit., pt. 9.6.

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

[28] *Ibidem*, lett. h.

[29] *Ibidem*, lett. i.

due to slow-onset natural disasters".[30] Therefore, the document seems to consider an interstate cooperative approach to environmental migrations: while taking into account the limits imposed by state sovereignty, it suggests a viewpoint of monitoring environmental disasters and developing cooperation plans to help individuals most affected by these climatic phenomena.

It is also worth mentioning the recommendations approved in 2018 by the Task Force on Displacement established by the Framework Convention on Climate Change (UNFCCC), which started to reflect and operate on the correlations between climate policies and environmental migrations since the COP21 of 2015. These recommendations are intended "to facilitate orderly, safe, regular and responsible migration and mobility of people, as appropriate and in accordance with national laws and policies, in the context of climate change, by considering the needs of migrants and displaced persons, communities of origin, transit and destination, and by enhancing opportunities for regular migration pathways, including through labour mobility, consistent with international labour standards, as appropriate".[31]

The recommendations go beyond the notion of displacement and cover the whole spectrum of human mobility: voluntary migration, displacement and planned relocation (lett. *c*). The document takes into account the different dimensions of migrations in the context of climate change and considers the difficulty to neatly classify movements in clear categories. Any solutions to these challenges need to look at human mobility as a whole and the recommendations offer solutions that are applicable to a broad range of circumstances. Within this context, the distinction between environmental migrants and environmentally displaced persons does not seem to be relevant, since the difficulty to distinguish the voluntary from the forced elements that determine the choice to abandon the country of origin.

If other initiatives and cooperation forums are taken into account, it is worth recalling the Global Forum on Migration and Development (GFMD). Created in 2006, this Forum represents an additional non-binding, informal and government-led process open to all UN Members States and Observers. Its aim is to advance understanding and cooperation on the relationship between migration and development.[32] During the Rabat 2017 GFMD thematic workshop on climate change and human mobility entitled *Towards dignified, coordinated and sustainable solutions*,[33] Member States agreed that there was ample evidence of the link between human mobility and climate change, and that there was a

[30] *Ibidem*, Goal 5, pt. 21, letter h.
[31] Conference of Parties (COP), *Recommendations of the Task Force on Displacement,* Decision 10/CP.24, par. 1 (*i -vi*).
[32] Forum participants of the GFDM include policymakers from a wide range of government agencies, such as ministries and departments of immigration, development, labour, foreign affairs, gender equality, home affairs, justice, interior, integration and nationals abroad as well as United Nations and other international agencies, academia and civil society organizations. The GFMD changes presidency every year or two years and is assisted by a Support Unit located within the International Organization for Migration (IOM).
[33] See Global Forum on Migration and Development, *Report of the Eleventh GFMD 2018 Moroccan-German Co-Chairmanship* "Honouring international commitments to unlock the potential of all migrants for development", 2018, available online.

need to move beyond the call for evidence and translate knowledge into action. A lack of adequate employment and livelihoods was raised as a particular area of concern in regions enduring the brunt of climate change impacts.[34]

It should also be remembered, with particular reference to environmentally displaced persons, the Nansen Initiative Agenda for the Protection of Persons Displaced Across Borders in the Context of Disasters and Climate Change and the Platform on Disaster Displacement (PDD). This Initiative was a bottom-up state-led consultative process led by Norway and Switzerland aimed at building consensus on the measures needed to protect displaced people across borders in the context of disasters and climate change. The outcome of the Nansen Initiative was an agenda detailing the measures that states and other stakeholders can take to address the protection needs of displaced persons across international borders by disasters, including the adverse effects of climate change.[35]

5. The silence of the New European Pact on Migration on environmental migrants

Notwithstanding the UN interest of the recent years on environmental migrations, the European Pact on Migration and Asylum is silent in relation to this delicate issue. This document should have represented an important turning point in the European dimension aimed at considering new migratory phenomena that are gradually affecting the EU Member States. On the contrary, the lack of inclusion of the category of environmental migrants and the missing clarity in the sphere of migration policies and environmental

[34] *Ibidem*, pp. 14-28. The participants highlighted the urgent necessity to support the most vulnerable populations and states in the long run, as well as building upon various existing initiatives. Lastly, participants stressed that taking into account and respecting human rights was a prerequisite to successful initiatives and public policies. Building upon the work undertaken during the Rabat meeting, the GFMD Summit in Berlin in December 2017 reaffirmed the GFMD engagement on climate change issues, asking each state to improve the tools of protection for environmental migrants within its own national legislation. Indeed, in the absence of a *momentum* capable of determining the conclusion of a new international agreement on the matter, the legislative intervention of each state, albeit on a discretionary basis, could lead to the emergence of gradual collective acknowledgment in the development of new rules to protect environmental migrants at international level.

[35] The Nansen Initiative Protection Agenda was endorsed by more than 100 governmental delegations at Nansen Initiative Global Consultation in October 2015 in Geneva, Switzerland. The agenda: "1. Conceptualizes a comprehensive approach to disaster displacement that primarily focuses on protecting cross-border disaster-displaced persons; 2. Compiles a broad set of effective practices that could be used by States and other actors to ensure more effective future responses to cross-border disaster-displacement; 3. Highlights the need to bring together and link multiple policies and action areas to address cross-border disaster-displacement and its root causes that to date have been fragmented rather than coordinated, and calls for the increased collaboration of actors in these fields; and 4. Identifies three priority areas for enhanced action by States, (sub)regional organizations, the international community as well as civil society, local communities, and affected populations to address existing gaps. See *Nansen Initiative Agenda for the Protection of Persons Displaced Across Borders in the Context of Disasters and Climate Change*, Geneva, 2015, available online. The Agenda, rather than calling for a new binding international convention on cross-border disaster-displacement, aims at supporting the integration of effective practices by states and regional organizations into their own normative frameworks in accordance with their specific situations and challenges.

projects to be developed with third States within the Pact, seems to undermine the entire work of the United Nations in the last twenty years. At the same time this situation seems to determine a clear disengagement of the EU Member States from the recent commitments in relation to environmental migrants undertaken in the last years within the UN system.

In particular, concerning environmental migrants, the Pact is characterised by a two-faced perspective approach. Firstly, the Pact seems to refer to the already existing qualifications of refugees and asylum seekers provided by international law. From this perspective, the Pact does not mention the possible recognition of new subjects deserving to be qualified as international refugees for other reasons than those recognised by the UN 1951 Convention, as such environmental displaced persons. In this case, the mechanism envisaged by the Pact seems to consider a governance system for migration and asylum seekers that would obviously remain complex. In fact, it would be particularly difficult for the European State of first access to carry out an objective assessment that firstly distinguishes the profile of the migrant from that of the refugee, further diversifying the protection of the refugee on the basis of political motivations from the protection due to environmental reasons. In these circumstances environmental migrants would be uncovered by any system of protection once arrived on the European territory, notwithstanding the existence of reactive reasons that induce environmental migrants to flee their country of origin because of the serious risk of survival as it is the case for international refugees.

Therefore, the inability of the Pact to envisage reallocation plans for environmental migrants arriving on the European ground – or at least to provide an enhanced protection mechanism towards environmentally displaced persons - is particularly evident. This would lead to determining a possible - but even realistic - case of an *ex-ante* discrimination, since the environmental refugee - once arrived in the European country of destination - would not benefit from the same protection that the Pact instead explicitly provides regarding recognised refugees. In this case, the environmentally displaced person would risk falling back into the more general attribution of migrant, being denied those rights expressly provided for international refugees.

On the other hand, the scope of the Pact should be considered in relation to the EU external dimension. Section 6 of the document heeds the enhancement of international partnerships to be relevant regarding migration governance systems in the migrants' countries of origin.[36] The Commission ponders cooperation with partners "based on bilateral engagement, combined with regional and multilateral commitment".[37] In this regard, it is considered that "the approach needs to deploy a wide range of policy tools and has the flexibility to be both tailor-made and able to adjust over time", being also able to recognise that "different policies such as development cooperation, security, visa,

[36] *Ibidem*, par. 6, *Working with our international partners*, p.17.
[37] *Ivi*.

trade, agriculture, investment and employment, energy, environment and climate change, and education, should not be dealt with in isolation".[38]

Thereupon, the Pact seems to consider cooperation with third countries as an important international instrument for dealing with international migration. This would take place through investment and development cooperation plans concerning numerous intervention policies, including those aimed at combating climate change within the countries most affected by environmental disasters. In this context, the EU action would be based on an active engagement both with universal international organizations – firstly with the UN – and with regional strategic organizations, such as the African Union (AU). It also suggested the creation of further innovative partnerships following the positive results of the AU-EU-UN *Taskforce on Libya*, which considered the participations of the three organizations in a multi-dimensional field of cooperation.[39]

As there are no significant precedents to be analysed in order to understand the extent to which these environmental policies can be truly effective in combating migration due to climate change, it is particularly complex to fully understand the nature of the Pact's specific policies in relation to the environment. While many states in the North-Saharan area, in cooperation with local NGOs, are implementing projects to deal with the phenomenon of desertification, in line with the UN Convention against Desertification[40], there is a substantial absence of EU policies in this type of environmental projects.[41]

Therefore, the ambiguity of the European Pact on Migration and Asylum in relation to environmental migrants stems, since the EU has omitted specific legal provisions to extend the scope of environmental migrants' protection in Europe. Additionally, emphasis must be added on partnerships with third countries facing environmental disasters due to climate change. Unfortunately, the document does not include *in nuce*

[38] *Ivi*.

[39] As suggested by the Pact, "the specific context of the post-Cotonou framework with states in Africa, the Caribbean and the Pacific is of particular importance in framing and effectively operationalising migration cooperation". *European Commission, Communication from the Commission on a New Pact on Migration and Asylum*, cit., p.18.

[40] In this area stands out, *inter alia*, the project of afforestation called *The African Great Wall Project*. The Green Wall is an African Union-led movement with the final ambition to grow an 8,000 km natural wonder of the world across the entire width of Africa. The Wall promises to be a compelling solution to the many urgent threats not only facing the African Continent, but the global community as a whole – notably climate change, drought, famine, conflict and migration. Once complete, the Great Green Wall will be the largest living structure on the planet, 3 times the size of the Great Barrier Reef. For additional information, see the website https://www.greatgreenwall.org/about-great-green-wall.

[41] The only relevant project that is worth mentioning in the Africa-EU Partnership is the Global Monitoring for Environment and Security (GMES). It is an initiative of the European Union and the European Space Agency (ESA), being developed to provide sustainable, reliable and timely services related to environmental and security issues in order to support the needs of users and public policymakers. GMES and Africa seeks to establish continuity in a more sustainable way by building on the infrastructure and capacities established by earlier projects such as PUMA (Preparation for the use of meteosat second generation in Africa) and AMESD (African monitoring of environment and sustainable development), and MESA (Monitoring of the environment and security in Africa). The project is funded by the EU under the Annual Action Programme 2015 of the DCI Pan-African Programme. In the recent developments of the project, the African Union (AU) Commission signed a Cooperation Arrangement with the European Commission (EC) in Brussels on 12 June 2018 to facilitate AU's access to Earth observation data from the Sentinel satellites of the Copernicus Programme.

several projects that the European institutions could consider in the next future. Besides, it does not specify the amount of funds and the type of projects - mainly of an environmental nature - that the EU intends to carry out in third countries. Given the origin of migrants in Europe, mostly from African states, especially those in the North and South Saharan belts and therefore most affected by desertification, the scenario is aggravated by the fact that these risks significantly increase the phenomenon of migration due to environmental reasons. This would determine a rising number of environmental migrants who, in demographic terms, could become ever closer to that of conventional migrants, which usually move to the EU countries mainly for political instability and economic harshness in their country of origin.

To sum up, the EU instruments envisaged by the Pact in connection with environmental migrants risk to be inadequate, probably determining a slim border management system. The mechanism would not only create further discrimination against international refugees once they arrive in Europe but might also generate a clear futility of any contribution system to finance environmental projects in the migrant's state of origin. In addition, it is worth noting that even the European Union has undertaken in the recent years a regulatory action – through its secondary EU legislation - which moved in a very similar direction to that of the Pact, thus amplifying the deafening silence of the Pact on Migration and Asylum *vis-à-vis* environmental migrants.

6. The silence of EU Law on environmental migrants

Not only the New European Pact on Migration and Asylum is silent on the category of environmental migrants, but also EU law does not expressly deal with them.[42]

One of the most recent developments in EU secondary legislation on the issue of subsidiary protection is the Directive 2011/95/EU.[43] This Directive has repealed the EU Directive 2004/83/EC of 29 April 2004,[44] with the aim of achieving greater harmonization of the rules on the recognition and content of international protection. As regards the content of protection, it must be said that this Directive brings the content of subsidiary protection status closer to that of refugee status, removing some of the

[42] On this point, see A. GEDDES, W. SOMERVILLE, *Migration and environmental change: Assessing the developing European Approach*, in *Policy Brief Series*, *Migration Policy Institute*, 2013, n. 2, pp. 1-7.
[43] Directive 2011/95/EU of the European Parliament and of the Council, *on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, of 13 December 2011, in OJ L 337, pp. 9-26. The new Qualification Directive has been transposed by the bound Member States by 21 December 2013. As from that date, Directive 2004/83/EC has been repealed, but only for the Member States bound by the new Qualification Directive. It should be noted that, as permitted by the relevant Protocol annexed to the Treaties, Ireland has chosen not to be bound by Directive 2011/95/EU. Denmark is not bound by the Qualification Directive by virtue of the Protocol on its position annexed to the Treaties.
[44] Council Directive 2004/83/EC, *on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted*, of 29 April 2004, in OJ L 304, 30 September 2004, pp. 12–23.

possibilities that EU Member States had of limiting access to certain rights to refugees alone. The application of a person eligible for subsidiary protection is given by article 2(f) of the 2011 Directive. According to the text, an individual claiming 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 […] or, owing to such risk, unwilling to avail himself or herself of the protection of that country".[45]

On a first reading of the article, it would seem that environmental migrants can be considered *per relationem* as persons who would face a risk of safety of their own lives if they returned in the country of origin, by virtue of the ongoing climate changes affecting his or her country.[46] Nevertheless, it is worth considering the definition of "serious harm" under Article 15 of the Directive, which defines it according to three specific headings, namely: (a) the death penalty or execution; (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.[47] Thus, these three cases seem distant from the circumstances of environmental migrants, since an environmental disaster is not considered to be an event in the same way as an armed conflict or political persecution to which a migrant could be exposed if returned to the of origin.[48]

Therefore, environmental migrants do not seem to fall under this type of subsidiary protection in the EU law. A similar form of protection, i.e., the Temporary Protection Status (TPS) may be mentioned on the issue of environmental migrants, namely the Council Directive 2001/55/EC.[49]

This Directive could provide general criteria for the protection of environmental migrants: as stated in article 1, the purpose of the Directive is "to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin and to promote a balance of effort between Member States in receiving and bearing the

[45] *Ivi*, art. 2(f).
[46] On this point, see V. KOLMANNSKOG, F. MYRSTAD, *Environmental Displacement in European Asylum Law*, in *European Journal of Migration and Law*, 2009, vol. 11, p. 317; G. MORGESE, *Environmental Migrants and the EU Immigration and Asylum Law: Is There any Chance for Protection?*, in G.C. BRUNO, F.M. PALOMBINO, V. ROSSI (eds.), *Migration and the Environment: Some Reflections on Current Legal Issues and Possible Ways Forward*, Rome, 2017, p. 51.
[47] Council Directive 2004/83/EC, *on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted*, cit., art. 15.
[48] G. MORGESE, *Environmental Migrants and the EU Immigration and Asylum Law: Is There any Chance for Protection?*, cit., p.53.
[49] Council Directive 2001/55/EC, *on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof*, of 20 July 2001, in OJ L 212, 7 August 2001, p. 12–23.

consequences of receiving such persons".[50] However, the qualification of a mass influx, according to the text, would require the "arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided […]".[51] Some scholars uphold the idea that the regime of temporary protection should apply to environmentally displaced people in case of a sudden influx of people following an environmental disaster, due to the absence of an exhaustive list as to who may be covered by this legal regime.[52] In this case, the Directive deals with a procedure of exceptional character, finding its application "in the event of a mass influx or imminent mass influx".[53] Thus the protection of the single individual would not be included wherein unless he or she is part of a mass influx arriving in the EU. Eventually, the TPS mechanism has never been activated by the Member States and again displays a very serious flaw with regard to environmental migrants.

Notwithstanding the two aforementioned Directives, also in this case it is worth appointing the lack of adequate instruments of international protection with regard to environmental migrants. The EU legislative measure in no case provides that an environmental event - often of long duration and with irreversible impacts on the territory and on the local population - can determine the impossibility of returning to the country of origin and therefore requires a permanent or a long-lasting protection for environmental migrants.

7. EU member State's legislation to the rescue of environmental migrants: the cases of Finland and Sweden

Due to the inability of EU law to successfully face the issue of environmental migrations in the European territory, some EU Member States have autonomously introduced several domestic laws *vis-à-vis* environmental migrants. As well as, in many cases states have released special permission of stay for some migrants on their territory on a temporary basis, based on humanitarian grounds.

With regard to the domestic legislation, the only countries that have adopted a normative regime of subsidiary protection for environmental migrants are Finland and Sweden.

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[50] *Ivi*, art. 1.
[51] Council Directive 2001/55/EC, *on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof,* cit., art. 2(d).
[52] G. MORGESE, *Environmental Migrants and the EU Immigration and Asylum Law: Is There any Chance for Protection?*, cit., pp. 54-56.
[53] Council Directive 2001/55/EC, *on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof,* cit., art. 2 (a).

The Finnish Aliens Act 2004 (No. 301/2004), Section 88 (1) states that "Aliens residing in the country are issued with a residence permit on the basis of a need for protection if the requirements for granting asylum under section 87 are not met but the aliens are in their home country or country of permanent residence under the threat of death penalty, torture or other inhuman treatment or treatment violating human dignity, or if they cannot return there because of an armed conflict or environmental disaster".

In the Finnish case, this normative framework includes a specific reference to cases where the migrant's original environment has become too dangerous for human habitation either due to human activity or because of natural disaster. Although the Finnish Immigration Service confirms that this provision of the Aliens Act has rarely been used,[54] this type of legislation demonstrates a certain concern on the need of ensuring a form of legal protection for environmental migrants. This provision represents a *unicum* in the European normative approach, carefully pondering the reasons that force people to leave their country of origin affected by environmental disasters. Moreover, it guarantees an analogous treatment for environmental migrants to that already provided for internationally recognized refugees.

Similar positions are addressed by the Swedish Aliens Act of 2005 (No. 716/2005). Section 2 states that the Act finds its applications with reference to a "person otherwise in need of protection", being defined as "an alien who […] is outside the country of the alien's nationality", for human rights violations (1), international or internal armed conflicts in the country of origin (2), or if he/she "is unable to return to the country of origin because of an environmental disaster" (3).[55]

At first glance, this legislation seems to offer a positive protection for people displaced by the effects of climate change. However, there are two major problems with the Swedish law. First, according to the Migration and Asylum Division of the Minister of Justice, the law is based on a "propaedeutic foundation" that limits its applicability only to cases of sudden environmental disaster and does not extend to cases of progressive environmental degradation. Second, no one has ever been granted subsidiary protection in Sweden on environmental grounds, which raises questions about Sweden's preparedness to handle large numbers of environmental asylum seekers.[56]

The Finnish and Swedish cases seem to show an interesting trend in state practice about recognition and protection of environmental migrants. This practice does not find

[54] For additional information, see the website of the Finnish Immigration Service at https://migri.fi/en/glossary.

[55] Aliens Act 2005:716 (Sweden), issued on 29 September 2005, entered into force on 31 March 2006.

[56] For additional information see the European website on migration at https://ec.europa.eu/migrant-integration/librarydoc/swedish-aliens-act. At the time of writing, is remarkable that new amendments are going to entry into force in the Swedish legislation on 20 July 2021, aimed at ameliorating the system of temporary protection status and the residence permits towards refugees. See also F. PERRINI, *Il riconoscimento della protezione umanitaria in caso di disastri ambientali nel recente orientamento della Corte di Cassazione,* cit., p.357-358.

its source not in the EU law, which on the contrary envisages legislative instruments unable to standardize the Member States' regulatory systems on this matter.[57]

8. Conclusion

The international protection system of environmental migrants has proved to be completely devoid of legal instruments to increase the protection of this group of migrants. This is due to a stasis in the development of new rules, both conventional and customary, capable of dealing with an expanding international phenomenon of common concern such as climate change, the consequent environmental disasters, and the further devastating effects that these natural phenomena might have on the population.

Even the European Union has omitted in the New European Pact on Migration and Asylum any reference to the issue of environmental migration and has focused its work only on some little-defined partnerships in environmental matters in the field of external relations. Therefore, it can be argued that it would be completely unrealistic at present to call for the adoption, in the short term, of new EU directives capable to deal with the delicate issue of environmental migrations. However, the same recent ruling of the United Nations Human Rights Committee of January 2020, even if not recognising the applicability of non-refoulement to environmental migrants, has seriously questioned the possible violation of the right to life under art. 6 of ICCPR due to the adverse effects of climate change. States should therefore seek to avoid the risk to incur serious human rights violations against environmental migrants.

Within this context, the only viable option for the protection of environmental migrants in the European Union could be the extension of the subsidiary protection by way of interpretation to this category of people within the domestic legislation of each EU Member State. While it is true that domestic legislation would be evidently detached from the EU (insufficient) provision on environmental migrants, the practice of Sweden and Finland has proved to be an interesting starting point in terms of positive rights to be conferred towards people forced to migrate for environmental reasons. In terms of new positive obligations, EU States could give extensive application to the subsidiary protection system, recognizing to the environmental migrant the same status of subsidiary protection that it already must provide to the migrant in conditions of serious harm.

Finally, concerning the external dimensions of the Pact, it is worth considering the economic partnership that the EU is going to plan in the countries most affected by environmental disasters. These economic partnerships, as *lato sensu* envisaged in the European Pact, could effectively contribute to fortifying the resilience of local communities forced to face environmental disasters such as desertification, drought, or food scarcity. The practical strengthening of these partnerships, through the elaboration of a disaster management cooperation plans and *ad hoc* adaptation projects to tackle

[57] On this point, see also the contribution of A. FRANCIS, *Climate-Induced Migration & Free Movement Agreements*, in *Journal of International Affairs*, 2019, vol. 73, n. 1, pp. 123-134.

climate disasters within developing countries, could represent an important starting point for trying to stem the problem of environmental migration from the bases.

ABSTRACT: Migrations linked to environmental degradation phenomena are increasingly gaining attention within the international community. The following work intends to compare the recent European Pact on Migration and Asylum of the European Commission, not dealing with the issue of environmental migrants, with the increased sensitivity of the United Nations in the field of recognition and protection of these subjects at the international level. The silence of the European Union is all the more serious considering that EU secondary legislation does not expressly admit environmental migrants to subsidiary protection. At this point, national legislation remains the main instrument to provide protection towards people affected by climate disasters in their country of origin.

KEYWORDS: Environmental migrants – International Migration Law – International Environmental Law – Disaster Law and environmental policies – International Climate Law and Politics.