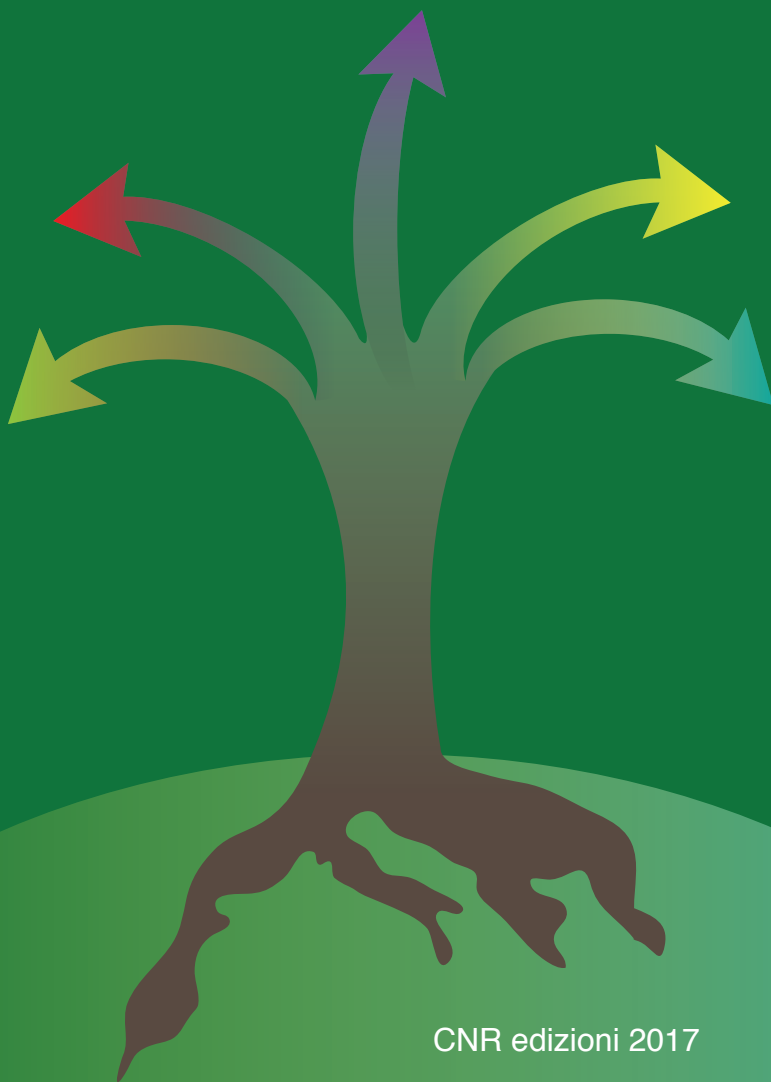


# MIGRATION AND THE ENVIRONMENT

## Some Reflections on Current Legal Issues and Possible Ways Forward

*Edited by* Giovanni Carlo Bruno  
Fulvio Maria Palombino  
Valentina Rossi







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**SOME REFLECTIONS ON CURRENT LEGAL ISSUES  
AND POSSIBLE WAYS FORWARD**

*edited by* GIOVANNI CARLO BRUNO  
FULVIO MARIA PALOMBINO  
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# 3. ENVIRONMENTAL MIGRANTS AND THE EU IMMIGRATION AND ASYLUM LAW: IS THERE ANY CHANCE FOR PROTECTION?

*Giuseppe Morgese\**

SOMMARIO: 1. Introduction. – 2. Protection under EU Asylum Law. – 3. Protection on Humanitarian Grounds. – 4. Protection from Removal According to Relevant Human Rights Law. – 5. Protection under Resettlement Programmes, Humanitarian Admission Schemes and Private Sponsorship. – 6. Protection within Regional Development and Protection Programmes. – 7. Conclusions.

## *1. – Introduction*

It is known that environmental change may affect migration both directly and indirectly. Directly, because natural disasters, drought, famines, and rising sea levels are able to force people to relocate from their home territories; indirectly, due to the fact that even slow environmental events may affect migration in combination with other factors (wars, conflicts over natural resources, etc.). Although environmental change-induced migrations (ECIMs) are not a new phenomenon, in the recent years it has been experienced an increasing deterioration of environment that is likely to

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play an important role on worldwide cross-border migration flows<sup>1</sup>.

Nonetheless, the notion of “migration due to environmental factors” is a controversial one due to existing uncertainties about the real impact of these factors on migration flows. From the one hand, there are little doubts that an earthquake (or any rapid-onset climate events) is likely to force people to move from the place they live in. From the other hand, however, it seems more difficult to assess movements in case of slow-onset climate events (i.e. drought, desertification, rising sea level), that often are not the only reason to migration decisions. Such an uncertainty has two main consequences: firstly, it is difficult to reach an international definition of “migrant due to environmental factors”; secondly, it is equally difficult to find appropriate and shared legislative responses.

At international level, there is still not a common legal definition of environmental migrants owing to two main problems: on the one side, most persons moving in the context of environmental events are likely to stay in their country or region of origin; on the other side, even when crossing borders, they usually are strictly speaking neither refugees nor economic migrants. Several documents refer them to *environmental* or *climate refugees*, pointing out their fear of suffering a physical danger in the home territory<sup>2</sup>; others refer to *environmental induced population movements*, to *environmentally displaced persons*, to *forced environmental migrants* and to *environmentally induced migrants*, each of them highlighting a specific part of the phenomenon<sup>3</sup>. International Organisation for Migrants (IOM) refers to *environmental migrants* as “persons or groups of persons who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad”<sup>4</sup>. The

<sup>1</sup> See in general LACZKO and AGHAZARM (eds.), *Migration, Environment and Climate Change: Assessing the Evidence*, Geneva, 2009; GUBBIOTTI et al., *Profughi Ambientali. Cambiamento climatico e migrazioni forzate*, Dossier Legambiente, 2013, available at: <[www.legambiente.it](http://www.legambiente.it)>.

<sup>2</sup> See NESPOR, “I rifugiati ambientali”, *Federalismi.it*, 21 February 2007; CARUSO and VENDITTO, “Il futuro del Mediterraneo. Studio preliminare sui rifugiati ambientali”, in VALLERI, PACE and GIRONE (eds.), *Il Mediterraneo: uno studio e una passione*, Bari, 2012, p. 251 ff.; BUSH, “Redefining Environmental Refugees”, *Georgetown Immigration Law Journal*, 2013, p. 553 ff.

<sup>3</sup> See KRALER, CERNEI and NOACK, *Climate Refugees” - Legal and Policy Responses to Environmentally Induced Migration*, Brussels, 2011, pp. 28-31; and PICCHI, “Climate Change and the Protection of Human Rights: The Issue of Climate Refugees”, *US-China Law Review*, 2016, p. 576 ff., pp. 579-581.

<sup>4</sup> KNIVETON et al., *Climate Change and Migration: Improving Methodologies to Estimate Flows*, Geneva, 2008, p. 31.

latter definition seems to be broad enough to include a vast majority of those affected by ECIMs and would better fit our purposes: this is the reason why, in this contribution, we will refer to “environmental migrants” (EMs).

The lack of a worldwide legal definition of EM is reflected in the absence of a common legal answer to ECIMs at both international and national level<sup>5</sup>. While some commentators stress the need of the extension of the scope of the 1951 Geneva Convention Relating to the Status of Refugee (“Refugee Convention” or “RC”)<sup>6</sup>, others call for broadening the scope of the non-binding 1998 Guiding Principles on Internal Displacement<sup>7</sup>. Further options refer to the need for a new international treaty on the status of environmental migrants, the addition of an *ad hoc* protocol to the 1992 United Nations Framework Convention on Climate Changes (UNFCCC)<sup>8</sup>, the broadening of a human rights approach, or the use of temporary protection and resettlement schemes at national level<sup>9</sup>.

So, it is not surprising that even in the European Union (EU) there is not a legal instrument explicitly allowing EMs to stay temporarily or permanently in the EU territory. It is true that, since the entry into force of the Treaty of Lisbon (1<sup>st</sup> December 2009), “Union policy on the environment shall contribute to pursuit of [the objective of, among others,] combating climate change” (Article 191(1) TFEU) and that the European Commission has repeatedly stressed the relevance of the climate

<sup>5</sup> See PERRINI, “Migrazione circolare e tutela internazionale ed europea dei migranti ambientali”, *Federalismi.it*, 21 July 2017, p. 2.

<sup>6</sup> Convention Relating to the Status of Refugees, 28 July 1951, in 189 U.N.T.S., p. 137 ff. See also the Protocol Relating to the Status of Refugees, 31 January 1967, in 606 U.N.T.S., p. 267 ff.

<sup>7</sup> Available at: <<http://www.ohchr.org/EN/Issues/IDPersons/Pages/Standards.aspx>>.

<sup>8</sup> Available at: <[http://unfccc.int/essential\\_background/convention/items/6036.php](http://unfccc.int/essential_background/convention/items/6036.php)>.

<sup>9</sup> In literature see MCCUE, “Environmental Refugees: Applying International Environmental Law to Involuntary Migration”, *The Georgetown International Environmental Law Review*, 1993, p. 151 ff.; WILLIAMS, “Turning the Tide: Recognizing Climate Change Refugees in International Law”, *Law & Policy*, 2008, p. 502 ff.; DOCHERTY and GIANNINI, “Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees”, *Harvard Environmental Law Review*, 2009, p. 349 ff.; ZETTER, “The role of legal and normative frameworks for the protection of environmentally displaced people”, in LACZKO and AGHAZARM (eds.), *cit. supra* note 1, p. 385 ff.; DEWITTE, “At the Water’s Edge: Legal Protections and Funding for a New Generation of Climate Change Refugees”, *Ocean and Coastal Law Journal*, 2010, p. 211 ff.; DUONG, “When Islands Drown: The Plight of Climate Change Refugees and Recourse to International Human Rights Law”, *University of Pennsylvania Journal of International Law*, 2010, p. 1239 ff.; LANGE, “Climate Refugees Require Relocation Assistance: Guaranteeing Adequate Land Assets through Treaties Based on the National Adaptation Programmes of Action”, *Pacific Rim Law & Policy Journal*, 2010, p. 613 ff.; LOMBARDO and TOVO, “Il problema dei “rifugiati climatici” nel diritto dell’Unione Europea”, *Diario europeo*, 2012, p. 34 ff.; KRALER, CERNEI and NOACK, *cit. supra* note 3, pp. 36-49.

change-migration connection<sup>10</sup>, the EU itself being involved in the “Nansen initiative”<sup>11</sup>, in the Steering Group of the Platform on Disaster Displacement<sup>12</sup> and also being party to the UNFCCC. But, for the time being, due to the reluctant approach of the Member States (“MS”), EU migration law regulates neither the definition and acquisition of the status of EM nor the content of protection, notwithstanding Articles 77 to 80 of the Treaty on the Functioning of European Union (TFEU) are designed in a broad enough manner to handle with it.

This contribution aims at examining legal options to fill the protection gap affecting environmental migrants in the EU. Starting from a discussion about the (limited) scope of application of EU harmonised protection statuses, options based on humanitarian grounds and on EU human rights obligations will be evaluated. We will thus take a closer look to further means of protection within (resettlement programmes, humanitarian admission schemes, private sponsorship) and outside (Regional Development and Protection Programmes) the EU territory. Eventually, it will be clear that existing means of protection in the EU are very limited in scope and not designed to fill in a satisfactory way the protection gap of EMs.

## 2. – *Protection under EU Asylum Law*

International law only acknowledges small groups of forced migrants suitable to be formally protected in States other than their own, namely refugees (and stateless persons) in accordance to the RC and people eligible for some kind of complementary protection. In the EU, there are three harmonised protection statuses (i.e. statuses granted in each MS on the basis of EU standards), namely refugee status, subsidiary protection status and temporary protection status. Thus, the question is whether or not EMs are suitable to be protected in the EU according to these statuses.

<sup>10</sup> Communication, The Global Approach to Migration and Mobility, 18 November 2011, COM(2011) 743 final, p. 7; Communication, An EU Strategy on Adaptation to Climate Change, 16 April 2013, COM(2013) 216 final, and its accompanying Staff Working Document, Climate Change, Environmental Degradation, and Migration, 16 April 2013, SWD(2013) 138 final; Communication, A European Agenda on Migration, 13 May 2015, COM(2015) 240 final, p. 7. See MAYRHOFER and AMMER, “People Moving in the Context of Environmental Change: The Cautious Approach of the European Union”, *European Journal of Migration and Law*, 2014, p. 389 ff., pp. 393-429.

<sup>11</sup> The Nansen Initiative, launched in 2012, aims at building an international consensus on a Protection Agenda addressing the needs of people displaced across borders in the context of disasters and the effects of climate change. Available at: <<https://www.nanseninitiative.org>>.

<sup>12</sup> Launched in May 2016 to follow up on the work of the Nansen Initiative and its Protection Agenda.

To begin with, Directive 2011/95/EU (“Qualification Directive” or “QD”)<sup>13</sup>, that have been implemented by MS in their domestic jurisdiction, draws a distinction between refugees and beneficiaries of subsidiary protection in the EU.

The conditions for granting the *refugee status* largely correspond to the definition of Article 1A(2) RC<sup>14</sup>. Article 2(d) QD stresses that

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

It does seem hard to bring EMs onto the definition of refugee<sup>15</sup>. Like the RC, the QD does require an identifiable human persecutor that must be a government actor or a non-State actor that the government is unwilling or unable to control (Article 6). It also needs a causal link between environmental event and action or omission directly imputable to the State of origin suitable to cause a well-founded (individual) fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group (Article 10). Unfortunately, the key point is that environmental events are indiscriminate by nature, are usually not of (direct) human origin and do not differentiate on the above five reasons. Maybe it could be possible, under specific conditions, to include EMs into the notion of “particular social group”, but it would happen in very few cases, namely where environmental

<sup>13</sup> Directive 2011/95/EU, 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, in OJ L 337, 20 December 2011, pp. 9-26.

<sup>14</sup> According to Article 1A(2): “the term ‘refugee’ shall apply to any person who [...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country [...]”. See ALEXANDER and SIMON, “Unable to Return in the 1951 Refugee Convention: Stateless Refugees and Climate Change”, *Florida Journal of International Law*, 2014, p. 531 ff.

<sup>15</sup> According to NI, “A Nation Going under: Legal Protection for Climate Change Refugees”, *Boston College International and Comparative Law Review*, 2015, p. 329 ff., p. 343 in note 115, the drafters of the RC knowingly declined to extend refugee status to the victims of natural calamities. *Contra* COOPER, “Environmental Refugees: Meeting the Requirements of the Refugee Definition”, *N.Y.U. Environmental Law Journal*, 1998, p. 480 ff.

disasters are linked to some extent to governmental actions or omissions. For instance, in *Teitiota* the High Court of New Zealand refused to recognize the refugee status to the applicant, a forced migrant from the low-lying Kiribati Islands, due to the lack of an identifiable actor and a proper persecution according to the RC<sup>16</sup>. On the contrary, if one can prove that a governmental action or omission has caused the environmental harmful event, at least the above causal link should be recognized: in *Budayeva*, the European Court of Human Rights (ECtHR) held that there had been a violation of Article 2 (right to life) of the European Convention on Human Rights (ECHR) owing to the Russia's failure to protect the life of the applicants, residents of the town of Tyrnauz, from mudslides which destructed their homes<sup>17</sup>.

Although apparently EMs may be qualified as refugees only under strict conditions, we cannot say that it is not possible at all: in order to achieve it, an asylum-seeker does need to fulfil all the eligibility conditions required by Articles 1A(2) RC and 2(d) QD, not being enough the mere environmental disaster-related migration.

Similarly, it would be hard to qualify EMs under the other protection status set out in the QD, namely *subsidiary protection* status applicable to individuals who, despite not qualifying as refugees, can nevertheless claim the protection<sup>18</sup>. Although an EM claiming subsidiary protection should prove a more favourable "real risk of suffering serious harm" as defined in Article 15 QD<sup>19</sup>, it must be stressed anyway that the three

<sup>16</sup> High Court (New Zealand), *Teitiota v. Chief Executive of Ministry of Business, Innovation and Employment*, Judgement of 26 November 2013, available at: <<http://www.nzlii.org/nz/cases/NZHC/2013/3125.html>>. It is worth nothing that both Court of Appeal and Supreme Court have declined to grant leave to appeal. See NI, *cit. supra* note 15, pp. 336-344.

<sup>17</sup> *Budayeva and Others v. Russia*, Applications Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgement of 20 March 2008. See MCADAM, *Climate Change, Forced Migration, and International Law*, Oxford-New York, 2012, pp. 59-60; CIERVO, "I rifugiati invisibili. Brevi note sul riconoscimento giuridico di una nuova categoria di richiedenti asilo", in ALTIERO and MARANO (eds.), *Crisi ambientale e migrazioni forzate*, Roma, 2016, p. 255 ff., pp. 261-263.

<sup>18</sup> According to Article 2(f) QD, "'person eligible for subsidiary protection' means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm [...] and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country". See BATTJES, "Subsidiary Protection and Other Alternative Forms of Protection", in CHETAIL and BAULOZ (eds.), *Research Handbook on International Law and Migration*, Cheltenham-Northampton, 2014, p. 541 ff., pp. 550-556.

<sup>19</sup> Under which "[s]erious harm consists of: (a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or

situations enumerated in the above-mentioned provision are hardly applicable to EMs.

To begin with, Articles 15(a) QD deals with the risk of suffering a death penalty or execution, thus imposing upon MS a specific obligation to grant subsidiary protection to individuals facing a risk of being subject to death penalty in the receiving State: as such, this provision seems not to be applicable to environmental disaster in the absence of a death sentence. Nor the actual or potential adverse effects of natural disasters could be easily considered as “indiscriminate violence in situations of international or internal armed conflict” according to Article 15(c) QD, except in cases where environmental factors induce or worsen such conflicts<sup>20</sup>.

Talking about the risk of “torture or inhuman or degrading treatment or punishment” according to Article 15(b) QD, the European Court of Justice (ECJ) held that this provision corresponds in essence to Article 3 ECHR and the ECtHR case-law is of relevance in interpreting the scope of the provision<sup>21</sup>. The Court has so far identified three situations in which removal bans applies to third-country individuals<sup>22</sup>. The first and more frequent one is linked to the risk of serious harm due to *direct and intentional infliction* by State or non-State actors in the receiving country<sup>23</sup>. The second category is resulting from *naturally occurring damages*<sup>24</sup>, but the ECtHR set a high threshold for these types of cases, having the situation to be very exceptional and humanitarian considerations be compelling<sup>25</sup>. Under the third category, the Court held that Contracting States of the ECHR must not issue a removal order where direct

internal armed conflict”.

<sup>20</sup> See MAYRHOFER and AMMER, *cit. supra* note 10, p. 409.

<sup>21</sup> See case C-465/07, *Elgafaji*, ECR, 200,9 I-921, para. 28.

<sup>22</sup> According to which “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment”. See MAYRHOFER and AMMER, *cit. supra* note 10, pp. 413-418, and SCOTT, “Natural Disasters, Climate Change and *Non-Refoulement*: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?”, *International Journal of Refugee Law*, 2014, p. 404 ff., pp. 412-416.

<sup>23</sup> In *Soering v. The United Kingdom*, Application No. 14038/88, Judgement of 7 July 1989, the Court held that an absolute prohibition of *non-refoulement* applied owing to the mere extradition of the applicant from a Contracting State of the ECHR to a receiving country where he would have faced a real risk of torture or inhuman or degrading treatment or punishment: see also *Chahal v. The United Kingdom*, Application No. 22414/93, Judgement of 15 November 1996, and *Saadi v. Italy*, Application no. 37201/06, Judgement of 28 February 2008.

<sup>24</sup> In *D. v. The United Kingdom*, Application No. 30240/96, Judgement of 2 May 1997, the applicant, a terminally-ill man, if expelled would not have received palliative care as adequate as in the Contracting State.

<sup>25</sup> *N. v. The United Kingdom*, Application No. 26565/05, Judgement of 27 May 2008, para. 42.

and indirect actions of State or non-State actors in the receiving territory are seen as the *predominant cause* of a natural disaster that the removing individual would face<sup>26</sup>.

In view of the above, it would be quite hard for EMs to seek subsidiary protection under Article 15(b) QD. The first category of Article 3 ECHR situations is very unlikely to apply owing to the lack of a direct and intentional harm by State or non-State actors in the majority of environmental events. Nor the provision is likely to play a role under the second category, absent those very exceptional and individual circumstances required to establish a claim in most environmental disaster cases, that are indiscriminate in nature. Even the third category is unlikely to apply, unless there can be alleged substantial evidence of human predominant cause: otherwise, the environmental event is likely to be seen as a purely natural occurring one<sup>27</sup>. To sum up, ECtHR case-law shows little room for claims where socioeconomic or environmental conditions in the receiving country would suffice *per se* to integrate an inhuman or degrading treatment<sup>28</sup>. Perhaps, the only possibility for protecting EMs according to Articles 15(b) QD and 3 ECHR, under specific conditions, could stem from situations of complete lack of food, water and housing if they are returned to countries affected by huge environmental disasters<sup>29</sup>.

If that is not enough, chances to apply refugee or subsidiary protection status to EMs are further complicated by two circumstances. On the one hand, under the optional provision of Article 8(1) QD,

“[...] MS may determine that an applicant is not in need of international protection if in a part of the country of origin, he or she: (a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or (b) has access to protection against persecution or serious harm; and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there”. So, in the case of such an “internal alternative”

<sup>26</sup> *Sufi and Elmi v. The United Kingdom*, Application No. 8319/07, Judgement of 28 June 2011, para. 282.

<sup>27</sup> In *Sufi and Elmi*, the ECtHR noted that the humanitarian situation was not solely due to naturally occurring phenomena, such as drought, but also a result of the actions or inactions of state parties to the conflict in Somalia.

<sup>28</sup> See MAYRHOFER and AMMER, *cit. supra* note 10, p. 417.

<sup>29</sup> *Ibid.*, p. 418. See also MCADAM, *cit. supra* note 17, p. 76.



(i.e. another part of the country of origin not affected by the alleged climate event), EMs are reasonably expected to relocate within their home country and thus not allowed to claim international protection elsewhere. Such a provision seems to play an important role in protection status determination within those MS that have opted-in on it, owing to the fact that there are very few cases where a State of origin has been entirely concerned by an environmental harmful event<sup>30</sup>. On the other hand, it must be recalled that asylum-seekers could anyway be excluded from refugee or subsidiary protection status according to Articles 12 and 17 QD.

Given the substantial limitations of the QD, one should pay attention to another kind of protection, namely *temporary protection* set out in Council Directive 2001/55/EC, of 20 July 2001 (“Temporary Protection Directive” or “TPD”)<sup>31</sup>.

At first sight, such a protection seems to be more promising when dealing with EMs. Indeed, the whole procedure aims at providing “immediate and temporary protection” regardless of any international protection status determination (Article 2(a)). Furthermore, TPD does not refer to the narrow definitions of refugees or persons eligible for subsidiary protection, but to “displaced persons”, namely “third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, [...] and are unable to return in safe and durable conditions because of the situation prevailing in that country” (Article 2(b)). Finally, unlike the QD, the TPD does contain only a non-exhaustive list of cases for temporary protection, thus giving room to a broader implementation of the Directive.

Notwithstanding these positive elements, however, there are others that run counter an application in the case of EMs<sup>32</sup>. First of all, we are dealing with a “procedure of exceptional character” applicable only “in the event of a mass influx or imminent mass influx” (Article 2(a)), inapplicable as such to persons moving individually or in small groups. Secondly, the temporary protection can be acknowledged by a MS

<sup>30</sup> See KRALER, CERNEI and NOACK, *cit. supra* note 3, p. 52. On the internal alternative see EATON, “The Internal Protection Alternative Under European Union Law: Examining the Recast Qualification Directive”, *International Journal of Refugee Law*, 2012, p. 765 ff., and NÍ GHRÁINNE, “The Internal Protection Alternative Inquiry and Human Rights Considerations - Irrelevant or Indispensable?”, *International Journal of Refugee Law*, 2015, p. 29 ff.

<sup>31</sup> 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, in OJ L 212, 7 August 2001, pp. 12-23. See BATTJES, *cit. supra* note 18, pp. 557-558. In this volume, see SCIACCALUGA, *infra* p. 77 ff.

<sup>32</sup> See MAYRHOFER and AMMER, *cit. supra* note 10, pp. 406-407.

only on the outcome of a complex procedure involving an EU Council Decision establishing the existence of a mass influx, based on a proposal from the Commission. But the major obstacle is represented by the long-lasting absence of MS political will to resort to such a procedure (mainly because of the resulting distribution of temporarily protected persons among MS themselves), which is the reason why the TPD mechanism has never been used so far.

The same holds true for those “provisional measures” set out in Article 78(3) TFEU, insofar as the Council could adopt them “in the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries”, thus excluding EMs moving on individual or in small group basis. As explained in *Slovak and Hungary v Council* (the so called “relocation case”), indeed, such non-legislative measures could be adopted on a temporary basis in case of “an inflow of nationals of third countries (...), even though it takes place in the context of a migration crisis spanning a number of years, [that] makes the normal functioning of the EU common asylum system impossible”<sup>33</sup> and are mainly inspired by an intra-EU solidarity rationale.

### 3. – *Protection on Humanitarian Grounds*

Owing to the difficulties in relying on the above-mentioned provisions in order to protect EMs, attention should be paid to further provision related to EU immigration law, namely those concerning the entry, stay on and protection from removal of third-country nationals from the MS territory for humanitarian reasons. According to Recital 15 of the QD, “[t]hose third-country nationals or stateless persons who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds fall outside the scope” of the QD itself. Moreover, as explained below and unlike EU harmonised protection statuses, these humanitarian provisions are non-mandatory, thus allowing Member States to deal with different national humanitarian practices.

Starting with entry provisions, it should be recalled that nationals from countries listed in the Annex 1 to the Regulation No. 539/2001 are subject to a visa requirement

<sup>33</sup> Case C-643/15 and C-647/15, *Slovak Republic and Hungary v. Council of the European Union* (Judgement), ECLI:EU:C:2017:631, para. 114.

prior to enter the EU territory<sup>34</sup>. Short-stay visas are subject to the Regulation No. 810/2009 (“Visa Code” or “VC”)<sup>35</sup>; by contrast, long-stay visas are issued by Member States under their domestic immigration law. As a general rule, a short-stay visa may be issued by MS consulates or representations in third States in specific cases and subject to a positive decision on admissibility criteria set out in the VC<sup>36</sup>, including the fact that the applicant does not present a risk of illegal immigration and must prove his intention to leave the territory of the MS before the expiry of the visa. Thus, short-stay visas do not allow third-country nationals to enter in any case and stay indefinitely on the territory of MS.

The Visa Code does not contain special provisions concerning the entry and stay of EMs. However, some key articles dealing with humanitarian-related situations<sup>37</sup> could be interpreted in order to meet their needs. On the one hand, Article 19(4) VC states that, by way of derogation, a visa application that does not meet the above-mentioned admissibility criteria “may be considered admissible on humanitarian grounds”. On the other hand, Article 25(1)(a) VC recalls that a MS, even when another MS is objecting to a third-country national visa application<sup>38</sup>, may exceptionally issue a so-called “visa with limited territorial validity”<sup>39</sup> when necessary “on humanitarian grounds”. Furthermore, an issued short-stay visa shall be prolonged “where the competent authority of a Member State considers that a visa holder has provided proof of [...] humanitarian reasons preventing him from leaving the territory of the Member States before the expiry of the period of validity of or the duration of stay authorised

<sup>34</sup> Regulation (EC) No 539/2001, of 15 March 2001, listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, in OJ L 81, 21 March 2001, pp. 1-7. On the contrary, nationals from countries on the list in Annex II of the Regulation are exempt from that requirement. EU nationals and nationals from countries that are part of the Schengen Area (and their family members) have the right to enter without prior authorisation.

<sup>35</sup> Regulation (EC) No. 810/2009, of 13 July 2009, establishing a Community Code on Visas, in OJ L 243, 15 September 2009, pp. 1-58. A “short stay” is intended as not exceeding 90 days in any 180-day period.

<sup>36</sup> For instance, possession of a valid travel document, justification of the purpose and conditions of the visit, non-listing of the applicant in the Schengen Information System, not posing a threat to public policy, internal security, public health or the international relations of the MS, possession of a travel insurance.

<sup>37</sup> See HEIN and DE DONATO, *Exploring Avenues for Protected Entry in Europe*, Abbiategrosso (MI), 2012, available at: <<https://cir-onlus.org/images/pdf/ET%20VOLUME%20FINALE%20OK.pdf>>; NEVILLE and RIGON, *Towards an EU humanitarian visa scheme?*, EP Policy Department C: Citizens’ Rights and Constitutional Affairs, PE 556.950, Brussels, 2016.

<sup>38</sup> The Visa Code sets out a system of “prior consultation” of all EU Member States before issuing a visa for nationals from particular third countries or in particular cases.

<sup>39</sup> Such visas are valid for one or more (but less than all) of the Schengen States.

by the visa” (Article 33(1) VC). Finally, in the case of a visa application at the external border, under Article 35(2) VC “the requirement that the applicant be in possession of travel medical insurance may be waived [...] for humanitarian reasons”.

Apart from such “protected entry” provisions, to which most of the MS resorts on an exceptional basis<sup>40</sup>, it should therefore be noted that Regulation 2016/399 (“Schengen Borders Code” or “SBC”)<sup>41</sup> provides in a manner consistent to VC. Under Article 6(5)(c) SBC, third-country nationals who do not meet all the conditions to enter the Schengen Area may be allowed by a MS to enter its territory “on humanitarian grounds, on grounds of national interest or because of international obligations”.

EU immigration law allows MS to resort to humanitarian grounds also against the removal of illegally staying third-country nationals. Following Article 6(4) of the Directive 2008/115/EC (“Return Directive”)<sup>42</sup>, “Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory”.

The question thus is whether or not these humanitarian grounds are ample enough to deal with environmental disasters and to let EMs to enter, stay on and not be removed from the territory of the EU Member States. Unfortunately, the VC does not go further in defining such grounds and, until now, no further measure has been adopted by the EU legislature with regard to uniform short-stay or, even more, long-stay visas on these reasons. Similarly, neither the Schengen Borders Code nor the Return Directive go into details of the humanitarian grounds according to their provisions. In *X and X v. Belgium*, a humanitarian visa case, Advocate General Mengozzi in its Opinion held that humanitarian grounds as referred to in Article 25(1) VC should be a concept of EU law and must not be exclusive to a Member State<sup>43</sup>, but the European Court of Justice has taken a different view stating that “the applications [for such visas] fall solely within the scope of national law”<sup>44</sup>.

<sup>40</sup> With reference to the Italian situation, see HEIN and DE DONATO, *cit. supra* note 36, pp. 44-45.

<sup>41</sup> Regulation (EU) 2016/399, of 9 March 2016, on a Union Code on the rules governing the movement of persons across borders, in OJ L 77, 23 March 2016, pp. 1-52.

<sup>42</sup> Directive 2008/115/EC, of 16 December 2008, on common standards and procedures in Member States for returning illegally staying third-country nationals, in OJ L 348, 24 December 2008, pp. 98-107

<sup>43</sup> Case C-638/16 PPU, *X and X v. Belgium* (Opinion), ECLI:EU:C:2017:93, para. 130.

<sup>44</sup> Case C-638/16 PPU, *X and X v. Belgium* (Judgement), ECLI:EU:C:2017:173, para. 44. See BROUWER, “The European Court of Justice on Humanitarian Visas: Legal integrity vs. political opportun-

Should that prove to be the case, then we shall conclude that the exact scope of application of these humanitarian grounds – eventually including environmental ones – lies within the competence of the MS. Similarly, decisions whether to let third-country nationals to enter, stay on and not be removed on such humanitarian grounds are also a matter of the competent national authorities, because of the fact that all the aforementioned provision in the VC, the SBC and the RD are non-mandatory.

The lack of EU mandatory provisions does not mean that MS themselves cannot introduce specific provisions in their domestic legal order<sup>45</sup>. It has to be recalled that the majority of EU States have not a legislation in place applicable, at least in part, to EMs. Some exceptions are, for instance, Sections 88a(1) and 109(1) of the Finnish Aliens Act, that provide for humanitarian protection in case of environmental catastrophe and temporary protection for environmental disaster; moreover, Section 2(3) of Chapter 4 of the Swedish Aliens Act provides residence permits for persons unable to return to the country of origin because of an environmental disaster.

In Italy, under Article 5(6) of the Legislative Decree No. 286/1998, a residence permit can be granted to third-country nationals or stateless persons that do not satisfy the conditions of stay on national territory according to international agreements but to whom there are serious reasons of humanitarian nature or resulting from constitutional or international obligations of the Italian State. Such a humanitarian permit may be granted also to third-country nationals whose requests for refugee or subsidiary protection status have been denied but to whom the same serious reasons arise. Article 5(6) has been implemented, for instance, in the occasion of a major natural disasters in Bangladesh, namely the Sidr cyclone<sup>46</sup>.

Moreover, Article 20 of the Italian Legislative Decree No. 286/1998 provides for

ism?”, 16 March 2017, available at: <<https://www.ceps.eu/publications/european-court-justice-humanitarian-visas-legal-integrity-vs-political-opportunism>>; CAGGIANO, “Are You Syrious? Il diritto europeo delle migrazioni dopo la fine dell’emergenza alla frontiera orientale dell’Unione”, *Freedom, Security & Justice: European Legal Studies*, 2017, p. 7 ff., pp. 14-16; FAVILLI, “Visti umanitari e protezione internazionale: così vicini così lontani”, *Diritti umani e diritto internazionale*, 2017, p. 553 ff.

<sup>45</sup> See EUROPEAN MIGRATION NETWORK, *The different national practices concerning granting of non-EU harmonised protection statuses*, December 2010, available at: <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european\\_migration\\_network/reports/docs/emn-studies/non-eu-harmonised-protection-status/0\\_emn\\_synthesis\\_report\\_noneuharmonised\\_finalversion\\_january2011\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/non-eu-harmonised-protection-status/0_emn_synthesis_report_noneuharmonised_finalversion_january2011_en.pdf)>.

<sup>46</sup> See BRAMBILLA, “Migrazioni indotte da cause ambientali: quale tutela nell’ambito dell’ordinamento giuridico europeo e nazionale?”, *Diritto Immigrazione e Cittadinanza*, 2017, pp. 15-16.

collective reception measures in the case of exceptional events, establishing temporary protection for relevant humanitarian needs for, among others, natural disasters. The latter provision has been implemented, for instance, in 2011 leading to the issue of residence permits to nationals of North Africa States during the events of the so-called “Arab Spring”<sup>47</sup>.

#### 4. – *Protection from Removal According to Relevant Human Rights Law*

Now we should pay attention to another kind of protection of EMs, namely that against removal orders from the territory of the MS according to relevant human rights law applicable in the EU (and MS themselves). Human rights law is of paramount importance to EMs in view of the fact that it sets out minimum standards of protection to every individual within the State jurisdiction, leading in some cases to an absolute protection against the *refoulement* beyond the refugee category<sup>48</sup>.

As widely known, the principle of *non-refoulement* incorporated in Article 33(1) RC, under which refugees must not be returned to a country where their life or freedom would be threatened due to their race, religion, nationality, membership of a particular social group or political opinion, is a key element of EU asylum law<sup>49</sup>. Under Article 78 TFEU, the EU must ensure “compliance with the principle of *non-refoulement*” according to the RC and other relevant treaties<sup>50</sup>. Article 21 QD stipulates that “Member States shall respect the principle of *non-refoulement* in accordance with their international obligations”. Unfortunately, both Article 33 RC and Article 21 QD are not of absolute nature, allowing for the removal of a refugee when he poses a threat to the security of the host State or when, after the commission of a serious crime, he is a danger to the host community.

<sup>47</sup> See COSSA, “Rifugiati climatici: le politiche e la normativa internazionale e dell’Unione Europea”, in ALTIERO and MARANO (eds.), *cit. supra* note 17, p. 269 ff., p. 276.

<sup>48</sup> See MCADAM, *cit. supra* note 17, pp. 52-53.

<sup>49</sup> See in general WALLACE, “The Principle of *Non-Refoulement* in International Refugee Law”, in CHETAIL and BAULOZ (eds.), *Research Handbook on International Law and Migration*, Cheltenham-Northampton, 2014, p. 417 ff.

<sup>50</sup> Including the ECHR, the International Covenant on Civil and Political Rights of 16 December 1966 (whose Article 7 states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (the Article 3 of which stresses that “[n]o State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”).

In turn, Article 19(2) of the Charter of Fundamental Rights of the EU (“Charter”), which has the same legal value as the Treaties, stipulates that Member States are bound by an absolute prohibition of any return of an individual “to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”. Article 19(2) Charter stems from the ECtHR case-law related to Articles 2 and 3 of the ECHR<sup>51</sup> and, according to Article 52(3) Charter, “the meaning and scope of those rights shall be the same as those laid down by the [ECHR itself]”. Moreover, according to Article 6(3) of the Treaty on European Union (“TUE”), “[f]undamental rights, as guaranteed by the [ECHR] shall constitute general principles of the Union’s law”.

So, the question is to assess whether, and to what extent, fundamental rights as enshrined in the ECHR and according to the ECtHR case-law, together with Charter provisions, prohibit decisions to remove EMs from the territory of the MS because of environmental events in the returning countries.

In Section 2, we have already examined the prohibition set out in Article 3 ECHR and its role in assessing the existence of a “serious harm” according to Article 15(b) QD: as a consequence, EU Member States are required to grant subsidiary protection status to EMs only under specific circumstances, according to the ECtHR case-law. But Article 3 ECHR does play a much wider role due to its applicability not only to beneficiaries of international protection but to any third-country national, irrespective of his personal status, the existence of persecution or any other condition. In this respect, under the same conditions set out in the aforementioned ECtHR case-law, MS would anyway be denied the possibility of issuing removal orders against every EMs facing a risk to be subject to inhuman or degrading treatment or punishment due to environmental harmful events.

The same reasoning does apply to removal bans owing to the duty of the Member States to safeguard the lives of third-country individuals, according to Article 2

<sup>51</sup> It must be stressed that the ECHR does not explicitly provide for *non-refoulement*. However, the ECtHR has recognised this principle through its case-law, by deriving from Article 1 ECHR an implicit obligation of Contracting States to protect migrants against *refoulement*.

ECHR (right to life)<sup>52</sup> and Articles 2<sup>53</sup> and 3(1)<sup>54</sup> of the Charter. It has to be recalled that the absolute right to life enshrined in Article 2 ECHR is wider than the mere prohibition of death penalty or execution – leading as such to subsidiarity protection status according to Article 15(a) QD – and includes other forbidden conducts as, for instance, the use of lethal force or the disappearance of persons by the State. Notwithstanding the ECtHR tends to examine relevant cases either under Article 2 or 3 ECHR, a removal from the territory of a Contracting State is absolutely prohibited *par ricochet* where it would expose an individual to a real risk of loss of life<sup>55</sup>. A key difference between Articles 2 and 3 lies in the fact that, under the former provision, the prospect of death as a consequence of return decision must be quite a certain one, unlike Article 3 where “substantial grounds” are enough. Should that prove to be the case, it seems that, at least in Article 2 stand-alone cases, EMs would face a higher threshold to prove the causal link between environmental harmful event and risk of death, especially in the case of a viable internal relocation alternative.

Finally, one should pay attention to Article 8(1) ECHR (right to respect for private and family life), according to which “[e]veryone has the right to respect for his private and family life, his home and his correspondence”. The right referred to in this provision has often been invoked as a protection against *refoulement* of migrants in cases not involving the risk of treatment contrary to Article 3 ECHR. The ECtHR provided a broad interpretation of Article 8, for instance covering situations where third-country nationals are threatened with removal (or are removed) and that could have serious repercussions for their existing family life, or where, absent such a family, the circumstances of applicants’ private life alone may justify the protection from *refoulement*.

<sup>52</sup> According to which “(1) Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. (2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection”. Nowadays, the prohibition of death penalty is of absolute character in most European States according to Protocols No. 6 (abolition of the death penalty) and No. 13 (abolition of the death penalty in all circumstances) to the ECHR.

<sup>53</sup> Under which “1. Everyone has the right to life. 2. No one shall be condemned to the death penalty, or executed”.

<sup>54</sup> According to which “[e]veryone has the right to respect for his or her physical and mental integrity”.

<sup>55</sup> *Z and T v. The United Kingdom*, Application No. 27034/05, Judgement of 28 February 2006, para. 6: “[the Article 3 analysis from *Soering*] applies equally to the risk of violations of Article 2”.



It must be recalled that, unlike Articles 2 and 3, Article 8 ECHR is not of an absolute character, interferences by public authorities being possible “in accordance with the law and [when] necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others” (para 2). It means that removal orders will be possible but only where they would result in a justified interference with third-country nationals’ right to respect for private or family life. In particular, removals will be allowed in situations of emergency under the conditions of legality, proportionality and necessity established by the ECtHR case-law. In order to strike a fair balance between the interests of the State and the rights of the individual, the Court has taken into consideration many aspects including the individual’s family situation, the best interest of children, the time spent in the removing State, the seriousness of the offence, the level of social and cultural ties in the latter State, etc.

So far, the ECtHR held that there had been numbers of violations of Article 8 ECHR in environmental cases, none of which however has implied a removal ban in a third country affected by a climate disaster. Nor it could be easy for EMs to rely on Article 8 case-law in the future, owing to the less weight the ECtHR usually places on the seriousness of the difficulties that a third-country national is likely to face in the receiving State, compared for instance with difficulties faced by his family in the same receiving State<sup>56</sup>. Thus, even if EMs could hypothetically rely on the argument related to the impact of removal according to Article 8 ECHR, it seems that stand-alone claims based on the fact that their right to “physical and moral integrity” would be adversely affected by environmental events in the receiving State are likely to have little prospect of success, in particular where dealing with a proper internal alternative.

Anyway, it must be pointed out that any removal bans applicable to EMs, according to human rights provisions, would be a “narrow” kind of protection. This is the reason why MS would only be precluded from removing concerned individuals from their home territory, but not bound to automatically grant them an international protection status. Article 9(1)(a) of the Return Directive stresses that “Member States shall postpone removal [...] when it would violate the principle of non-refoulement”

<sup>56</sup> For relevant case-law, see SCOTT, *cit. supra* note 22, p. 418.

but does not go further in putting on MS an obligation to grant international protection. At least, there could be issued residence permits on humanitarian reasons<sup>57</sup>, generally on a non-mandatory basis according to Article 6(4) of the Return Directive. For instance, in the Sidr cyclone case, Italian authorities only approved removal bans of Bengali nationals according to “justified reasons” under Article 14(5-ter) of the Legislative Decree No. 286/1998<sup>58</sup>, but they did not grant those nationals humanitarian permits for a long time<sup>59</sup>.

### 5. – *Protection under Resettlement Programmes, Humanitarian Admission Schemes and Private Sponsorship*

While EU provision on international protection, humanitarian statuses and protection from *refoulement* according to human rights law, where applicable to EMs, assume that third-country nationals have previously entered legally or illegally the territory of the Member States, or are going to enter it, there are further options applicable to EMs not already present in the EU, namely resettlement programs, humanitarian admission schemes, private sponsorship and local integration under Regional Development and Protection Programmes (RDPP).

First of all, we need to assess the opportunities of *resettlement* to fill the protection gap of EMs. According to the United Nations High Commissioner for Refugees (UNHCR), “[r]esettlement is the transfer of refugees from the country in which they have sought asylum to another State that has agreed to admit them as refugees and to grant them permanent settlement and the opportunity for eventual citizenship”<sup>60</sup>. Resettlement is one of the three durable solutions – together with voluntary repatriation and local integration – identified by UNHCR as adequate means to end the cycle of displacement by resolving refugees’ plight so that they can lead normal lives<sup>61</sup>.

<sup>57</sup> See for instance Article 28(d) of the Italian Decree of the President of the Republic No. 394/1999.

<sup>58</sup> According to which “[t]he infringement of the [removal order] is punished, *unless there is a justified reason*, with a fine from 10,000 to 20,000 Euros [...]” (emphasis added).

<sup>59</sup> See BRAMBILLA, *cit. supra* note 45, p. 15.

<sup>60</sup> See UNHCR, *Resettlement Handbook*, Geneva, 2011, p. 36. See also PERRIN-McNAMARA, *Refugee Resettlement in the EU: Between Shared Standards and Diversity in Legal and Policy Frames*, San Domenico di Fiesole (FI), 2013, available at: <<http://cadmus.eui.eu/handle/1814/29400>>.

<sup>61</sup> *Ibid.*, p. 28. See also MORGESE, “Solidarietà e ripartizione degli oneri in materia di asilo nell’Unione europea”, in CAGGIANO (a cura di), *I percorsi giuridici per l’integrazione. Migranti e titolari di protezione internazionale tra diritto dell’Unione e ordinamento italiano*, Torino, 2014, p. 365 ff., pp. 396-400; and ZIECK, “The Limitations of Voluntary Repatriation and Resettlement of Refugees”, in CHETAIL and

The European Commission has begun to discuss resettlement quite recently, stressing since 2000 the need for an EU-wide scheme as a way to ensure more orderly and managed entry in the EU for persons in need of international protection<sup>62</sup>. In 2012, the EU issued a Decision on a Joint EU Resettlement Programme, consisting in setting common priorities instead of different MS national priorities and including financial support (under ERF Regulation) to MS willing to resettle targeted individuals from third countries<sup>63</sup>. Under the 2012 Decision, targeted individuals are persons from countries/regions identified for Regional (Development and) Protection Programmes, persons belonging to a vulnerable group falling within the UNHCR resettlement criteria<sup>64</sup>, and persons from a geographical location on the list of common EU priorities for 2013.

In 2014, the EU approved the AMIF Regulation, repealing the ERF Regulation<sup>65</sup>. Under Article 2(a) of the AMIF Regulation, “‘resettlement’ means the process whereby, on a request from the [UNHCR] based on a person’s need for international protection, third-country nationals are transferred from a third country and established in a Member State where they are permitted to reside with” an international protection status or any other status which offers similar rights and benefits. According to Article 17, “Member States shall [...] receive every two years an additional amount [...] based on a lump sum [...] for each resettled person”. Targeted persons

BAULOZ (eds.), *Research Handbook on International Law and Migration*, Cheltenham-Northampton, 2014, p. 562 ff., pp. 574-580.

<sup>62</sup> Communication, Towards More Accessible, Equitable and Managed Asylum Systems, 3 June 2003, COM(2003) 315 final; Communication, On the managed entry in the EU of persons in need of International Protection and the enhancement of the protection capacity of the regions of origin “Improving Access to Durable Solutions”, 4 June 2004, COM(2004) 410 final. See PAPAPOPOULOU et al., *Comparative Study on the Best Practices for the Integration of Resettled Refugees in the EU Member States*, requested by the EP Committee on Civil Liberties, Justice and Home Affairs, PE 474.393, Brussels, 2013, pp. 12-20, available at: < [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474393/IPOL-LIBE\\_ET\(2013\)474393\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474393/IPOL-LIBE_ET(2013)474393_EN.pdf)>.

<sup>63</sup> Decision No. 281/2012/EU, of 29 March 2012, amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme “Solidarity and Management of Migration Flows”, in OJ L 92, 30 March 2012, pp. 1-3.

<sup>64</sup> For instance, women and children at risk, unaccompanied minors, survivors of violence and torture, persons having serious medical needs, persons in need of emergency or urgent resettlement for legal or physical protection needs.

<sup>65</sup> Regulation (EU) No. 516/2014, of 16 April 2014, establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No. 573/2007/EC and No. 575/2007/EC and Decision 2007/435/EC, in OJ L 150, 20 May 2014, pp. 168-194.

are those from a country or region designated for the implementation of a R(D)PP, those from a country or region which has been identified in the UNHCR resettlement forecast and where Union common action would have a significant impact on addressing the protection needs, and those belonging to a specific category falling within the UNHCR resettlement criteria.

In 2015, as part of the EU response to the so-called “refugee crisis” according to the European Agenda on Migration that *inter alia* called the EU to step up its resettlement efforts<sup>66</sup>, the Commission adopted Recommendation No. 2015/914 on a European resettlement scheme<sup>67</sup>. According to its Paragraph 2, the term “resettlement” refers to the transfer of “individual displaced persons in clear need of international protection”, on request of the UNHCR, from a third country to a Member State, in agreement with the latter, with the objective of protecting against *refoulement* and admitting and granting the right to stay and any other rights similar to those granted to a beneficiary of international protection. The Recommendation called on Member States to resettle 20.000 persons over a two-year period, but JHA Council had adopted conclusions on resettling 22.504 displaced persons<sup>68</sup>. MS agreed that they would have taken account of priority regions including North Africa, the Middle East, and the Horn of Africa.

To date, several Member States have implemented permanent or *ad hoc* national resettlement programmes<sup>69</sup>. As to Italy, the first national resettlement project, the *Oltremare I* project (2007-2008) resulted in the resettlement of 39 Eritrean refugees from Libya; as to the *Oltremare II* project (2008- 2009), it resettled further 30 Eritrean refugees from Libya. During the period 2009-2011, it has been implemented an *ad hoc* resettlement programme, the *Reinsediamento a sud*, aimed at resettling

<sup>66</sup> See COM(2015) 240 final, p. 5.

<sup>67</sup> Recommendation (EU) 2015/914, of 8 June 2015, on a European resettlement scheme, in OJ L 148, 13 June 2015, p. 32-37.

<sup>68</sup> JHA Council, Conclusions of 20 July 2015. See MORGESE, “Recenti iniziative dell’Unione europea per affrontare la crisi dei rifugiati”, *Diritto Immigrazione e Cittadinanza*, 2015, p. 15 ff., pp. 28-31.

<sup>69</sup> See EUROPEAN MIGRATION NETWORK, *Resettlement and Humanitarian Admission Programmes in Europe - what works?*, 9 November 2016, available at: <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european\\_migration\\_network/reports/docs/emn-studies/emn-studies-00\\_resettlement\\_synthesis\\_report\\_final\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn-studies-00_resettlement_synthesis_report_final_en.pdf)>.

179 Palestinian recognized refugees living in a camp situated at the Syrian-Iraqi border<sup>70</sup>. In 2011-2015, Italy has resettled a number of 766 individuals within resettlement (and humanitarian admission) schemes.

In the light of the above, it seems that resettlement schemes could hardly fill the protection gap of persons displaced by environmental events. Indeed, they could not be considered “targeted persons” both under Article 17 of the AMIF Regulation or Paragraph 2 of the Recommendation No. 2015/914 as long as they are not suitable to international protection (i.e. refugees according to the RC and beneficiaries of subsidiary protection under the QD), no matter if at national level they do not obtain a proper refugee or subsidiary protection status but any other status which offers similar rights and benefits under national and Union law<sup>71</sup>. Partially different seemed to be the Preparatory Action on Emergency Resettlement (PAER)<sup>72</sup>, that had complemented in 2012 the former ERF with the aim of quickly targeting persons recognised by the UNHCR as being in need of urgent international protection for the reasons of having fallen victims of a natural disaster, armed conflict, or being otherwise in extremely vulnerable situations threatening their life, and that are resettled in MS with a permanent residence status: the reference to different situations as natural disaster seemed to expand the scope of that emergency resettlement scheme beyond persons in need of international protection as such. Notwithstanding that, the PAER financial tool has only allowed for the first wave of resettlement from Syria in 2012 and not for environmental displaced persons.

As if that were not enough, the major obstacles of resettlement programmes lie in the facts that, for the time being, they are still under-funded and implemented on a voluntary basis only, which leaves their little practical usefulness in the “willing hands” of the Member States. Nor the proposed regulation establishing a Union Resettlement Framework<sup>73</sup>, not yet in force, is likely to change substantially this situation. It is true that this proposal aims at creating a common EU policy on resettlement with a permanent framework and common procedures, and defines resettlement as

<sup>70</sup> See PAPAPOULOU et al., *cit. supra* note 61, pp. 77-80.

<sup>71</sup> For a national review of different granted statuses see EUROPEAN MIGRATION NETWORK, *cit. supra* note 68, pp. 29-30.

<sup>72</sup> Decision No. C(2012) 7046, of 10 October 2012, concerning the adoption of the Work Programme serving as financing decision for 2012 for the Preparatory Action - Enable the resettlement of refugees during emergency situations to be financed under budget line 18 March 2017.

<sup>73</sup> 13 July 2016, COM(2016) 468 final.

“the admission of third-country nationals and stateless persons in need of international protection from a third country to which or within which they have been displaced to the territory of the Member States with a view to granting them international protection”, thus including internally displaced people. However is also true that, according to the proposal, not only the scope of application of EU resettlement framework will be still unduly limited to asylum-seekers<sup>74</sup> but also Member States will remain free to decide how many persons to be resettled each year.

More promising are *humanitarian admission schemes* (“HAS”) offered by Member States and sometimes financed by the EU budget. According to Article 2(b) of the AMIF Regulation, HAS consist in a process – similar to resettlement but, for several reasons, not fully adhering to its definition – whereby “a Member State admits a number of third-country nationals to stay on its territory for a temporary period of time in order to protect them from urgent humanitarian crises due to events such as political developments or conflicts”. While some MS have in place either (permanent or *ad hoc*) resettlement programmes or HAS only, there are others (like Germany, France and the UK) with both of them.

It should be stressed that HAS could also be put in place by the EU itself. In December 2015, the European Commission presented a Recommendation for a voluntary humanitarian admission scheme with Turkey for persons displaced by the conflict in Syria<sup>75</sup>, an expedited process (compared to resettlement) where Member States would admit, on a voluntary basis, those persons in need of international protection based on a recommendation by the UNHCR following a referral by Turkey, with the aim of refocusing resettlement efforts primarily on Jordan and Lebanon<sup>76</sup>.

The key difference between resettlement programmes and HAS is that the latter have a much broader scope of application, i.e. not limited to individuals in need of international protection as such but opened to any third-country national facing urgent humanitarian crisis. Thus, HAS seems to be a better fit for the specific protec-

<sup>74</sup> According to the proposal, “[t]he possibility for resettlement is foreseen for those third-country nationals or stateless persons who have been displaced not only to another country but also within their own country due to a well-founded fear of persecution or due to substantial grounds for believing that they would face a real risk of suffering serious harm”.

<sup>75</sup> Recommendation C(2015) 9490, of 15 December 2015, for a voluntary humanitarian admission scheme with Turkey. See FERNÁNDEZ ARRIBAS, “Again in the Hands of States: A New EU Unfeasible Plan to Face Refugee Crisis? Commission Recommendation for a Voluntary Humanitarian Admission Scheme with Turkey”, European Papers, 2016, p. 343 ff.

<sup>76</sup> See MORGESE, *cit. supra* note 67, pp. 31-34.

tion needs of EMs. By contrast, like resettlement programmes, HAS are on a voluntary basis, thus not compelling MS to put them into place.

It must be pointed out that the 2015 European Agenda on Migration has called on Member States to use to the full any other legal avenue available to individuals in need of protection, including *private/non-governmental sponsorships*. In the subsequent Communication of April 2016, the Commission sets out steps to be taken in order to ensure and enhance safe and legal migration routes, calling on MS to explore the possibility of complementing resettlement and HAS by other initiatives such as private sponsorship, that could take several forms (from scholarships for students and academics to integration support for sponsored family members)<sup>77</sup>.

Private sponsorship is likely to be a viable alternative for admitting EMs in the territory of the Member States owing to the fact that “the costs of sponsorship and settlement support for persons in need of protection can be supported by private groups or organisations”, thus both helping to raise public awareness and support for admitted individuals and allowing for a more welcoming environment as local communities are usually involved. Most of all, private sponsorship is very likely to overcome legal and political obstacles set by resettlement and, in part, HAS, thus giving EMs a realistic mean of protection. For instance, in Italy have been recently signed two protocols on “humanitarian corridors” as a result of a Memorandum of Understanding between the Ministry of Foreign Affairs and International Cooperation, the Ministry of Interior and some religious entities (the Italian Episcopal Conference, Community of Sant’Egidio, Federation of Evangelical Churches in Italy, and Tavola Valdese). These two protocols aim at the protected entry in Italy for 1.500 displaced persons from Lebanon, Ethiopia and other African States, whose selection, entry and reception are supervised by the religious entities themselves<sup>78</sup>.

<sup>77</sup> Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, 6 April 2016, COM(2016) 197 final, pp. 15-16.

<sup>78</sup> See in detail MOROZZO DELLA ROCCA, “I due Protocolli d’intesa sui ‘corridoi umanitari’ tra alcuni enti di ispirazione religiosa ed il Governo ed il loro possibile impatto sulle politiche di asilo e immigrazione”, *Diritto immigrazione e cittadinanza*, 2017, p. 1 ff.

## 6. – *Protection within Regional Development and Protection Programmes*

As stated above, most individuals moving due to environmental events are very likely to remain within their country or region of origin. For this reason, we briefly mention another way of protecting EMs that involves the EU support for regions and countries of origin (and transit) in their efforts to assist and protect displaced persons in general, namely *Regional Development and Protection Programmes* (RDPPs)<sup>79</sup>.

Such programmes, launched in 2005 as Regional Protection Programmes (RPPs)<sup>80</sup>, were designed to enhance the capacity of areas close to regions of origin or transit of refugees, in cooperation with UNHCR and host third countries. The goal was (and still is) to support refugees by developing financial, legal and technical assistance to enhance capacities of local institutions and actors, and promoting the conditions for local integration as one of the three aforementioned durable solutions<sup>81</sup>. RPPs were intended to be flexible and situation specific policy toolboxes, consistent with EU humanitarian and development policies, and including practical actions such as enhancement of national refugee determination status capacities, access to asylum, technical assistance to institutions, public awareness activities on refugee protection, promotion of resettlement, etc. The 2005 Communication launched two pilot RPPs in the Newly Independent States (Ukraine, Belarus and Moldova) and in the Great Lakes Region (mainly focused on Tanzania). In 2010, two other RPPs were launched in the Horn of Africa (as a region of origin) and in North Africa (as a region of transit).

By contrast, in more recent RDPPs the traditional “protection component” of RPP model has been supplemented by a “socioeconomic development component” aimed at fostering economic opportunities and livelihood capacity of refugees through employment generation and business development, on the one side, and strengthening local ownership and the overall social cohesion in host countries, on the other side. So far, RDPPs have been initiated in the Middle East (2014), as part of the response to the Syria crisis, and again in the Horn of Africa and in North Africa (2015).

<sup>79</sup> See PAPADOPOULOU, *Regional Protection Programmes: An Effective Policy Tool?*, Discussion Paper, DOMAID project, January 2015; CORTINOVIS, *Reshaping the External Dimension of EU Asylum Policy: the Difficult Quest for a Comprehensive Approach*, Ismu Paper, January 2017, pp.10-11; MORGESE, “I programmi di (sviluppo e) protezione regionale dell’Unione europea: uno strumento efficace per i rifugiati africani?”, *Federalismi.it*, 21 July 2017.

<sup>80</sup> Communication on regional protection programmes, 1 September 2005, COM(2005) 388 final.

<sup>81</sup> See *supra* note 60 and accompanying text.



While it seems that RDPPs could represent one of the best solution to meet the protection needs of EMs, it must be borne in mind that, unlike all other above-mentioned EU protection provisions, RDPPs suffer from some specific problems. In the first place, they are not normative but cooperative in nature: thus, as long as the existing framework remains unchanged, these programmes are only intended to “induce” third countries to grant protection and foster local integration for environmental displaced persons, but the EU cannot act in a more direct way. Furthermore, R(D)PPs encompass projects not always part of a coherent policy framework and not adequately funded<sup>82</sup>, notwithstanding some improvements in more recent African RDPP.

Moreover, protection under RDPPs cannot always be available in regions of origin or transit for all EMs and, even when available, cannot address all the challenges facing those persons and their host countries. Above all, it must be borne in mind that these programmes must not constitute a way of allocating the responsibility of processing asylum claims to third countries. Thus, hosting areas within RDPP third States must not be considered as “safe havens” from an extraterritorial processing standpoint (i.e. allowing MS to escape their obligations under refugee and asylum law).

## 7. – Conclusions

This contribution has discussed some legal options with the aim to protect EMs within the EU, none of which however has proven to be fully satisfactory. It depends, as seen above, on the absence of a common legal definition of environment-related migrant which, at the time being, mirrors the lack of a common understanding of such a matter within the International Community as a whole. Nor the EU and its MS, despite a number of statements stressing the need to further explore the impact of climate change on migration and displacement, had provided so far a proper solution within the European regional area.

First of all, the legal framework for international protection according to the Qualification Directive has shown to be inadequate. Neither the refugee status, based on the provisions of the 1951 Refugee Convention, nor the subsidiary protection status are fit for purposes of EMs: in the former case, due to the absence, in most environmental cases, of eligibility conditions required by Articles 1A(2) RC and 2(d) QD; in the latter, owing to the fact that conditions under Article 15 QD are unlikely to be reached according to the relevant ECtHR case-law; in both cases, provisions of

<sup>82</sup> See MAYRHOFER and AMMER, *cit. supra* note 10, p. 425.

the QD on internal alternative and exclusion from international protection are additional hindrances. By the way, the proposed replacement of the QD with a Regulation<sup>83</sup> neither expands the notion of refugee nor explicitly include environmental disaster as a “serious harm” for the purpose of subsidiary protection. Also the Temporary Directive looks like unsatisfactory, as long as the trigger mechanism remains the same, as well as temporary measures according to Article 78(3) TFUE are mainly inspired by an intra-EU solidarity rationale.

In turn, humanitarian provisions in the Visa Code, the Schengen Borders Code and the Return Directive would seem to be a viable legal instrument for EMs, if it weren't that they are non-mandatory and thus let MS free to use them in a manner consistent with their (restrictive) national immigration policies. Moreover, it has to be pointed out that, from an EM perspective, it would be sometimes hard to visit a consulate to apply for such a visa, diplomatic representations being located in States capitals not always easily accessible in case of a rapid-onset environmental disaster. Nor a EU compulsory legal instrument on humanitarian protection, whether or not including an environmental provision, has even appeared on the horizon: in this regard, Italian provisions on humanitarian permit and collective reception for natural disasters might serve as a model in the future.

Furthermore, EU provisions on protection against removal orders from the territory of the MS according to relevant human rights law applicable in the EU are not a valid solution for all cases, because of the inherent features of environmental events, the above-mentioned ECtHR case-law on Articles 2, 3 and 8 ECHR, the need of a previous entry of EMs, and the fact that those provisions are a second best solution (i.e. granting removal bans but not always residence permits).

Finally, the remaining options might be useful only in specific cases. While resettlement programmes are reserved for persons in need of international protection only (being also under-funded and implemented on a voluntary basis), humanitarian admission schemes look like more promising but still under-funded. Private sponsorships (like Italian humanitarian corridors) are proving to be a prominent solution for the future, as long as they would be allowed by MS in a manner consistent to the protection needs of EMs. By contrast, the cooperative nature of the RDPPs, along with the fact that they are under-funded, not always available in every region of

<sup>83</sup> 13 July 2016, COM(2016) 466 final. See PEERS, “The new EU law on refugees takes shape: More Harmonisation but Less Protection?”, *EU Law Analysis*, 23 July 2017, available at: <<http://eulawanalysis.blogspot.it/2017/07/the-new-eu-law-on-refugees-takes-shape.html>>.

origin and, above all, not to be considered as safe havens for MS wishing to put in place extraterritorial processing of protection claims, substantially limit the usefulness of these programmes for EMs.

As a conclusion, we stress the need for a European *ad hoc* legal instrument dealing with every aspect of the protection of environmental migrants, no matter if it take the form of an extension of the notion of subsidiarity protection, or a new temporary protection instrument, as well as a comprehensive humanitarian protection provision or a specific HAS. In other terms, the EU should lead rather than adapt to the international environmental migration debate, officially recognising EMs as vulnerable persons in need of protection<sup>84</sup>. Unfortunately, due to the refugee crisis starting from 2015 and the persistent (if not exacerbated) reluctance of MS to implement such a legislation for political reasons, it seems that such a legal instrument is unlikely to be put into place at least in the near future.

<sup>84</sup> See COUNIL and TABAU (coords.), *Human rights and climate change: European Union policy options*, requested by the EP Subcommittee on Human Rights, PE 457.066, Brussels, 2012, pp. 68-69; MAYRHOFER and AMMER, *cit. supra* note 10, p. 391.

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