

NEW VOICES

THE CLIMATE CHANGES, SHOULD EU MIGRATION LAW CHANGE AS WELL? INSIGHTS FROM ITALY

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The climate is changing, generating increasingly significant migration flows. Yet the climate change–migration nexus is scarcely reflected in the relevant legislation of the European Union. This article argues that the EU needs to address this nexus coherently for its migration and climate actions to be effective. To this end, three avenues might be feasible: 1) EU institutions could promote an extensive application of existing protection instruments; 2) the European Court of Justice could expansively interpret asylum and migration provisions in light of potential environmental threats to migrants' rights; and 3) within the framework of the New Pact on Migration and Asylum, EU institutions could encourage the revision of the Common European Asylum System by making explicit reference to the environmental causes of migration. Although overlooked in the literature so far, Italy has already developed all three of these avenues to foster protection against environmental causes of migration and may provide helpful insights for the supranational level.

Keywords: EU law; Italian law; migration; climate change; New Pact on Migration and Asylum; international protection.

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I. INTRODUCTION

The climate is undoubtedly changing with unprecedented rapidity and, in some cases, irreversible effects.¹ Although environmental factors have constantly shaped migration movements in the past, data suggest that they will do so even more strongly in the future.² Indeed, the World Bank's 2021 *Groundswell* report suggests that the impact of climate change and environmental degradation, which have been recognized as drivers of forced

¹ 'Climate Change Widespread, Rapid, and Intensifying – IPCC' (IPCC, 9 August 2021) <<https://www.ipcc.ch/2021/08/09/ar6-wg1-20210809-pr/>> accessed 17 June 2022.

² Marie McAuliffe and Anna Triandafyllidou (eds), *2022 World Migration Report* (International Organization for Migration (IOM) 2021) 233.

migration at the international level,³ may lead to the displacement of 216 million people by 2050.⁴

In this scenario, the European Union (EU, the Union) can and should play an active role not only in minimizing the adverse environmental drivers of migration in climate-vulnerable third countries in a spirit of solidarity, but also in fostering the protection of environmental migrants under international human rights obligations when disasters occur. While significant EU funds and projects deal with the former,⁵ little attention has been dedicated to the latter. In recent years, in fact, the European Commission has developed the European Green Deal and the New Pact on Migration and Asylum (the New Pact) to address climate change and migration separately. This division potentially disregards the scientific evidence as to the cross-cutting effects of climate change, including as a trigger for migration, while also contradicting the results achieved at different policy and judicial levels.⁶ Emblematically, the Commission recognises climate change in many Communications as one of the major global challenges that will characterise present and future migration flows but fails to take concrete actions to comprehensively address these

³ UNGA Res 72/220 (20 December 2017) UN Doc A/RES/72/220.

⁴ Viviane Clement and others, *Groundswell Part 2: Acting on Internal Climate Migration* (The World Bank 2021).

⁵ Commission, 'Forging a climate-resilient Europe - the new EU Strategy on Adaptation to Climate Change' (Communication) COM (2021) 82 final, 1, 17, 21. Here, the Commission mentions that '[t]he EU is already committed to helping Africa adapt to a more hostile climate, including through nature-based solutions' and the mobilization of '[...] EUR 3.4 billion to support climate adaptation in the region'. Ibid 18.

⁶ UN Human Rights Committee, 'Views Adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning Communication No 2787/2016' (24 October 2019) UN Doc CCPR/C/127/D/2728/2016 (*Teitiota v New Zealand*); UNHCR, 'Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters' (refworld, 1 October 2020) <<https://www.refworld.org/docid/5f75f2734.html>> accessed 1 May 2022.

interconnected challenges.⁷ This attitude, moreover, contrasts with the Union's ambition to provide global responses to global challenges, such as climate change, a core tenet of this Commission's objectives.⁸

As the climate changes, migration law should also change to protect environmental migrants from climate-related violations of human rights. For the EU's climate and migration actions to be truly comprehensive and effective, the EU should address the nexus between the two. *But, how?* This article argues that three avenues might be available: 1) EU political institutions could promote an extensive application of existing protection instruments; 2) the European Court of Justice (CJEU) could expansively interpret asylum and migration provisions in light of potential environmental threats to migrants' rights; and 3) within the framework of the New Pact, EU institutions could encourage the revision of the Common European Asylum System (CEAS) by making explicit reference to the environmental causes of migration.

This article presents an Italian case study as illustrative of how this can be done. Over time, Italian institutions have promoted an extensive application of national protection provisions dealing with environmental causes of migration. Meanwhile, the judiciary has supported an evolutionary reading of national asylum provisions. Therefore, I argue that the Italian experience, although under-researched in the literature so far, may provide inspiration for a comprehensive EU approach to climate change and migration that both builds upon existing instruments and upholds the CEAS.

⁷ Commission, 'A New Pact on Migration and Asylum' (Communication) COM (2020) 609 final, 1-17. See also Commission, 'The European Green Deal' (Communication) COM (2019) 640 final; Commission, 'Forging a climate-resilient Europe' (n 5).

⁸ Commission, 'The European Green Deal' (n 7) 20.

II. THREE PROTECTION AVENUES TO ADDRESS ENVIRONMENTAL CAUSES OF MIGRATION IN THE EU LEGAL ORDER

The first two protection avenues, examined here together in light of their strong correlation, concern the promotion of an extensive application and expansive interpretation of existing EU protection instruments. As they do not require negotiations to amend or create binding arrangements, these options may be more feasible, especially in the short-term. In my view, three EU Directives might *already* cover environmental causes of migration, namely the Qualification Directive (QD),⁹ the Temporary Protection Directive (TPD),¹⁰ and the Return Directive.¹¹

1. Promoting an Extensive Application and Expansive Interpretation of Existing EU Protection Instruments

It has been widely argued that international protection statuses, namely refugee status and subsidiary protection within the meaning of the QD, cannot apply to purely environmental causes of migration in the absence of one or more grounds substantiating a well-founded fear of persecution or of serious harm.¹² According to international and EU asylum law, refugees can

⁹ 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 (recast) [2002] OJ L192/27 (Qualification Directive).

¹⁰ 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 [2001] OJ L212/12.

¹¹ 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 [2008] OJ L348/98 (Return Directive).

¹² Jane McAdam, 'Swimming Against the Tide: Why a Climate Change Displacement Treaty is Not the Answer' in Mary Crock (ed), *Refugees and Rights*

have a well-founded (individual) fear of persecution on account of their race, nationality, religion, political opinion or membership to a particular social group. Environmental reasons *per se* can hardly amount to 'persecution' because climate change is unlikely to qualify as a 'persecutor', and because evidence regarding the individual adverse impact of general climate conditions is often lacking. Thus, environmental threats are usually cast as a supplementary, not the main, reason to issue international protection.

According to Article 2(f) QD, a person who does not qualify as a refugee may nonetheless be eligible for subsidiary protection when there are substantial grounds for believing that, upon removal, they would face a real risk of suffering serious harm.¹³ Article 15 QD establishes three possible sources of serious harm: a) death penalty or execution; b) torture or inhuman or degrading treatment or punishment; or c) serious and individual threat by reason of indiscriminate violence in situations of international or internal armed conflict. Importantly, the CJEU has stipulated that subsidiary protection requires that a specific actor intentionally inflicts serious harm, which cannot result from 'a general shortcoming' in the country of origin.¹⁴

Environmental threats arguably fall outside of the scope of Article 15(a) QD, as they do not involve formal judicial death sentences or execution. As for Article 15(b) QD, the CJEU has ruled that the prohibition of torture or inhuman, degrading treatment or punishment, which is borrowed from Article 4 of the EU Charter of Fundamental Rights (EU Charter), is absolute in that it is closely linked to the respect for human dignity mandated by

(Routledge 2017) 379; Matthew Scott, *Climate Change, Disasters, and the Refugee Convention* (Cambridge University Press 2020). For opposing views, see Norman Myers, 'Environmental Refugees: A Growing Phenomenon of the 21st Century' (2002) 357 *Philosophical Transactions of the Royal Society of London* 609; Roger Zetter, 'More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization' (2007) 20(2) *Journal of Refugee Studies* 172.

¹³ Qualification Directive (n 9) art 2(f).

¹⁴ Case C-542/13 *M'Bodj* EU:C:2014:2452, para 35.

Article 1 of the EU Charter.¹⁵ In *Hamed*, the CJEU clarified that the breach of human dignity linked to Article 4 of the EU Charter requires a particularly high threshold of seriousness.¹⁶ However, in elaborating this threshold, it expressly included cases where State authorities' acts or omissions create 'a situation of extreme material deprivation' that would prevent the claimant from meeting their most basic needs and that would impair their physical or mental health or place them in a state of degradation incompatible with human dignity.¹⁷ Therefore, it might be argued that unbearable environmental conditions caused by a State's actions or inertia and involving extreme material deprivation might, in certain circumstances, amount to violation of Article 4 of the EU Charter and, consequently, meet the threshold of serious harm under Article 15(b) QD. As for Article 15(c), in *Elgafaji*, the CJEU ruled that the existence of a serious and individual threat in the country of origin may exceptionally be established where indiscriminate violence is so endemic that the applicant would be at serious risk for the sole reason of returning there.¹⁸ On this point, as we will see, the Italian jurisprudence has recently provided some fresh insights that might suggest a broader application of subsidiary protection under specific environmental conditions.

The TPD, for its part, applies in the case of a mass movement of international protection-seekers (IP-seekers) who are unable to return home due, *in particular*, to armed conflict or endemic violence or a serious risk of systematic or generalised violations of their human rights. In light of growing scientific evidence, academic literature and relevant jurisprudence supporting the recognition of a link between environmental threats and

¹⁵ Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru* EU:C:2016:198, paras 85-86. See Charter of Fundamental Rights of the European Union [2012] OJ C326 (EU Charter), arts 1, 4.

¹⁶ Cases C-540/17 and C-541/17 *Bundesrepublik Deutschland v Adel Hamed and Amar Omar* EU:C:2019:964, para 36.

¹⁷ *Ibid* para 39 (my translation).

¹⁸ Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* EU:C:2009:94.

human rights violations, there might be cases where people displaced because of environmental disasters may qualify as beneficiaries of temporary protection pursuant to the TPD.¹⁹ Furthermore, its scope might be extended to encompass additional causes of migration, such as those associated to an adverse environment, given the presence of the phrase 'in particular'. Besides, Article 7 grants the Member States discretion to extend temporary protection to additional categories of displaced persons, including those affected by environmental factors. Yet, some key shortcomings notably weaken its possible applicability. Indeed, since its adoption in 2001, it has been activated only in the context of the ongoing Russian-Ukrainian conflict, primarily because doing so entails a cumbersome and highly politicized process involving the absolute discretion of the Council in determining the actual existence of a mass influx of displaced people.²⁰ Moreover, the TPD applies only in case of mass inflows coming from the same geographical area and displaced for the same reason. Arguably, there might be few cases where mass inflows to the EU can be attributed primarily to environmental threats. Finally, the Commission has expressed its intention to abrogate the TPD and substitute it with a crisis management mechanism.²¹ Therefore, its very existence is currently under discussion.

The Return Directive contains *non-refoulement* obligations that may provide a mechanism to prevent the removal of a third-country national affected by

¹⁹ Giovanni Sciacaluga 'Sudden-Onset Disasters, Human Displacement, and the Temporary Protection Directive: Space for a Promising Relationship?', in Giovanni Carlo Bruno, Fulvio Maria Palombino and Valentina Rossi (eds), *Migration and the Environment: Some Reflections on Current Legal Issues and Possible Ways Forward* (CNR Edizioni 2017).

²⁰ Commission, 'Staff Working Document Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund]' SWD (2020) 207 final.

²¹ Commission, 'Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum' COM (2020) 613 final (Migration Crisis Proposal).

environmental and climatic changes.²² It states that the implementation of a return decision must respect this principle and that any removal that would violate it must be postponed.²³ Other limitations on removal stemming from this principle concern the obligation for competent authorities to consider the returnee's personal and family situation, their health conditions, and the best interests of the child.²⁴ Moreover, the Return Directive allows the Member States to decide at any moment to withdraw or suspend a return decision or to grant a right to stay for compassionate, humanitarian or other reasons.²⁵

In this framework, both *non-refoulement* and humanitarian reasons may apply to cases where removal to climate change-affected countries would be unsafe, although the latter would apply only on a discretionary basis.²⁶ An expansive interpretation of the exceptions to removal that would include environmental considerations would also be consistent with the views adopted by the UN Human Rights Committee in *Teitiota v New Zealand*, as later described.²⁷

The above directives demonstrate how protection from environmental causes is implicit in EU law. As a result, the protection of migrants from such environmental causes is mostly left to national competence, which means that such protection may be susceptible to significant variation across the EU. Not only do very few countries provide national protections to migrants

²² *Non-refoulement* is a core principle of international asylum law that forbids any state, or any person or group exercising governmental or institutional authority, from expelling or returning an IP-seeker or -holder to the frontiers of territories where their life or freedom would be threatened. Humanitarian admission and stay are positive measures through which states comply with this principle.

²³ Return Directive (n 11) recital 8, arts 5, 9.

²⁴ Ibid art 5.

²⁵ Ibid art 6(4).

²⁶ This was the case for an Afghan citizen whose removal order was annulled by a German Court in part due to the country's environmental conditions. VGH Baden-Wuerttemberg, Judgment of 17 December 2020, A 11 S 2042/20.

²⁷ See text to nn 33-34.

on environmental grounds, but those that do often subject them to radical changes or even to repeal. Until 2015, for instance, environmental disaster qualified as grounds for claiming protection in Sweden and Finland. However, both countries suspended and ultimately repealed them during the so-called "refugee crisis".²⁸ In opposition to potentially fragmented national responses, a common and uniform approach to the climate change-migration nexus could support the Union's efforts to act as a global leader and provide much-needed assistance to people displaced because of a changing climate.

2. Revising the CEAS within the New Pact on Migration and Asylum

The third protection avenue seized upon the New Pact, which could offer a significant opportunity to revitalise the CEAS to provide protection against emerging new causes of forced migration, where climate change and environmental degradation will play a critical role. To date, this opportunity has arguably been missed. The crisis management mechanism that the Commission proposed to create in place of the TPD only refers to mass influxes triggered by indiscriminate violence in exceptional situations of armed conflict, thus excluding environmental factors from its application.²⁹ The proposed Qualification Regulation does not amend the components of persecution and serious harm, thus leaving the protection against environmental factors difficult to obtain.³⁰ However, the Commission's

²⁸ Emily Hush, 'Developing a European Model of International Protection for Environmentally-Displaced Persons: Lessons from Finland and Sweden' (Preliminary Reference Blog, 7 September 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/>> accessed 1 May 2022.

²⁹ Migration Crisis Proposal (n 21) art 10.

³⁰ Commission, 'Proposal for a Regulation 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

pending proposal for a Union Resettlement Framework, adopted in 2016 and re-proposed under the New Pact, aims to provide safe and legal pathways to vulnerable IP-seekers displaced within or beyond national borders, including people with socio-economic vulnerability and those with family links in the EU.³¹ Not only do these categories widen the classical scope of resettlement beneficiaries, but they may also cover different categories of people hit by environmental threats. The proposal might, indeed, apply to those displaced for environmental reasons and those whose vulnerability is linked to the impact of environmental factors on their livelihood and wealth, as well as those who may count on family links to flee from dire environmental conditions. If such applications, currently only hypothetical, were made explicit, this proposal could constitute a relevant protection instrument in the environmental context. Still, this proposal has been in a deadlock for the past six years and its adoption remains uncertain.

Although the Union's restrictive approach to migration might make negotiating protection for additional categories of migrants seem unrealistic, EU institutions should acknowledge that, as it stands, the CEAS is not equipped from an operational viewpoint to deal with movements triggered by environmental forces. From a legal perspective, moreover, it seems inconsistent with the recent authoritative interpretation of international human rights standards in the context of climate change given by the UN Human Rights Committee in *Teitiota v New Zealand*, which reaffirms that 'environmental degradation, climate change and unsustainable development constitute some of the *most pressing and serious threats* to the ability of present and future generations to enjoy the right to life', thus rendering *refoulement*

the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents' COM (2016) 466 final.

³¹ Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the Parliament and the Council' COM (2016) 468 final.

improper.³² In doing so, *Teitiota* undoubtedly consolidates the existence of a direct, causal link among environmental threats, forced migration and *non-refoulement*. As a result, it confirms the possibility for migrants compelled to flee due to environmental threats to obtain complementary protection.³³ Although formally non-binding, the views expressed in *Teitiota* have already influenced subsequent jurisprudence, as the Italian experience highlights.

III. DRAWING INSIGHTS FROM ITALY: RECENT DEVELOPMENTS IN DOMESTIC MIGRATION LAW

This section presents an Italian case-study as illustrative of how the EU could develop a coherent approach to climate change and migration. Indeed, Italian institutions have promoted an extensive application of humanitarian protection that includes environmental factors, while the judiciary has supported an evolutionary reading of national asylum and migration provisions, in conformity with *Teitiota*. Finally, over the last three years, Italian legislators have amended domestic law to include specific provisions dealing with environmental causes of migration. Of all the 27 Member States, Italy is currently the only one to offer explicit and multiple protection statuses to people displaced because of environmental factors.

The first provision in Italian migration law that deals with the protection of migrants on environmental grounds is Article 20 of the Consolidated Act on Immigration (CAI).³⁴ Under this provision, the President of the Council of Ministers may adopt temporary protection measures to fulfil relevant

³² *Teitiota v New Zealand* (n 6) para 9.4 (emphasis added).

³³ Miriam Cullen, 'The UN Human Rights Committee's Recent Decision on Climate Displacement' (Asylum Insight, February 2020) <<https://www.asyluminsight.com/c-miriam-cullen>> accessed 1 May 2022.

³⁴ Legislative Decree 25 July 1998, n 286 'Consolidated Act on Provisions Concerning the Immigration Regulations and Foreign National Conditions Norms', art 20.

humanitarian needs in the case of conflicts, natural disasters or other serious events in non-EU countries.

A second relevant provision in Italian migration law is the inclusion of environmental and climate factors in the assessment of applications for humanitarian protection. Article 5(6) CAI has regulated humanitarian protection for over two decades. It operates as a safeguard to ensure full compliance with the principle of *non-refoulement* and with on the constitutional right to asylum. It was therefore conceived to apply to people who are ineligible for international protection statuses but who nevertheless cannot be expelled because of serious humanitarian reasons or because such expulsion would violate the constitutional or international obligations of the Italian state. Humanitarian protection was a flexible remedy to be granted to persons who had suffered, or would have been at risk of suffering upon removal, an '*effective deprivation of human rights*', to be assessed by taking into account both the objective situation in the country of origin and the applicant's personal conditions, with particular reference to their vulnerability.³⁵ As noted by the Tribunal of L'Aquila, vulnerability needed to be interpreted broadly to encompass, *inter alia*, the IP-seeker's exposure to famine, natural or environmental disasters and land grabbing, as well as the general environmental and climatic conditions of the country of origin, if these are such as to jeopardize the core of basic human rights of the individual.³⁶

It was in this context that, in January 2008, the Ministry of the Interior decided to temporarily suspend the expulsion of Bangladeshi citizens due to the serious damage in part of the country caused by the violent cyclone Sidr in November 2007.³⁷ More recently, it gave humanitarian protection to IP-

³⁵ *Inter alia*, Court of Cassation, I Civil Section, Judgment of 23 February 2018, n 4455, 8 (my translation, emphasis added).

³⁶ Tribunal of L'Aquila, Order of 16 February 2018, 4.

³⁷ Circolare n 400/C/2008/128/P/1.281 del 9 gennaio 2008 Ministero dell'Interno: Bangladesh ciclone SIDR. Problematiche varie.

seekers coming from Nepal following the dramatic earthquake that destroyed wide areas of that country in 2015.³⁸ This dynamic approach was endorsed by administrative and judicial authorities alike and formed the basis for the issuance of humanitarian protection with respect to serious natural disasters,³⁹ droughts,⁴⁰ famine⁴¹ and floods.⁴²

In recent years, Italian legislators have intervened significantly, *inter alia*, to amend migration provisions in the context of natural disasters. The Decree-Law number 113 of 4 October, among other things, introduced Article 20-bis CAI, a new provision that offered protection to IP-seekers whose country of origin was in a situation of '*contingent and exceptional calamity*' that did not allow for a safe return.⁴³ Under these circumstances, a six-month residence permit would be issued that could be renewed for a further period of six months if unsafe conditions persisted. The requirement that the calamity should be contingent and exceptional meant that only sudden and singular events, such as earthquakes or floods, could be considered as eligible events under this provision and that slow-onset events were excluded from

³⁸ Court of Appeal of Genoa, 'La protezione umanitaria dai lavori preparatori all'applicazione pratica. Breve excursus di giurisprudenza' (6 November 2017) <https://webcache.googleusercontent.com/search?q=cache:5zgKSRrQQUIJ:https://www.corteappello.genova.it/Distretto/formazione_magistrati.aspx%3Ffile_allegato%3D1768+&cd=1&hl=it&ct=clnk&gl=it> accessed 1 May 2022.

³⁹ Territorial Commission for the Recognition of International Protection of Rome, Section II, Decision of 21 December 2015.

⁴⁰ Tribunal of Cagliari, Order of 31 March 2019, n 4043.

⁴¹ Tribunal of Milan, Order of 31 March 2016, n 64207.

⁴² Tribunal of Naples, Order of 5 June 2017, n 7523. On this point, Chiara Scissa, 'Estrema povertà dettata da alluvioni: condizione (in)sufficiente per gli standard nazionali di protezione?' [2022] *Questione Giustizia* <<https://www.questionegiustizia.it/articolo/estrema-poverta-dettata-da-alluvioni>> accessed 1 May 2022.

⁴³ Decreto-legge 4 ottobre 2018, n 113 'Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica', convertito con modificazioni dalla L 1 dicembre 2018, n 132, art 1.1(h) (my translation, emphasis added).

its scope of application.⁴⁴ Interestingly, the legislator did not qualify the nature of the calamity in question, meaning that both natural and man-made environmental disasters were potentially covered.

The Decree-Law number 130 of 21 October 2020 amended the former Decree-Law, including Article 20-bis, which now provides for the issuance of residence permits in the context of a 'serious' (rather than a 'contingent and exceptional') calamity.⁴⁵ This amendment seems to allow for a broader interpretation of 'calamity' based on the degree of severity rather than on its progression over time. Additionally, the provision no longer specifies the maximum duration of renewal, thus potentially suggesting that the initial six-month permit can be renewed for as long as the conditions of environmental insecurity in the country of origin persist.⁴⁶

The 2020 Decree-Law also amends the grounds on which removal is prohibited under Article 19 CAI, already modified by the former 2018 Decree-Law. Pursuant to the new formulation, *refoulement* is prohibited when there are reasonable grounds for believing that the applicant would be at risk of torture, inhuman or degrading treatment, or otherwise of systematic and gross violations of human rights.⁴⁷ Moreover, removal cannot take place when it would result in a violation of the applicant's right to private and family life.⁴⁸ In such cases, 'special protection' residence permits

⁴⁴ On this point, Court of Cassation, II Section, Order of 8 April 2021, n 9366, 3.

⁴⁵ Decreto-legge 21 ottobre 2020, n 130 'Disposizioni urgenti in materia di immigrazione, protezione internazionale e complementare, modifiche agli articoli 131-bis, 391-bis, 391-ter e 588 del codice penale' art 1.1(f)(1) (my translation, emphasis added). For a comparative analysis of the use of the term calamity in Italian environmental and migration law, see Chiara Scissa, 'Alla ricerca di un fil rouge tra le molteplici nozioni di "calamità" nell'ordinamento italiano' (2021) 3 *Rivista di Diritto Agrario* 423.

⁴⁶ Decreto-legge 21 ottobre 2020, n 130 (n 45) art 1.1(f)(2).

⁴⁷ Ibid art 1.1(e)(1).

⁴⁸ Ibid.

are issued to those persons who, although not qualifying for international protection, cannot be expelled.⁴⁹

Therefore, it can be argued that a broad range of environmental causes of migration are expressly protected under Article 20 and 20-bis CAI, respectively, through temporary protection and protection against serious calamity. At the same time, before ordering the removal of a third-country national, the competent authorities are required pursuant to Article 19 to assess whether the environmental conditions of the country of origin may constitute a violation of their basic human rights and human dignity. Although the exact number of permits issued on environmental grounds is not available, it is important to stress that Italy's migration law is equipped with specific provisions providing protection to migrants who fled their home countries because of environmental factors and who would otherwise potentially be left without protection. Adapting law to the current causes of migration helps states not only to comply with human rights norms and their (inter)national obligations, but also to ensure a functioning asylum system prepared for eventual future inflows. It is in this vein that the CEAS needs to consider the effects of climate change on migration to adequately respond to migration movements heightened by environmental and climate stressors.

1. Drawing Insights from Italy's Jurisprudence: Emblematic Case Law of Evolutionary Interpretation

The following pages describe the relevant Italian case law through which the Supreme Court of Cassation, the highest court of appeal in Italy, has promoted a human rights-based and evolutionary interpretation of these domestic norms in light of the effects of climate change and environmental degradation. In doing so, the Court helped unveil these norms' full potential. By following the Italian example, the CJEU could give full effect to the

⁴⁹ Ibid art 1.1(e)(2).

protections enshrined in Article 78 of the Treaty on the Functioning of the EU and in the EU Charter.

In early 2020, a Bangladeshi citizen appealed to the Court of Cassation against a decision rejecting his international protection claim, lamenting that the dire environmental situation of his country of origin was not adequately considered.⁵⁰ Indeed, the Court noted that the destruction of the applicant's home due to flooding that hit large parts of Bangladesh in 2012 and again in 2017 could 'affect the vulnerability of the applicant if accompanied by adequate allegations and evidence relating to 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'.⁵¹ The Court argued that natural disasters, which have the capacity to exacerbate people's vulnerability and violate core human rights, can themselves be a compelling reason to leave.⁵² Hence, the judges suggested endorsing an evolutionary interpretation of humanitarian protection in light of the 2018 permit against contingent and exceptional calamities, in particular by exploring whether the repeated floods 'amount to disasters that do not allow the return to the country of origin in safe conditions'.⁵³

The CJEU might draw insights from this evolutionary approach, which demonstrates that, in specific cases, environmental factors can be the main cause of migration and of living conditions that are precarious that they cannot satisfy fundamental rights and ensure respect for human dignity. By leveraging the EU Charter, which protects human dignity, life and integrity, the CJEU might uphold its jurisprudence on international protection.

⁵⁰ Court of Cassation, I Civil Section, Order of 4 February 2020, n 2563.

⁵¹ Ibid 6 (my translation).

⁵² The Court reached the same conclusion in two recent cases. Court of Cassation, I Civil Section, Order of 8 January 2021, n 121; Court of Cassation, Civil Section - Labour, Order of 19 May 2021, n 13652.

⁵³ Court of Cassation, n 2563 (n 50) (my translation).

In February 2021, the Court of Cassation issued another order of crucial importance for a future interpretation of subsidiary protection in light of environmental circumstances.⁵⁴ The case was lodged by an IP-seeker from the Niger Delta who appealed against a decision by the Tribunal of Ancona rejecting international protection. Indiscriminate exploitation of natural and oil resources by numerous companies and conflict among paramilitary groups fighting for control over these resources, as well as sabotages that led to oil spills, made the Niger Delta an unbearable place to live. Evidence of soil and water pollution due to oil depletion, environmental disasters and widespread instability was, however, disregarded by the Tribunal, which denied subsidiary and humanitarian protection to the claimant.

The Court noted that the right to life is susceptible to violation not only in case of armed conflict, but also when socio-environmental conditions are so dire as to put one's life at serious risk. Therefore, the Court ruled that humanitarian protection should be granted in the case of 'conditions of social, environmental or climatic degradation, or contexts of unsustainable exploitation of natural resources, which entail a serious risk for the survival of the individual'.⁵⁵ This evolutionary reasoning, if pursued in future judgments, may pave the way for the recognition of subsidiary protection when environmental disasters stemming from intentional human misconduct or overexploitation of natural resources endanger a claimant's life or safety, as already found in *Teitiota*.

This interpretation could be revolutionary also at the EU level where, as seen, the CJEU requires an actor to perpetrate serious harm for subsidiary protection to be issued. It could be argued that, when migration is found to be compelled by illicit environmental actions committed by states or non-state actors, these actors may qualify as perpetrators of serious harm.

⁵⁴ Court of Cassation, II Civil Section, Order of 24 February 2021, n 5022.

⁵⁵ Ibid [5].

⁵⁵ Ibid [6] (my translation).

Likewise, subsidiary protection might be offered if the damage caused to migrants could place their life at serious risk, such as in the Niger Delta case.

V. CONCLUDING REMARKS

This contribution has argued that the effects of climate change on human mobility need to be fully recognised and endorsed by the EU for its actions to be truly effective, as well as for law to respond efficaciously to current challenges. To do so, three avenues were considered feasible: extensively applying existing EU protection instruments; expansively interpreting them in light of potential environmental causes of migration; and revising the CEAS by making explicit reference to environmental migration. The above analysis revealed that a few EU secondary provisions may provide implicit protection, although with relevant limitations.

In this context, the Italian case showed, first, that an evolutionary approach can allow for an expansive interpretation of existing norms, resulting in the full respect and implementation of human rights standards, in compliance with the interpretation given in *Teitiota*. Second, despite the fact that the CJEU uses a high threshold for eligibility for subsidiary protection, the Italian case law unveils ground-breaking scenarios where intentional human misconduct damaging the environment can also amount to profound human rights violations, legitimizing the need for protection. Third, although there is little room for the inclusion of environmental causes of migration in the New Pact, the Italian experience offers, again, a unique perspective where environmental threats are considered as valid grounds for protection (Article 20 and 20-bis CAI) and as a restriction on removal to environmentally unsafe countries (Article 19 CAI). In conclusion, the Union should consider studying more closely the Italian legislation and case law to assess whether its experience might be leveraged as part of the EU's common efforts on climate change and migration management.