Diritto, Immigrazione e Cittadinanza
Fascicolo n. 3/2022

THE PRINCIPLE OF NON-REFOULEMENT AND ENVIRONMENTAL MIGRATION: A LEGAL ANALYSIS OF REGIONAL PROTECTION INSTRUMENTS

By Chiara Scissa

Abstract: *The Teitiota case paves the way for deeper reflections upon the role of the principle of non-refoulement as protection instrument in those cases where migration is compelled by environmental and climate factors, so-called environmental migration, also beyond the international level. This contribution provides for a timing and thorough analysis of the regional refugee and human rights frameworks, where the principle of non-refoulement is embedded, in six geographical areas: Africa, the Americas, Asia, Europe, Middle East, and Oceania. The aim is to draw relevant insights into a possible application of this principle as protection instrument from removal to the migrant's country of origin affected by dire environmental conditions. This paper also considers regional non-refoulement jurisprudence, where available, associated with environmental migration.*

Abstract: *Il caso Teitiota apre la strada a riflessioni più profonde sul ruolo del principio di non-refoulement come strumento di protezione in casi di migrazione dettata da fattori ambientali e climatici, cd. migrazione ambientale, non solo a livello internazionale. Il presente contributo propone un'analisi puntuale e approfondita della cornice normativa regionale in materia di rifugiati e diritti umani in cui è inserito il principio di non-refoulement in sei aree geografiche: Africa, Americhe, Asia, Europa, Medio Oriente e Oceania. L'obiettivo è quello di trarre spunti rilevanti per una possibile applicazione di questo principio come strumento di protezione dal rimpatrio verso il Paese di origine del migrante caratterizzato da gravi condizioni ambientali. Lo scritto prende inoltre in considerazione la giurisprudenza regionale in materia di non-refoulement, ove disponibile, associata alla migrazione ambientale.*

ISSN 1972-4799

THE PRINCIPLE OF NON-REFOULEMENT AND ENVIRONMENTAL MIGRATION: A LEGAL ANALYSIS OF REGIONAL PROTECTION INSTRUMENTS

By Chiara Scissa*

1. Introduction

The case *Teitiota v. New Zealand* decided by the UN Human Rights Committee (UN HRC), the quasi-judicial monitoring body of the International Covenant on Civil and Political Rights (ICCPR), provides for unprecedent and enlightening insights on the nexus between the principle of non-refoulement and environmental degradation[1]. The adopted

* PhD candidate in Law at Sant'Anna School of Advanced Studies and Expert in International Protection and Human Rights at the Territorial Commission of Brescia. Email: chiara.scissa@santannapisa.it. I would like to express my deepest gratitude to Francesca Biondi Dal Monte for her constant support in all my steps. Special thanks to Eleonora Frasca and Virginia Passalacqua for their enlightening comments and observations.

1. See, UN Human Rights Committee, Views adopted by the Committee under Article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016, 07 January 2020. For comments, see: E. Sommario, *When change and human rights meet: A brief comment on the UN Human Rights Committee's Teitiota decision,* in *Questions of International Law*, 2021, p. 51 ff., www.qil-qdi.org; S. Villani, *Reflections on human rights law as suitable instrument of complementary protection applicable to environmental migration*, in *Diritto, Immigrazione e Cittadinanza*, 3.2021, p. 1 ff; J. Hamzah Sendut, *Climate Change as a Trigger of Non-Refoulement Obligations Under International Human Rights Law*, in *EJIL:Talk*!, 6 February 2020, www.ejiltalk.org; G. Reeh, *Climate Change in the Human Rights Committee*, in

views represent a landmark determination, since for the very first time a human rights treaty monitoring body undoubtedly acknowledges that «without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending states». *Teitiota*, therefore, paves the way for deeper reflections upon the role of the principle of non-refoulement as protection instrument in those cases where migration is compelled by environmental and climate factors, so-called environmental migration, also beyond the international level[2].

This contribution promotes a thorough and timing analysis on the potential (and different) role that the principle of non-refoulement can play in defining a ban to removal to the migrant's country of origin if dire environmental conditions do not make it safe or reasonable, depending on the region concerned. To do so, the study takes into account the regional refugee and human rights legislation, and non-refoulement case law where available, that is relevant to defining a possible ban to removal to environmentally unsafe countries of origin. This analysis is conducted in six geographical areas: Africa, the Americas, Asia, Europe, Middle East, and Oceania. The chosen division aims to limit the cases of overlapping legal regimes to the minimum.

To do so, Section 2 sets the scene by providing a description of the principle of non-refoulement in international refugee and human rights law and briefly illustrates the key findings of *Teitiota*. Section 3 presents the widely divergent transposition of the principle of non-refoulement in Africa, the Americas, Asia, Europe, Middle East, and Oceania. The analysis of these regions follows the same order: first, it presents the regional application of the principle of non-refoulement in the respective refugee and human rights law; second, it explores the (potential) application of the principle of non-refoulement to cases of environmental migration, by leveraging existing regional law and jurisprudence, where feasible. Section 4 concludes that widely divergent approaches exist to the principle of non-refoulement as well as different levels of implementation. In certain regions, the principle of non-refoulement is strongly rooted in the relevant legislation and dynamically interpreted by regional Courts in light of environmental challenges to human mobility. In other regions, non-refoulement is weakly enforced, and environmental causes of migration are scantly acknowledged. It is therefore suggested that the role that the principle of non-refoulement

EJIL:Talk!, 18 February 2020, www.ejiltalk.org; A. Maneggia, *Non-refoulement of Climate Change Migrants: Individual Human Rights Protection or 'Responsibility to Protect'? The Teitiota Case Before the Human Rights Committee*, in *Diritti umani e diritto internazionale*, 2020, p. 635 ff.

2. For the purposes of this contribution, environmental migrants are defined as «persons or groups of persons who, predominantly for 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». IOM, Migration and the Environment, Discussion Note: MC/INF/288, prepared for the Ninety-fourth Session of the IOM Council, 27-30 November 2007, available at www.iom.int.

could play in future environmental migration cases will be fragmented and largely depend on the region concerned.

2. The principle of non-refoulement in international refugee and human rights law

The principle of non-refoulement, enshrined in Article 33 of the 1951 Geneva Convention relating to the Status of Refugee, stipulates that: «No Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion»[3]. It addresses any practice, direct or indirect, that the State or any person or group exercising governmental or institutional authority could implement to avoid admitting asylum-seekers into its territories («in any manner whatsoever»). Illustrative examples of forbidden actions are deportation, return, expulsion, and rejection. The territorial application of non-refoulement refers not only to the national territory of each contracting State but also to those territories in which it has jurisdiction or exercises effective control[4]. According to the guidelines set forth by the UN High Commissioner for Refugees (UNHCR), Article 33 extends *ratione personae* to each person falling under the declaratory refugee definition provided by Article 1.2 and therefore to persons with a well-founded fear of being persecuted who do not or cannot benefit from the protection of the country of origin[5]. Thus, the prohibition of refoulement encompasses not only recognized refugees but also all asylum-seekers, even in case of mass influx[6]. States must, therefore, refrain from expelling asylum-seekers and ensure their full enjoyment of the right to asylum. To do so, States are required to grant them access to the territory and to fair and efficient asylum procedures[7]. It should be noted, however, that this principle is not absolute under international refugee law, as States may derogate from it for reasons of national security and public order. Indeed, Article 33.2 specifies that it may not apply to refugees constituting a danger to the security of the hosting country, or to those who, having been convicted by a final judgment of a particularly serious crime, represent a

3. For a comment, see J.C. Hathaway, The Evolution of Refugee Status in International Law: 1920-1950, in International and Comparative Law Quartely, 2/1984, pp. 348-380.

4. OHCHR, The principle of non-refoulement under international human rights law, available at www.ohchr.org.

5. UNHCR, UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, 2011, para. 28, available at www.unhcr.org.

6. UNHCR, The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, 31, January 1994, para. 4, available at www.unhcr.org.

7. UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, para 8, available at www.unhcr.org.

danger to its community. The principle of non-refoulement has been transposed at the regional level worldwide, although with substantial differences that contribute to fragmenting related protection guarantees. It is worth noting that non-refoulement is consistently considered a norm of customary international law, thus binding all States to comply with it, including those that are not Parties to the main international refugee law instruments[8]. Although contested, some scholars argue that non-refoulment obligations imply an absolute ban to removal also in context of «civil disorder, domestic conflicts, or human rights violations generates a valid presumption of humanitarian need»[9].

Beyond international refugee law, this principle is also present in international human rights law, where its scope of application is significantly broader. Here, the principle operates in all those cases where there is a real risk of irreparable harm, either prohibited by treaty or by customary international law[10]. In this context, the principle of non-refoulement is absolute and no exception or derogation is allowed. Second, it applies to all persons – irrespective of their citizenship, nationality, statelessness, or migration status – and wherever a State exercises jurisdiction or effective control, within or beyond its boundaries. In other words, the principle of non-refoulement applies without territorial or personal scoping restrictions[11]. This principle is embedded in several international and regional human rights instruments, and it has also been recognised as an implicit principle by the UN HRC and the Committee against Torture[12]. States have a legal obligation under international human rights law to respect and ensure the principle of non-refoulement. These go far beyond the duty to refrain from interfering with its enjoyment, and extend up to implement positive measures to facilitate and fulfil it. These include mechanisms to 1)

8. UNHCR, The Principle of Non-Refoulement as a Norm of Customary International Law, cit. See also, J. Allain, The jus cogens nature of non-refoulement, in International Journal of Refugee Law, 33/2001, p. 533 ff; E. Lauterpacht, D. Bethlehem, The Scope and Content of the Principle of Non-Refoulement: Opinion, Cambridge University Press, 2003; D.W. Grieg, The Protection of Refugees and Customary International Law, in Australian Yearbook of International Law, 1984, p. 108 ff; T. Meron, Human Rights and Humanitarian Norms as Customary Law, Oxford, 1989, p. 23.

9. G. Goodwin-Gill, *Non Refoulement and the New Asylum Seekers*, in *Virginia Journal of International Law*, 4/1986, p. 905. See also, in more nuanced terms, J.C. Hathaway, *The Law of Refugee Status,* Butterworths Canada Ltd. 1991, p. 26.

10. OHCHR, The principle of non-refoulement under international human rights law, cit.

11. C. Caskey, Non-Refoulement and Environmental Degradation: Examining the Entry Points and Improving Access to Protection, in Global Migration Research Paper Series, 26/2020. See also, W. Kälin, Conceptualising Climate-Induced Displacement, in J. McAdam (ed.) Climate Change and Displacement: Multidisciplinary Perspectives, London, Hart Publishing, 2010.

12. 1950 European Convention on Human Rights, Article 3; 1957 European Convention on Extradition, Article 3(2); 1966 International Covenant on Civil and Political Rights, Article 7; 1969 American Convention on Human Rights, Article 22(8); 1981 Inter-American Convention on Extradition, Article 4(5); 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3; 2000 Charter on Fundamental Rights of the European Union, Article 19; and the 2007 International Convention for the Protection of All Persons from Enforced Disappearance, Article 16.

ensure an individual and reliable assessment of the protection needs of all migrants; 2) allow entry and stay when a safe return is not attainable; 3) provide temporary or permanent protection status on humanitarian grounds[13].

2.1. Non-refoulement obligations and climate change: Teitiota v New Zealand

Understanding the novelties set forth by the UN HRC in *Teitiota v New Zealand* is essential to start our discussions upon the relevance of the principle of non-refoulement, as established under international refugee and human rights law, in cases of environmental migration. In this case, the complainant was Mr. Ioane Teitiota who in 2007 migrated with his family from Tarawa, an island of the Republic of Kiribati, to New Zealand, where he applied for the refugee status, but his claim was rejected. In September 2015, he filed a complaint before the UN HRC, claiming that, by expelling him to Kiribati, his right to life, protected under Article 6 ICCPR, had been threatened and that New Zealand's authorities did not properly assess the risk inherent in his removal. More specifically, Mr. Teitiota argued that the dire impacts of climate change on water scarcity, land disputes, sea level rise, and malnutrition, among others, made livelihood in Tarawa increasingly precarious and compelled him to migrate. The UN HRC recalled its General Comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the ICCPR, where it found that the obligation of States parties not to extradite, deport, expel or otherwise remove a person applies in all those cases where there are substantial grounds for believing that there is a real risk of irreparable harm under Articles 6 and 7 ICCPR either in the country of origin or in any country to which the person may subsequently be removed[14]. It also recalled its General Comment No. 36 (2018) on the right to life, where it specified that «the duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity», such as environmental degradation[15]. Whilst the UN HRC accepted that environmental threats constitute a real risk of irreparable harm and acknowledged that «the conditions of life in such a country

13. Respectively, Committee Against Torture, General Comment No. 4 on the implementation of article 3 of the Convention in the context of article 22, 9 February 2018; Report of the Special Rapporteur on Torture, A/HRC/37/50, 26 February 2018, para. 40; Committee Against Torture, *Seid Mortesa Aemei v Switzerland*, CAT/C/18/D/34/1995, 29 May 1997.

14. UN Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, 29 March 2004, para. 12. In doing so, the Committee deduces an indirect non-refoulement obligation under Article 2 ICCPR, requiring States Parties to respect and ensure the Covenant rights for all persons under their jurisdiction or effective control.

15. See, UN Human Rights Council, The Slow onset effects of climate change and human rights protection for cross-border migrants, 26 February – 23 March 2018, A/HRC/37/CRP.4.

[Kiribati] may become incompatible with the right to life with dignity before the risk is realized», it notes that the timeframe of 10 to 15 years could allow for Kiribati to intervene to protect «and, where necessary, relocate its population»[16]. By considering as unestablished the fact that he faced a risk of a personal, imminent, or reasonable risk of arbitrary deprivation of life upon return to his country of origin, the Committee concluded that Mr. Teitiota's removal to Kiribati did not violate his right to life. Despite the negative outcome of the case, the views of the UN HRC arguably leads to three significant outcomes: 1) it consolidates the existence of a direct, causal link between environmental threats and forced migration; 2) it establishes that violations of the right to life under Article 6 ICCPR due to climate change may trigger States' non-refoulement obligations; 3) as a result, it confirms the possibility for people displaced across borders due to environmental threats to obtain complementary protection under international human rights law[17]. Although non-binding, the highly authoritative nature of the decision is considered to be able to influence subsequent jurisprudence on the matter[18].

3. The principle of non-refoulement and environmental migration: Lessons from the world

This Section aims to describe the divergent scope and application of the principle of non-refoulement in relevant refugee and human rights instruments in six regions: Africa, the Americas, Asia, Europe, Middle East, and Oceania. The analysis of these regions follows the same order. It first presents the regional application of the principle of non-refoulement in the respective refugee and human rights law. Second, it explores the (potential) application of the principle of non-refoulement to cases of environmental migration, by leveraging existing regional law and jurisprudence, where available.

3.1. Africa: Regional application of the principle of non-refoulement

As Sharpe notes, most African States are Parties to the 1951 Geneva Convention and 1967 Protocol as well as to the African Union Convention Governing the Specific Aspects of Refugee Problems in Africa (AU Convention)[19]. The AU Convention provides for the

16. UN Human Rights Committee, Views adopted by the Committee under Article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016, para. 9.11.

17. M. Cullen, The UN Human Rights Committee's Recent Decision on Climate Displacement, in Asylum Insights, February 2020.

18. V. Rive, Is an enhanced non-refoulement regime under the ICCPR the answer to climate change-related human mobility challenges in the Pacific? Reflections on Teitiota v New Zealand in the Human Rights Committee, in Questions of International Law, 75/2020, p. 9.

19. M. Sharpe, *Regional Refugee Regimes: Africa*, in C. Costello, M. Foster, and J. McAdam (eds) *The Oxford Handbook of International Refugee Law*, Oxford, Oxford University Press, 2021. The analysis on Africa focuses on the regional legal regime established by treaties that have been adopted continent-wide. Thus, for the most part, the region as analyzed here aligns with the African continent.

regional refugee protection framework in Africa and complements the 1951 Refugee Convention and has been so far ratified by 46 out of 55 AU Member States. Its Article 3 enshrines the principle of non-refoulement as it follows: «No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2». As such, the AU Convention closely follows Article 3.1 of the UN Declaration on Territorial Asylum. The African non-refoulement provision broadens the 1951 Geneva Convention's provision in four respects[20]. First, the AU Convention does not include exceptions on grounds of national security. It, indeed, allows expulsion in very limited circumstances, namely where the individual concerned commits a serious non-political crime outside the country of refuge after admission as a refugee or seriously infringes the Convention's purposes and objectives (Article I(4)(f) and (g)). The remaining three grounds refer to aspects that make the AU Convention textually broader that the 1951 Refugee Convention. Indeed, Article 3 AU Convention protects against refoulement where the person's life, physical integrity or liberty would be threatened, whereas Article 33 of the 1951 Refugee Convention only mentions the individual's life and freedom. However, protection from threats to physical integrity is clearly included in protection from threats to life. Third, non-refoulement under the AU Convention explicitly applies at frontiers, while the 1951 Geneva Convention makes no such explicit provision, although States have by far recognized that the latter prohibits refoulement at high seas, land borders, or within a State. And fourth, the AU Convention's non-refoulement provision applies to persons, whereas the 1951 Geneva Convention applies to refugees. However, as seen, the latter equally extends to asylum-seekers.

In addition to protection stemming from refugee law, refugees in Africa also enjoy protection under regional human rights law, such as the African Charter on Human and Peoples' Rights, which is the main human rights protection instrument in Africa[21]. Importantly, it provides for the creation of the African Commission on Human and Peoples' Rights (African Commission), the judicial monitoring body of both the AU Convention and the African Charter, then complements by the African Court on Human and Peoples' Rights. The African Charter safeguards not only civil and political rights, but also economic and social rights and both categories have been extended to refugees. The African

20. R.M. D'Sa, The African Refugee Problem: Relevant International Conventions and Recent Activities of the Organization of African Unity, in Netherlands International Law Review, 1984, pp. 378-397.

21. The African Charter has been complemented by two additional instruments, namely the Protocol to the African Charter on the Rights of Women in Africa, and the African Charter on the Rights and Welfare of the Child.

Commission has repeatedly found that States must «secure the rights protected in the Charter to all persons within their jurisdiction, nationals or non-nationals», including non-refoulement, enshrined in Article 12 of the African Charter[22]. While Article 12.3 prohibits the collective expulsion of aliens, Articles 12.4 and 12.5 respectively forbid the arbitrary expulsion of aliens, and postulate that the expulsion of a non-national legally admitted in a territory of a State Party must be provided by a decision taken in accordance with the law.

The African Commission engaged with the principle of non-refoulement under the African Charter on several occasions. In *Malawi African Association and Others v Mauritania*, the Commission found Mauritania responsible for massive violations of the African Charter in light of the collective expulsion of almost 50.000 people to Senegal and Mali with the consequent loss and destruction of property[23]. In one case it found the expulsion of Burundian refugees from Rwanda on account of their ethnic origin was a breach of Article 2 on the right to life[24]. Article 5 of the African Charter on the torture, cruel, inhuman or degrading punishment or treatment has been interpreted as protecting individuals from being returned to a State where they are likely to be subjected to violations under that provision[25]. In the famous *Organisation Mondiale Contre La Torture and Others v Rwanda* case, the African Commission observed that that the principle of non-refoulement is embedded in Article 12 of the African Charter, as «this provision should be read as including a general protection of all those who are subject to persecution, that they may seek refuge in another state»[26]. As one author noted, this interpretation had far-reaching consequences for African countries that have not yet ratified the AU Refugee Convention, but have ratified the African Charter[27]. In other words, «[...] such countries cannot just expel refugees without putting into consideration their rights, such as the right not to be

22. African Commission on Human and Peoples' Rights, *Rencontre Africaine pour la Defense des Droits de l'Homme (RADDHO) v. Zambia*, Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights, 1996-1997, ACHPR/RPT/10th, para 52.

23. African Commission on Human and People's Rights, Malawi African Association, Amnesty International, Ms Sarr Diop, Collectif des Veuves et Ayants-Droits and Association Mauritanienne des Droits de l'Homme v Mauritania, Thirteenth Annual Activity Report of the African Commission, 11.12.2000.

24. African Commission on Human and Peoples' Rights, Organisation Mondiale Contre La Torture and Association Internationale des Juristes Democrates, Commission Internationales des Juristes, Union Interafricaine des Droits de l'Homme v Rwanda, Seventh Activity Report of the African Commission on Human and Peoples' Rights, 1993-1994, ACHPR/RPT/7th.

25. R. Murray**,** Refugees and internally displaced persons and human rights: the African system, in Refugee Survey Quarterly, 24/2005, p. 60. As a case-study, please see African Commission on Human and Peoples' Rights, John K Modise v Botswana, Tenth Annual Activity Report of the African Commission, 1996-1997, ACHPR/RPT/10th.

26. African Commission on Human and Peoples' Rights, *Organisation Mondiale Contre La Torture and Others v Rwanda*, cit., paras 29-34.

27. Such as Djibouti, Eritrea, Madagascar, Mauritius, Namibia, Saharawi Republic, Somalia and São Tomé and Principe.

sent back to a country where they will be persecuted and also the right to be heard before they can be returned back to such countries»[28].

3.2. The principle of non-refoulement and environmental migration in Africa's law and jurisprudence

The AU Convention broadens the traditional refugee definition as the term «shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality»[29]. Whether individuals displaced in the context of climate change and disasters can be recognized as refugees under Article I(2) of the AU Convention is contested[30]. The legal concept of events seriously disturbing public order, which does not present a common definition in international law, is particularly relevant for refugee claims related to the adverse effects of climate change and disasters. Rwaleimera affirms that the clause «is designed to cover a variety of man-made conditions which do not allow people to reside safely in their countries of origin [...]»[31]. The author shares an even broader view of the applicability of this provision, by affirming that it is equipped with «the necessary flexibility to include even victims of ecological changes such as famine and drought, which remain among the most challenging situations on the continent»[32]. In a similar vein, Grahl-Madsen argues that the refugee definition, when viewed in the context of the principle of non-refoulement, cannot logically be restricted to victims of persecution but must also include the circumstances of civil and social disorder as well as conditions of famine and natural catastrophes[33]. Very recently, UNHCR has called for a more dynamic and evolutionary approach towards the interpretation of the AU Convention, thus including the current causes of forced migration and displacement: «The

28. J.D. Mujuzi, The African Commission on Human and Peoples' Rights and the promotion and protection of refugees' rights, in African Human Rights Law Journal, 9/2009, p. 175.

29. *Ivi*, Article 1(2).

30. M. Sharpe, *op. cit.*, p. 8.

31. M.R. Rwelamira, Two Decades of the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa, in International Journal of Refugee Law, 4/1989, pp. 557 ff. See also, M.R. Rwelamira, Some reflections on the OAU convention on refugees: some pending issues, in Comparative International Law Journal of South Africa, 1983, pp. 153 ff.; M. Bond Rankin, Extending the limits or narrowing the scope? Deconstructing the OAU refugee definition thirty years on, in UNHCR's series of Working Papers on New Issues in Refugee Research, April 2005, p. 561; F. Deng, Dealing with the Displaced: A Challenge to the International Community Global Governance, in Global Governance, 1/1995.

32. M. R. Rwelamira, Two Decades of the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa, op. cit.

33. A. Grahl-Madsen, International Refugee Law Today and Tomorrow, in International Refugee Law, 1982, p. 440.

ongoing effectiveness of the regional refugee criteria requires the adoption of an evolutionary approach to interpretation of these treaty-based criteria, reflecting the ongoing developments in international law more broadly. This is particularly important for the interpretation of the concept of «events seriously disturbing public order» if the changing realities for people in need of international protection are to be accommodated where they are affected by the adverse effects of climate change and disasters. In line with this approach, people displaced by the adverse effects of climate change and disasters can be refugees under regional refugee criteria»[34]. In practice, however, African States do not seem inclined to go beyond humanitarian assistance towards people escaping from environmental degradation. In fact, most authors agree that, in cases where African States have assisted people coming from neighbouring countries, they have underlined the voluntary and humanitarian character of their actions, claiming that they did not act in accordance with the legal obligations of the AU Convention[35]. Nevertheless, recent policy developments may be read as a significant step towards a more attentive approach to people (internally or internationally) displaced in the context of climate change[36].

Furthermore, the African Commission may have hinted at a potential, although still blurred, opening towards the protection of environmental migrants under the AU Convention, as auspicated by UNHCR. In a 2021 resolution, it acknowledges the «vulnerability of refugees, internally displaced and stateless persons who are among the most affected by the climate emergency» and expressed its concerns about «the direct effects on forced displacement of increasingly frequent and intense natural disasters due to climate change» as well as «increased poverty, food insecurity, water shortages and lack of access to other natural resources on which communities depend for their survival, due to climate

34. UNHCR, Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters, cit., para 14.

35. Sharpe noticed that while Kenya recognized Somalis fleeing drought in 2011 as refugees under article I(2), Uganda did not give refugee status to individuals who fled a volcano eruption in the Democratic Republic of Congo in 2002. See M. Sharpe, *op. cit.*; and M. Zecca, *The Protection of "Environmental Refugees" in Regional Contexts*, in G. C. Bruno, F.M. Palombino, V. Rossi (eds) *Migration and the Environment. Some Reflections on Current Legal Issues and Possible Ways Forward*, Rome, CNR edizioni, 2017, p. 117.

36. In late July 2022, a new Kampala Ministerial Declaration on Migration, Environment and Climate Change has been signed by the Member States of the Inter-Governmental Authority on Development (IGAD), the East African Community (EAC), and the States of the East and Horn of Africa. Among other things, they expressed their concern about «the progressive desertification and land degradation creating forced mobility of people and livestock» and committed to «implement and domesticate the provisions of the United Nations Convention to Combat Desertification (UNCCD) underscoring State role to address desertification, land degradation and drought as one of the drivers of poverty and forced mobility». Kampala Ministerial Declaration on Migration, Environment and Climate Change signed by the Member States of the Inter-Governmental Authority on Development, the East African Community, and the States of the East and Horn of Africa, 29th July 2022, pp. 1-4, available at www.environmentalmigration.iom.int.

change»[37]. In light of the dire impacts of climate change on forcing displacement, among other things, the Commission importantly «reminds States of their treaty obligations and the commitments they have made by embracing the standards and policies of the African Union relating to the protection of asylum seekers, refugees and migrants on the continent, in particular the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa [...]». In connecting climate forced displacement to the compliance with obligations stemming from the AU Convention, the African Commission might have intended to stimulate a broader and flexible application of the regional refugee instrument to cases of environmental migration, both with reference to its refugee definition and to the principle of non-refoulement enshrined therein[38].

At the same time, the African Commission also refers to the direct impacts of climate change on limiting the access to core human rights, such as the right to food and freedom for hunger and poverty. Human rights provisions under the African Charter may also facilitate the emergence of non-refoulement obligations to third countries where these rights might be at heightened risk. Among these, the rights to development, to enjoy the best attainable state of physical and mental health, to self-determination, to freely dispose of their wealth and natural resources, the right to economic, social and cultural development, and to a general satisfactory environment favorable to people's development may play a relevant role in enhancing States' protection obligations. Moreover, in its General Comment No. 3 and akin to the UN HRC in *Teitiota*, it finds close connections between State parties' human rights obligations and the protection of the environment: «[...] the Charter envisages the protection not only of life in a narrow sense, but of dignified life. This requires a broad interpretation of States' responsibilities to protect life. Such actions extend to preventive steps to preserve and protect the natural environment and humanitarian responses to natural disasters, famines, outbreaks of infectious diseases, or other emergencies. [...] Such an approach reflects the Charter's ambition to ensure a better life for all the people and peoples of Africa through its recognition of a wide range of rights, including the right to dignity, economic, social and cultural rights, and peoples' rights such as the right to existence and the right to peace»[39]. In both arrangements, the African Commission acknowledges that climate change and other environmental factors directly affect core human rights, especially the right to a dignified life. In doing so, the African Commission seems to endorse a position similar to the UN HRC. If it will ever be asked to deal with migration triggered by climate change, its previous conclusions may lead the African

37. African Commission on Human and People's Rights, *Resolution on Climate Change and Forced Displacement in Africa*, ACHPR/Res. 491 (LXIX), 5.11.2021.

38. Most African States have ratified the ICCPR and, although to a lesser extent, its Optional Protocol No. 1.

39. African Commission on Human and People's Rights, General comment No. 3, cit., paras. 3 and 41.

Commission to recognize that non-refoulement obligations of the hosting State arise where the environmental conditions of the migrant's country of origin are deemed so dire to reach the threshold of violation of core human rights, including the right to a dignified life.

3.3. The Americas: Regional application of the principle of non-refoulement

In the Americas, the protection from non-refoulement and other refugee's rights is delivered by human rights law instruments, as a regional treaty of refugee law is missing[40].

Regional binding instruments for the protection of refugees in the Americas only include the founding Charter of the Organization of American States (OAS), and the American Convention on Human Rights (ACHR), which is monitored by the Inter-American Commission on Human Rights (American Commission) and the Inter-American Court of Human Rights (Inter-American Court)[41]. These provisions are binding for the entire region, although with strong differences regarding ratification and implementation.

The 1984 Cartagena Declaration on Refugees and subsequent Declarations on refugee protection, originally intended to provide a refugee definition for Central America, are instead the point of reference in Central and Latin America[42]. However, it must be noted that this instrument does not cover North America and lacks legal force. Akin to the AU Convention, it reflects the need for a broader refugee definition able to cover mass influxes triggered by conflict, civil war and foreign aggression[43]. As a result, and this is why some authors argued that the Cartagena's refugee definition is not innovative, the Declaration's refugee definition substantially reflects the African definition to also cover persons who have fled their countries because their life, security or freedom has been threatened by widespread violence, foreign aggression, internal conflicts, massive human rights violations or other circumstances that have seriously disturbed public order. It reiterates the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a cornerstone of the international protection of refugees. This principle is considered as imperative with regards to refugees and acknowledged as a rule of *jus cogens*. Although not legally binding, the Cartagena Declaration has been adopted

40. The present analysis embraces a geographical definition of the Americas that includes both North America (the US and Canada), Central and Latin America (Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, and Panama, Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay, and Venezuela) as well as the Caribbean (Cuba, the Dominican Republic, and Haiti).

41. It is also worth mentioning the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador) recognizes the right to a healthy environment and to have access to basic public services.

42. D. Anker, *Regional Refugee Regimes: North America*, in C. Costello, M. Foster, and J. McAdam (eds) *The Oxford Handbook of International Refugee Law*, Oxford, Oxford University Press, 2021, p. 3.

43. *Ivi*, p. 7.

and transposed at the national level by at least 15 Central and Latin American countries, while the legal authority of the refugee definition enshrined in the Cartagena Declaration has been recognized by the General Assembly of the OAS as well as by the Inter-American Court[44]. Subsequent Declarations reiterate the commitments of Central and Latin American States in enhancing refugee protection. These are: the 1994 San José Declaration on Refugees and Displaced Persons, the 2000 Rio de Janeiro Declaration on the Institution of Refuge, the 2004 Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America, the 2010 Brasília Declaration on the Protection of Refugees and Stateless Persons in the Americas, the 2012 Fortaleza Mercosur Declaration of Principles on International Refugee Protection, and the 2014 Brazil Declaration on the Protection of Refugees and Stateless Persons in the Americas.

The Inter-American System of Human Rights, which beyond the mentioned binding instruments includes the non-binding American Declaration on the Rights and Duties of Man, relies on a two-tier mechanism, where the Commission hears cases at the first instance and can deliver reports and recommendations that, however, are not legally binding. If the violations are not fully repaired at that level, the Commission is empowered to sue the concerned State before the Court, whose decisions are final and binding. The 1969 American Convention restates some grounding provisions enshrined in the 1948 American Declaration of the Rights and Duties of Man, including the right to asylum and the principle of non-refoulement. Akin to Article 33 of the 1951 Geneva Convention, Article 22.8 ACHR prohibits the deportation or removal of an alien to a country, regardless of whether or not it is their country of origin, if their right to life or personal freedom would be at risk of being violated because of their race, nationality, religion, social status, or political opinions. The collective expulsion of aliens is likewise prohibited. In *Haitian Centre for Human Rights v United States*, the Inter-American Commission sets an important benchmark in the extra-territorial application of the principle of non-refoulement in holding that it has «no geographical limitations»[45]. In that case, the Commission holds that, in order to facilitate the interpretation of the right to seek and receive asylum established in the Inter-American human rights instruments, the latter must have as their main reference point the treaties on the protection of refugees and asylum seekers, thereby establishing a clear link between the asylum and human rights (sub-) regimes[46].

As for the jurisprudence of the Inter-American Court, it has not engaged much in the interpretation and application of articles 22.7 and 22.8 ACHR, respectively concerning the

44. UNHCR, Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters, cit., p. 7.

45. Inter-American Commission on Human Rights, *Haitian Centre for Human Rights v United States*, Report No 51/96, Case No 10.675, 13 March 1997, para 157.

46. Inter-American Commission on Human Rights, Report No 6/02, Admissibility Petition No 12.071, 27.2.2002.

right to seek and be granted asylum, and the principle of non-refoulement. In *Pacheco Tineo Family v Plurinational State of Bolivia*, concerning a family of asylum seekers from Peru who were removed by Bolivia before their refugee claim was properly determined, the Inter-American Court expands the scope of application of non-refoulement to all aliens arguing that «[...] the right of any alien, and not only refugees or asylees, to non-refoulement is recognized, when his life, integrity and/or freedom are in danger of being violated, whatsoever his legal status or migratory situation [...]»[47]. Finally, the Court includes non-refoulement among other *erga omnes* rights, such as the prohibition of torture and other cruel, inhuman or degrading treatment or punishment[48]. Thus, under the ACHR, specific human rights provisions provide a solid basis for protection against refoulement. In this regard, States must refrain from deporting, returning, expelling, extraditing or otherwise removing a person subject to a third State where there they risk of being subject to torture, cruel, inhuman or degrading treatment[49].

In its advisory opinion OC-25/18 requested by the Republic of Ecuador, the Inter-American Court approaches the principle of non-refoulement from three perspectives. First, it acknowledges this principle as a customary norm of international law and part of *jus cogens*, this meaning that the principle of non-refoulement cannot be breached or derogated under any circumstances and that it applies to all countries of the region, regardless of whether they have ratified key international refugee or human rights treaties or not. As a result, States should abstain from any act that whatsoever result in *de jure* or *de facto* refoulement. Second, the Court finds the principle of non-refoulement as an integral component of the right to seek and to apply for asylum. In particular, the Court observes that the right to asylum at the regional level imposes additional duties on the States, among which the principle of non-refoulement and its extraterritorial application, and the obligation to allow individuals to claim asylum and not to reject them at the border[50]. Finally, it notes that the asylum regime and the human rights regime are closely interconnected, with the principle of non-refoulement playing a key and cross-cutting role. Indeed, the principle of non-refoulement is not only considered as a crucial component of the right to asylum, but also as a guarantee of many non-derogable human rights given its inherent aim to preserve life, liberty and integrity of the person concerned. In its words, «in the regional system, both because of its historical roots and the development of the legal tradition of inter-American law, the connection between the two [international protection regime and human rights] is undeniable. In particular, the Court notes that the inter-American instruments recognize

47. Inter-American Court of Human Rights, *Pacheco Tineo v. Bolivia*, 25.11.2013, para. 135.

48. Inter-American Court of Human Rights, *Wong Ho Wing v. Peru*, 30.9.2015, para. 127.

49. *Ibidem*.

50. Inter-American Court of Human Rights Advisory Opinion OC-25/18 requested by the Republic of Ecuador, 30.5.2018, para. 122.

the right to seek and receive asylum, as well as the principle of non-refoulement. The refugee protection regime cannot exist separately from the human rights regime so that, with the parallel processes of international positivisation and progressive interpretative development by monitoring mechanisms, the international protection regime has become imbued with a human rights approach»[51]. The findings of the American Court gain further importance in light of the absence of a binding refugee treaty at the regional level.

3.4. The principle of non-refoulement and environmental migration in the Americas' law and jurisprudence

Regional binding instruments in the Americas fail to address the correlation between non-refoulement and environmental causes of migration. The same can be said for the Cartagena Declaration. Moreover, the Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America prepared by the Group of Experts for the International Conference on Central American Refugees in 1989 stress that the expression «other circumstances which have seriously disturbed public order» enshrined in Cartagena «must be manmade and cannot constitute natural disasters», also highlighting that victims of natural disasters cannot be qualified as refugees, «unless special circumstances arise which are closely linked to the refugee definition»[52].

However, subsequent (yet equally non-binding) Declarations partially fill this gap. For instance, the 1994 San José Declaration on Refugees and Displaced Persons calls upon States to urge existing regional fora dealing with matters such as economic issues, security and protection of the environment to include in their agenda consideration of themes connected with refugees, other forced displaced populations and migrants[53]. The 2014 Brazil Declaration on the Protection of Refugees and Stateless Persons in the Americas recognizes the challenges posed by climate change and natural disasters, as well as by the displacement of persons across borders that these phenomena may cause in the region[54]. In Chapter 7, UNHCR is requested to prepare a study on the new challenges posed by climate change and natural disasters, as well as by displacement of persons across borders that

51. *Ivi*, para 42.

52. Principles and Criteria for the Protection and Assistance of Central Americans Refugees, Returnees and Displaced Persons in Latin America, International Conference on Central American Refugees held in Guatemala, 3.12.1989, p.11.

53. Regional Refugee Instruments & Related, San José Declaration on Refugees and Displaced Persons, 7 December 1994, para. 20.

54. Declaration of Brazil: A Framework for Regional Cooperation and Solidarity to Strengthen International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean. Brasilia, 3.12.2014, p. 3.

these phenomena may generate, «with the aim of supporting the adoption of appropriate national and regional measures, tools and guidelines, including response strategies for countries in the region, contingency plans, integrated responses for disaster risk management and humanitarian visa programmes, within the framework of its mandate».

With regards to the regional jurisprudence, the Inter-American Commission observes that not only are climate change and disasters current causes of displacement and forced migration within the region, but they are expected, along with demographic pressures and globalization, to increase internal and international migration flows in the next decades[55]. The Inter-American Commission further notices that Central America and the Caribbean have been hard hit by natural disasters, which have become increasingly important «push» factors in driving many people to migrate from the region, especially vulnerable and poor people who are left with no other option but to move away from their places of origin[56]. Overall, the Inter-American Commission notes that OAS Member States have not taken measures to address the situation and the need for protection of people have been forced to migrate, either internally or internationally, because of the effects climate change or natural disasters. Given its highly political authority, the 2014 Brazil Declaration may encourage the adoption of provisions addressing this gap at least at the sub-regional level, with particular emphasis on the State's duty to respect, protect and ensure human rights against the adverse effects of climate change on the most vulnerable, including the poor and migrants. In particular, in its 2021 resolution, the Inter-American Commission observes that «[F]aced with migrant workers and others who mobilize for reasons directly or indirectly associated with climate change, States must guarantee due process during the procedure leading to the recognition of their migratory status, and in any case guarantee their human rights, such as the safeguard of non-refoulement while their status is determined»[57]. Therefore, the lack of a binding definition of environmental migrants in the Americas shall not lead to underestimate their need of protection or to impinge their enjoyment of human rights, emblematically the principle of non-refoulement. This position has been also endorsed by the Inter-American Court in its 2017 Advisory Opinion OC-23/17 on Human Rights and the Environment, where it recognised «the existence of an undeniable relationship between the protection of the environment and the realization of

55. Inter-American Commission on Human Rights, Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System, 2015, para. 17-18 and 63-64.

56. Inter-American Commission on Human Rights, Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico, 30.12.2013, para. 67.

57. Inter-American Commission on Human Rights, Resolution 3/2021 on Climate Emergency Scope of Inter-American Human Rights Obligations, 31.12.2021, p. 16.

other human rights, in that environmental degradation and the adverse effects of climate change affect the effective enjoyment of human rights»[58]. The findings of UNHCR in the framework of the 2014 Brazil Declaration as well as the observations of the Inter-American Commission and Court may lead the Americas to adopt, in the next years, appropriate regional measures to address environmental migration, such as humanitarian visas. This in light of the recognition that climate change, environmental degradation and other related factors may violate core human rights, including but not limited to the right to life, thus compelling migration and/or impeding the removal to the migrant's country of origin.

3.5. Asia: Regional application of the principle of non-refoulement

The analysis of Asia is difficult to frame for several overlapping reasons[59]. First, there is no regional treaty on refugee or human rights protection, and refugees are often not distinguished from third country nationals in general. Second, regional jurisprudence on the rights of migrants and refugees, such as the principle of non-refoulement, is scant and whatever analysis in the context of climate change is, at best of my knowledge, missing. In general, it seems that Asian countries prefer to establish soft-law agreements than to take up binding responsibilities. With particular reference to non-refoulement, there seems to be a «persistent refusal of most states of Asia and the Middle East to be formally bound by the asserted comprehensive duty of non-refoulement»[60]. The fact that only few countries are Parties to the 1951 Geneva Convention and that no binding instrument in Asia guarantees against refoulement confirms this tendency[61].

The Bangkok Principles on the Status and Treatment of Refugees adopted by the Asian African Legal Consultative Committee unprecedently endorse the principle of non-refoulement in their Article 3, which includes rejection at the frontier, return or expulsion, of the asylum-seeker if it would result in their life or freedom being threatened on account of their race, religion, nationality, ethnic origin, membership of a particular social group or political opinion. However, such a provision suffers from two main pitfalls: the Bangkok Principles are only declaratory and not legally binding; and compliance with these Principles is neither enforced nor monitored[62]. This responds to the principle of non-interference in the

58. Inter American Court of Human Rights, Advisory Opinion requested by the Republic of Colombia: Environment and Human Rights, OC-23/17, 15.11.2017, para. 108. Most States in the Americas have ratified the ICCPR and, although to a lesser extent, its Optional Protocol No. 1.

59. For the purposes of the present analysis, Asia covers Central Asia, East Asia, South Asia and Southeast Asia.

60. J.C. Hathaway, Leveraging Asylum, in Texas International Law Journal, 3/2010, p. 513.

61. Uzbekistan, Hong Kong SAR (China), North Korea, Bhutan, India, Maldives, Nepal, Sri Lanka, Bangladesh, Brunei, Burma (Myanmar), Indonesia, Laos, Malaysia, Mongolia, Singapore, Thailand, Vietnam and Pakistan are not parties to the 1951 Geneva Convention and/or its 1967 Protocol.

62. S.E. Davies, The Asian Rejection? International Refugee Law in Asia, in Australian Journal of Politics and History, 4/2006, p. 564.

internal affairs of the State endorsed by many States of the region as a buffer against outside pressure. Second, the principle may not apply when the claimant represents a danger to the national security or public order or if they have been convicted by a final judgement of a particularly serious crime and constitute a danger to the community of the hosting country.

Most Asian countries are members of the Executive Committee of the High Commissioner's Program (EXCOM), which adopts non-binding resolutions called Conclusions on International Protection. Despite the lack of legal force, these EXCOM Conclusions have strong political authority especially for those States that are not parties to the Refugee Convention or Protocol but are members of EXCOM (such as Bangladesh, India, Pakistan, and Thailand)[63]. The principle of non-refoulement seems to be weakly implemented. Indeed, the EXCOM members expressed their deep concern regarding the frequent violation of this principle within the region, while the 2011 Almaty Declaration, an important although non-binding human rights instrument in the region, only makes a superficial reference to such a principle[64].

The Association of South East Asian Nations (ASEAN) is an inter-governmental organization composed of ten members from East and South East Asia. In 2012, its members adopted the non-binding ASEAN Human Rights Declaration, whose Article 16 recognizes the right to asylum, but it stays silent on the principle of non-refoulement. The ASEAN Charter 2007 mandates the establishment of human rights bodies, namely the ASEAN Inter-governmental Commission on Human Rights and the ASEAN Commission on the Rights of Women and of Children, that lack judicial or investigative powers. Finally, the ASEAN Human Rights Declaration envisages lower standards than international law demands, in particular as regards the right to asylum: «Every person has the right to seek and receive asylum in another State in accordance with the laws of such State and applicable international agreements». Given that the ratification of key international refugee and human rights treaties is very low in the region, the provision leaves wide discretional margins upon Asian States as it subjects people to national laws which may provide far less protection than international law.

63. T. Savitri, *Refugee Protection in the Asia Pacific Region*, in *Rights in Exile Programme*, available at www.refugeelegalaidinformation.org.

64. F. Chang-Muy, International Refugee Law in Asia, in NYU Journal of International Law and Politics, 1992, pp. 1171 ff.; V. Muntarbhorn, The Status of Refugees in Asia, London, Clarendon Press, 1992.

3.6. The principle of non-refoulement and environmental migration in Asia's law and jurisprudence

There are few soft-law instruments relevant for the Asian region that deal to a certain extent with environmental migration. In a Conclusion adopted by EXCOM, State Members recognize that the underlying causes of population displacements are complex, interrelated, and include environmental degradation. Thus, they urge UNHCR to mobilize assistance from the international community to address environmental degradation in refugee-hosting areas[65]. Furthermore, the 2011 Almaty Declaration acknowledges that «environmental degradation can be in certain circumstances an additional factor which may impact the movement of people. Irrespective of their underlying causes, such population movements can give rise to protection and assistance needs, particularly if they take place in an irregular manner»[66]. Finally, the Asian and Pacific Declaration on Population and Development calls on States to «[d]evelop measures to prevent and mitigate the effects of natural disasters in urban areas, and ensure the provision of necessary and prompt assistance to affected populations, especially vulnerable groups, such as persons with disability, migrants and older adults»[67]. And it also includes a specific priority action to «[...] support and facilitate adaptation and/or migration with dignity and respect for identity where countries can no longer support the lives of people due to adverse changes in their circumstances and environment resulting from climate change»[68]. However, given the wide and rooted flaws of the Asian refugee and human rights regime for the protection of core rights of refugees and asylum-seekers, at least for the time being, it seems unrealistic to expect improvements towards the protection of environmental migrants against refoulement.

3.7. Europe: Regional application of the principle of non-refoulement

In Europe, two main legal orders can be envisaged, the European Union (EU) and the Council of Europe. The principle of non-refoulement has been consistently embodied in the main binding arrangements stemming from these two legal orders, namely the EU Treaties in the former; the European Social Charter and, most prominently, the European Convention on Human Rights in the latter.

Relevant treaties within the EU legal order are the Treaty on the European Union, the Treaty on the Functioning of the European Union (TFEU) and the European Charter of Fundamental Rights (EU Charter). Although the EU is not party to the 1951 Refugee

65. UNHCR, Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975-2017 (Conclusion No. 1-114), October 2017, HCR/IP/3/Eng/REV. 2017, available at www.refworld.org.

66. For a comment, T. Savitri, *op. cit.*

67. Asian and Pacific Ministerial Declaration on Population and Development, 26.11.2018, part III (J)(g bis.).

68. *Ibidem*.

Convention, the Court of Justice of the European Union (CJEU) observes that Article 78 TFEU is an internal obligation of primary law to act in accordance with the 1951 Refugee Convention and the other relevant treaties. For instance, in *N.S. and M.E.*, the CJEU observes that «All the Member States are contracting parties to the Geneva Convention and the 1967 Protocol. [...] The European Union is not a contracting party, [...] but Article 78 TFEU and Article 18 of the Charter provide that the right to asylum is to be guaranteed with due respect for the Geneva Convention and the 1967 Protocol»[69]. Thus, the principle of non-refoulement enshrined in the 1951 Refugee Convention and the other relevant treaties is part of the EU legal order by virtue of this primary law obligation. In addition, beyond the right to asylum (Article 18), the EU Charter prohibits collective expulsion (Article 19.1), and refoulement (Article 19.2). Hence, no one may be removed, expelled or extradited to a State where they would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. The principle of non-refoulement guides and informs the EU common policy on asylum pursuant to Article 78 TFEU.

Scholars have argued that, in some respects, EU law reflects international refugee law, such as the transposition of the concept of persecution and the five Convention grounds; while diverging in other aspects, such as in the reduction or extension of safeguards, guarantees and protection standards[70]. Emblematically, through the Qualification Directive (Directive 2011/95/EU), the EU introduced an additional protection status beyond the refugee status, that is subsidiary protection. It applies to people who, although not meeting the requirements to be eligible for the refugee status, are still in need of protection based on Member States' obligations under international and European human rights law. Another remarkable example of EU's expansion in refugee protection matters concerns the principle of non-refoulement. In *M v. Ministerstvo vnitra* and *X and X v. Commissaire général aux réfugiés et aux apatrides* joined cases, the CJEU concludes that refugees enjoy stronger protection from refoulement under EU law than under the 1951 Geneva Convention, since any form of removal under EU secondary asylum law (in those specific cases, the Qualification Directive) must be compliant with the right to asylum and the principle of non-refoulement, as enshrined in Articles 4 and 19.2 of the EU Charter[71]. Under EU law, removal must be balanced with the full respect of the human rights of the person concerned. In particular, the EU Return Directive refers to the best interests of the child, family life,

69. CJEU, N.S. v. Secretary of State of the Home Department and M.E. and Others v. Refugee Application Commissioner and another (N.S. and M.E.), Joined Cases C-411 and C-493/10, 21.12.2011.

70. E. L. Tsourdi, *op. cit.*, pp. 3-4.

71. CJEU, M v. Ministerstvo vnitra; X and X v. Commissaire général aux réfugiés et aux apatrides, Joined Cases C-391/16, C-77/17 and C-78/17, 14.05.2019, paras. 94-95.

the state of health of the person concerned and the principle of non-refoulement as barriers to removal[72].

Within the Council of Europe, two human rights instruments, the European Social Charter and the European Convention on Human Rights (ECHR), are of particular relevance for our purposes. The former does not engage directly with the principle of non-refoulement, but it refers to relevant socio-economic rights connected with the protection of refugees[73]. In 2020, the President of the European Committee of Social Rights suggested to take the necessary steps towards the drafting of a new protocol to the European Social Charter to incorporate, as already done in the Americas, environmental issues into human rights protection[74]. This in light of the impact that environmental degradation has on migrants and refugees and its consequent impacts on social rights protection.

Similarly, the ECHR does not regulate the situation of refugees directly, nor does it stipulate the right to asylum. Nevertheless, it contains several asylum-relevant rights, such as Article 4 Protocol 4 ECHR that prohibits collective expulsions. Moreover, Articles 2 and 3 ECHR on the rights to life and not to be subjected to torture, inhuman or degrading treatment or punishment have been consistently interpreted by the European Court of Human Rights (ECtHR) as forbidding the direct or indirect removal of an individual to a State where there are substantial grounds for believing that there is at real risk of violations of either of those provisions[75]. The Court further clarifies that Article 3 ECHR applies to every person, not only refugees and international protection-seekers, thus going beyond Article 33 of the 1951 Refugee Convention, and it cannot be subject to any exception, derogation or limitation for security reasons or public order. In fact, an individual must benefit from the principle of non-refoulement under Article 3 ECHR even if involved in criminal activities that threaten national security[76]. Beyond Articles 2 and 3 ECHR, other rights may act as a barrier to removal[77]. In particular, the ECtHR has ruled that specific circumstances leading to a «flagrant» or «disproportionate» breach of the rights enshrined

72. CJEU, Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v. Moussa Abdida, C-562/13, 18.12.2014.

73. For instance, the European Committee on Social Rights found systemic flaws in Greek law, policy, and practice, which deprive unaccompanied children of rights to housing, health, and education. See, European Committee of Social Rights, *International Commission of Jurists and European Council for Refugees and Exiles v Greece*, 23.05.2019, mentioned in E.L. Tsourdi, *op. cit.*, p. 9.

74. G. Palmisano, President of the European Committee of Social Rights at the High-level Conference "Environmental Protection and Human Rights", 27 February 2020, Strasbourg, available at www.coe.int.

75. ECtHR, *Soering v. United Kingdom*, n. 14038/88, 7.07.1989, para. 88; ECtHR, *Saadi v. Italy*, n. 37201/06, 28.2.2008; ECtHR, M.*S.S. v. Belgium and Greece*, n. 30696/09, 21.1.2011.

76. R. Mandal, Legal and protection policy research series: Protection Mechanisms Outside of the 1951 Convention, 2005, p. 25.

77. C.W. Wouters, International Legal Standards for the Protection from Refoulement, Cambridge, Intersentia, 2009, p. 345 ff.

in the Convention may prevent from refoulement[78]. These include the right not to be subjected to slavery and forced labour (Article 4), the right to liberty and security (Article 5), right to a fair trial (Article 6), no punishment without law (Article 7), right to respect for private and family life (Article 8), and right to freedom of thought, conscience and religion (Article 9)[79]. This persuaded Mandal to affirm that the non-refoulement jurisprudence of the ECtHR «is perhaps the most developed of all the international institutions concerned with these concepts»[80].

3.8. The principle of non-refoulement and environmental migration in Europe's law and jurisprudence

First, this Section examines relevant secondary provisions under EU asylum and human rights law, enriched by the case law of the CJEU, to explore whether they may give rise to non-refoulement obligations in case of dire environmental conditions in the migrant's country of origin. Second, after a brief overview of the main attempts promoted by the Council of Europe to encourage the creation of a protection framework for environmental migrants, the analysis proceeds by focusing on the interpretation given by the ECtHR of Articles 2, 3 and 8 ECHR in the context of dangerous industrial activities and environmental disasters, which could provide relevant insights regarding the approach that the ECtHR may adopt in environmental migration claims that it most probably will be asked to address in the near future.

3.8.1. EU law and case law

As previously discussed, the EU has transposed the principle of non-refoulement both in Article 78 TFEU on asylum and in Article 19 EU Charter. A number of secondary asylum and migration provisions stemming from these primary norms may be of relevance in environmental migration cases. The Qualification Directive concerns the issuance of international protection statuses (refugee status and subsidiary protection). According to international and EU asylum law, refugees have a well-founded fear of persecution on account of their race, nationality, religion, political opinion, or membership to a particular social group. Part of the scholarship agrees that environmental causes of migration can hardly fall within the refugee definition as usually environmental forces do not sufficiently

78. A. Anderson, M. Foster, H. Lambert, J. McAdam, Imminence in refugee and human rights law: A misplaced notion for international protection, in International and Comparative Law Quarterly, 2019, p. 116 ff.

79. ECtHR, *Soering v. United Kingdom*, cit.; ECtHR, *Tomic v United Kingdom*, n. 17837/03, 14.10.2003; ECtHR, *Einhorn v France,* n. 71555/01, 16.10.2001; ECtHR, *F v United Kingdom*, n. 17341/03, 22.6.2004.

80. R. Mandal, *op. cit*., p. 25.

substantiate its essential requirements, namely the assessed existence of an actor, an act, a reason of persecution and their State's unwillingness or incapacity to ensure protection[81]. Thus, environmental threats are usually sought to be a supplementary, not the main, reason to grant the refugee status. However, according to Article 2(f) of the Directive, a person who does not qualify as a refugee may be eligible for subsidiary protection when there are substantial grounds for believing that, if returned to their country of origin, they would face a real risk of suffering serious harm caused by a State or non-State actor. Article 15 enumerates three 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. As explained elsewhere, subsidiary protection claims based on environmental grounds could only exceptionally be accepted[82]. In principle, we might expect some promising results in the future stemming from Article 15(b), although in very limited cases. In *Jawo*, the CJEU has established a connection between the prohibition of torture or inhuman, degrading treatment or punishment and human dignity enshrined in Article 1 EU Charter, yet observing that the threshold required to give rise to such a violation is extremely high. Emblematic examples could include the case where State authorities' omissive or active conduct create «a situation of extreme material deprivation» or «destitution», which would not enable the claimant to meet their most basic needs, and which would impair their physical or mental health or place them in a state of degradation incompatible with human dignity [83] . Therefore, non-refoulement cases involving return in extreme material deprivation, caused or associate with unbearable environmental conditions due to State's inertia or actions, might constitute a breach of human dignity and meet the threshold of serious harm under Article 15(b) of the Directive[84].

The Qualification Directive is not the only EU instrument that could, at least in principle, deal with migration movements triggered by environmental forces. The Temporary Protection Directive (Directive 2001/55/EC) is an emergency tool that

81. For comments, see E. Delval, From the U.N. Human Rights Committee to European Courts: Which protection for climate-induced displaced persons under European Law?, in Odysseus Network Blog, 2020; M. Scott, Climate Change, Disaster, And the Refugee Convention, Cambridge, Cambridge University Press, 2020; J. McAdam, Swimming against the tide: Why a climate change displacement treaty is not the answer, in M. Crock (ed.), Refugees and Rights, London, Routledge, 2017, p. 379; M. Cullen, Disaster, Displacement and International Law: Legal Protections in the Context of a Changing Climate, in Politics and Governance, 2020, pp. 272-273.

82. C. Scissa, The climate changes, should EU migration law change as well? Insights from Italy, in European Journal of Legal Studies, 14/2022, p. 4, available at www.ejls.eui.eu.

83. CJEU, Abubacarr Jawo v Bundesrepublik Deutschland, C-163/17, 19.3.2019, para 92.

84. For a comment, see C. Scissa, The climate changes, should EU migration law change as well? Insights from Italy, op. cit.; A. Brambilla, Migrazioni indotte da cause ambientali: quale tutela nell'ambito dell'ordinamento giuridico europeo e nazionale?, in questa Rivista, 2.2017, p. 23 ff.

provides immediate, collective, and temporary protection to mass movements of third country nationals, who are unable to return in their country of origin due to a non-exhaustive list of causes, which includes but is not limited to, armed conflict or endemic violence; serious risk of systematic or generalised violations of their human rights. Therefore, environmental threats may well require the application of this Directive, either when they are the primary cause of mass displacement or if able to trigger severe violations of human rights, as per Article 2(c)[85]. Besides, Article 7 allows the EU Member States to extend temporary protection to additional categories, thus potentially including those climate-displaced. Yet, Directive 2001/55/EC comes with relevant pitfalls concerning its activation, its geographical scope of application and the fact that it may be soon repealed[86].

In the context of removal from the EU, the Return Directive (Directive 2008/115/EC) may provide a mechanism to prevent the return of a third-country national in an environmentally unsafe country in light of non-refoulement obligations. The Directive makes clear, in fact, that the implementation of a return order must respect this principle (recital 8 and Article 5) and that removal shall be postponed if it would violate it (Article 9). Moreover, competent authorities shall consider the returnee's personal and family situation, their health conditions, and the best interests of the child as further barriers to removal (Article 5). Finally, Article 6(6) allows the Member States to decide at any moment to grant a residence permit on compassionate, humanitarian or other reasons, nullifying a removal decision. These safeguards may all apply to cases where removal in climate change-affected countries would be unsafe.

The above Directives, all embedding the principle of non-refoulement, demonstrate that EU asylum and migration law could potentially cover environmental causes of migration. It is up to the EU institutions to turn these implicit opportunities into explicit protection avenues, leveraging an evolutionary and flexible application and interpretation of these instruments by competent authorities.

85. J. McAdam, Climate Change, Forced Migration, and International Law, Oxford, Oxford, University Press, 2012, p. 102; V. Kolmannskog, F. Myrstad, Environmental Displacement in European Asylum Law, in European Journal of Migration and Law, 11/2009, p. 313; G. Sciaccaluga, Sudden-Onset Disasters, Human Displacement, and the Temporary Protection Directive: Space for a Promising Relationship?, in G.C. Bruno, F.M. Palombino, V. Rossi (eds) Migration and the Environment. Some Reflections on Current Legal Issues and Possible Ways Forward, Rome, CNR Edizioni, 2017; P. Bonetti, La protezione speciale dello straniero in caso di disastro ambientale che mette in pericolo una vita dignitosa, in Lexambiente, 2/2021; OHCHR, Addressing human rights protection gaps in the context of migration and displacement of persons across international borders resulting from the adverse effects of climate change and supporting the adaptation and mitigation plans of developing countries to bridge the protection gaps, 2018.

86. C. Scissa, The climate changes, should EU migration law change as well?: insights from Italy, op. cit., p. 6.

3.8.2. The Council of Europe

Over time, the Council of Europe has promoted a deeper understanding of the need to recognize and protect against environmental causes of migration. In 2009, the Parliamentary Assembly of the Council of Europe adopted a resolution and a recommendation on the matter. Even if non-binding, they have the merit to concretely address the persisting challenges surrounding the recognition and protection of environmental migrants and set forth tangible solutions to reduce their vulnerability. Indeed, Resolution No. 1655 (2009) acknowledges that «[o]ne of the most fundamental issues in climate change and environmentally induced migration is that it is a global process, not a local crisis. Hence, it is the responsibility of the global community and not only that of local and national authorities to engage in proactive intervention»[87]. It also invites the Member States to consider the elaboration of a specific protection framework either in a separate convention or as part of multilateral environmental treaties, or both. Alternatively, the Parliamentary Assembly encourages the respective United Nations agencies to consider creating principles of existing international law on climate-related international displacement. Recommendation No. 1862 (2009) reiterates those proposals and further focuses on the possibility to add a new protocol to the ECHR, concerning the right to a healthy and safe environment.

Ten years later, the Parliamentary Assembly adopted resolution 2307 (2019), where it stresses again the role of climate change and environmental disasters in triggering forced internal and cross-border displacement. Among other things, it calls the Member States to include in their asylum systems protection statuses for people fleeing long-term climate change in their country of origin. The Parliamentary Assembly partially grounds this need on the particular responsibility that industrialised Member States of the Council of Europe carry with respect to third countries affected by man-made climate change, «and should therefore provide appropriate asylum for climate refugees»[88].

3.8.3. Article 2 ECHR on the right to life

The ECtHR has not yet had the opportunity to deal with non-refoulement obligations in the context of adverse climate and environmental impacts. There are however relevant elements that inspired some initial reflections on the matter. In nearly 300 cases the ECtHR has concluded that environmental harm may lead to violation of a broad range of hitherto

87. Parliamentary Assembly of the Council of Europe, Resolution No. 1655 (2009): Environmentally Induced Migration and Displacement: A 21st Century Challenge, 30 January 2009, para 8.

88. Parliamentary Assembly of the Council of Europe, Resolution 2307 (2019) A legal status for "climate refugees", 3 October 2019, para. 4.5.

guaranteed human rights – that is, the right to life, to health, to private and family life and, to property[89]. In particular, the Court has found positive obligations to arise under Article 2 in the specific context of industrial and environmental disasters[90]. The obligation to protect life applies not only to hazardous industrial activities, which are dangerous by their very nature, but also in case of a natural disaster or when the danger is imminent and clearly identifiable, for instance in case of mudslides and earthquakes. Article 2 ECHR applies not only where actions or omissions of the State have led to a person's death, but also where a person has been exposed to a serious, real and immediate risk to their life[91]. The Court must also consider whether the authorities knew or ought to have known, at the material time, that the applicant had been exposed to a mortal danger, and whether the competent authorities have taken appropriate steps to protect life, including a preventive and deterrent legislative and administrative framework, adequate regulations to ensure public's right to information, and technical prevention and protection measures[92].

The *Kolyadenko and Others v. Russia* case constitutes an emblematic example of violation of Article 2 ECHR in light of environmental disasters that competent authorities have neither prevented nor adequately addressed, and which may provide some insights for our analysis on environmental migration[93]. The case concerned six Russian applicants who claimed their State responsible for putting their life at serious risk and for the damage to their homes and property caused by a sudden, large-scale flooding occurred on 7 August 2001. The applicants claimed that no emergency warning was given before the flood. More into detail, three out of six applicants were at home when the flood started submerging their residences. These were a 63-year-old disabled woman, a mother with a 21-month-old son, and a 55-year-old woman who could not swim. Their flats were gravely flooded and in less than 15 minutes, the water in the applicants' flats reached a height ranging from 1.20 to 1.80 metres. All public transport lines were submerged; therefore, it was impossible to move out from the flooded area by transportation. According to the applicants, the water remained at those levels for approximately a day. Their home, property, land, and belongings were severely or entirely damaged by the flood. It is worth noting that «the applicants further argued that during and after the flood they had been left to their own

89. Among others, ECtHR, *Öneryıldız v Turkey*, n. 48939/99, 30.11.2004; ECtHR, *López Ostra v Spain*, n. 16798/90, 09.12.1994; ECtHR, *Fadeyeva v Russia*, n. 55723/00, 09.6.2005. For a comment, C. Scissa, *The right to a healthy environment as an EU normative response to covid-19. A theoretical framework*, in P. Czech, L. Heschl, K. Lukas, M. Nowak, G. Oberleitner (eds) *European Yearbook of Human Rights,* Cambridge, Intersentia, 2021.

90. ECtHR, *Öneryıldız v Turkey*, cit., ECtHR, *Kolyadenko and Others v. Russia*, n. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, 28.2.2012.

91. Among others, ECtHR, *Fadeyeva v Russia*, cit.

92. ECtHR, *Öneryıldız v Turkey*, cit.; ECtHR, *Budayeva and Others v. Russia*, n. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02), 20.3.2008.

93. ECtHR, Kolyadenko and Others v. Russia, cit.

devices, that no evacuation had been organised and that they had had to make their way to safety and to deal with the consequences of the flood on their own. They pointed out that even today [2012] the authorities had not taken any measures to eliminate the danger of a flood – the state of the Pionerskaya river channel remained unsatisfactory and the area where they lived was regularly flooded». The Court found a violation of Article 2 ECHR for these three applicants, reiterating that the right to life is also susceptible of violation when States' action or omission leads to situations where there clearly existed a risk to individuals' life. According to the ECtHR, the circumstances experienced by the three applicants and the damage occurred to their belongings determined the existence of an imminent risk to the lives. The fact that they survived and sustained no injuries has no bearing on this conclusion. This case could give us a hint about how the Court may approach a hypothetical protection claim by individuals forced to flee due to an environmental disaster over which the State had or ought to have had control. In fact, what would have happened if the applicants had left their country because of the flood? Would the assessed violation of their right to life have been enough to trigger the hosting State's non-refoulement obligations or protection guarantees? May the fact that the flooded area was still unsafe after eleven years convince the Court to exclude the removal of protection-seekers back to the Russian Federation? These are just some of the compelling questions it will almost certainly asked to deal with in the near future. In 2012, when *Kolyadenko* was released, McAdam accidentally advanced a potential answer to these compelling questions. In describing the State's duty to protect life from natural hzards where the risk is known, she noted that «there is nothing in principle which would prevent its reasoning [of the European Court of Human Rights], from extending to removal cases where there is a real risk that the applicant would be affected by natural disasters in a State that failed to mitigate against them», although observing that the economic capacity of the State may soften its burden of responsibility. She also noticed that «in a complementary protection claim, the focus is the potential «harm» to the applicant if he or she is removed. Thus, the relevant question is the extent to which the receiving State is able and willing to mitigate against that harm, whatever its cause», be it natural or man-made[94].

3.8.4. Article 8 ECHR on the right to private and family life

In its guidelines, the ECtHR holds that the scope of the positive obligations under Article 2 ECHR largely overlaps with that under Article 8, and finds that the principles developed in the Court's case law relating to protection against industrial and environmental

94. J. McAdam, Climate Change, Forced Migration, and International Law, cit., p. 60.

disasters affecting the right to life may as well affect the right to private and family life[95]. The Court observes that a violation of Article 8 occurs when a «direct and immediate link» can be assessed between the environmental damage and the applicant's home, or their private or family life[96]. Moreover, the interference must attain a minimum level of severity, this meaning that a general deterioration of the environment is not sufficient to be determined according to the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects on the applicant's health or quality of life[97]. This last criterion has been established by the ECtHR in *Bensaid v United Kingdom,* a case concerning the removal of an Algerian national suffering from mental disease. Here, the Court finds that the impact of expulsion to the country of origin on the claimant's physical and moral integrity is a relevant consideration for Article 8[98]. According to Scott «the concept of physical and moral integrity is inherently loose and would extend at least to the physical health impacts related to natural disasters (such as increased disease incidence in the aftermath) as well as to the psychological impacts of living in the aftermath of a natural disaster»[99]. This brings Scott to argue that «the proportionality exercise [in Article 8] is concerned with striking a "fair balance" between competing interests, and where climate change is implicated in a natural disaster, or significantly diminished human security, that "fair balance" should arguably include the role of the contacting state in contributing materially to the adverse environmental conditions that the claimant resists being expelled to. In this connection, the individual emission levels of the host state are relevant»[100]. A last remark concerns the use by the Court of terms such as «environmental danger» or «environmental risk/hazard» that, the ECtHR argues, might suggest that Article 8 could be applicable to cases of environmental risks whose materialisation would not have very serious consequences[101]. This may start initial reflection upon the application of Article 8 in case of damages to the migrant's home, private or family life triggered by environmental disasters over which their State has or is ought to have some control.

95. ECtHR, Guide to the case-law of the European Court of Human Rights, 30 April 2022, para. 16.

96. *Ibidem*.

97. *Ivi*, para 61.

98. ECtHR, *Bensaid v United Kingdom*, n. 44599/98, 6.2.2001.

99. M. 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?, in International Journal of Refugee Law, 2014, p. 418.

100. *Ivi*, p. 426.

101. ECtHR, Guide to the case-law of the European Court of Human Rights, cit.

3.8.5. Article 3 ECHR on the prohibition of torture, inhuman or degrading treatment or punishment

When it comes to non-refoulement obligations stemming from Article 3 ECHR, Caskey observes that, although the Court has primarily focused on situations of violence, it seems open to other distinguishing features which, on a case-by-case basis, may place an individual at risk of treatment contrary to Article 3[102]. The ECtHR seems to have so far focused more on the consequences of the (occurred or potential) ill treatment, rather than on its triggering causes, by assessing the level of severity of harm necessary to meet the threshold of Article 3[103].

For instance, in *D v United Kingdom*, the Court establishes that a State can breach Article 3 ECHR not only by expelling a person to face the direct and intentional infliction of harm by the receiving State, but also in situations where the expulsion would result in harm relating more to socio-economic rights, in the present case the claimant's right to health and medical care, than to civil and political rights[104]. The ECtHR found that the expelling State has indeed a positive obligation to carefully assess the situation in the country of origin and the personal circumstances of the returnee before removal[105]. If their living in the country of origin would result in destitution or lie below minimum subsistence, removal would breach Article 3. In other words, «it may be that removal is absolutely precluded at the ECtHR where one can establish a generalised situation of environmental degradation that seriously impacts the enjoyment of human rights, and/or individual circumstances aggravating vulnerability»[106]. In exploring the jurisprudence of the ECtHR concerning cases of individuals subject to removal to receiving states in the aftermath of a natural disaster, Scott argues that returnees in the context of a «pure» natural disaster, therefore beyond human (and State) control, would succeed in triggering host State obligations under Article 3 ECHR only in very exceptional cases, where the harm feared must be «very exceptional» and the «humanitarian considerations» must be «compelling», as later confirmed in *N v United Kingdom*[107]. Therefore, Scott concludes that «although it is not inconceivable that a natural disaster-related non-refoulement claim could succeed

102. E. Hamdan, Non-Refoulement under the ECHR and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Leiden/Boston, Brill Nijhoff, 2016, p. 211.

103. J. De Coninck, A. Soete, Non-refoulement and climate change-induced displacement: Regional and international cross fertilization?, in Review of European, Comparative & International Environmental Law, 2022, p. 6.

104. ECtHR, D. v. the United Kingdom, n. 30240/96, 2.5.1997. See, M. 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?, op. cit., p. 413.

105. ECtHR, *Tarakhel v. Switzerland*, n. 29217/12), 4.11.2014, paras 97-99.

106. C. Caskey, Non-Refoulement and Environmental Degradation: Examining the Entry Points and Improving Access to Protection, op. cit., p. 14.

107. ECtHR, *N v United Kingdom*, n. 26565/05, 27.5.2008.

even where the impacts are seen as resulting from "purely natural" phenomena, the circumstances would have to be very exceptional, involving extreme deprivation without relief»[108]. According to Scott, however, where climate change reportedly plays a role in the occurrence of a natural disaster, the Court should consider the responsibility of, mainly, industrialized States in contributing to the worsening of climate change via greenhouse gas emissions. In his words, «[a]ny claim that seeks to rely on the impact of climate change as a way of resisting expulsion will have to overcome substantial challenges, in particular, the challenge of establishing a connection between climate change and the particular natural disaster»[109]. In its recent communication on the pending case *Duarte Agostinho and Others v. Portugal and Others*, the ECtHR has asked the parties to comment not only on the alleged violations of Articles 2, 8, and 14 (non-discrimination), but also on Article 3 ECHR, raising the issue *proprio motu*[110]. If pursued, the Court may elaborate on the existence of substantial grounds for establishing a real and immediate risk of ill-treatment on climate-related grounds, which could provide relevant insights also in similar migration cases.

To conclude, the Parliamentary Assembly of the Council of Europe is particularly sensitive to the issue of providing a legal protection status to people compelled to flee cross-borders due to climate change and other environmental factors, supporting the recognition of the so-called "climate refugees". Its resolutions and recommendations surely give impetus to keeping high the attention of the Council of Europe on the matter. Moreover, although the Strasbourg Court has not yet dealt with non-refoulement obligations in the context of climate change, relevant insights contribute to shed light on the possible approach it might endorse in future cases. As illustrated, the ECtHR may find a breach under Articles 2, 8, and 3 ECHR in very exceptional, yet conceivable, cases. A serious, real, and immediate risk of damage is key for the Court to establish a violation of Article 2 on the right to life in the context of industrial and environmental disasters in conjunction with an assessed failure of the State to take all appropriate measure to prevent and to protect from harm. This hypothesis has already materialized in the context of floods that, as known, are a driving factor of forced migration[111]. Violations of this right may also well lead to violations of Article 8 on private and family life, where the loose concept of damage to the claimant's physical and moral integrity in case of removal to their country of origin might allow for an extensive interpretation so to include environmental disasters. Finally, a very high

108. M. 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?, op. cit., p. 415.

109. *Ibidem*.

110. C. Heri, The ECtHR's Pending Climate Change Case: What's Ill-Treatment Got To Do With It?, in EJIL: Talk!, 22 December 2020, available at www.ejiltalk.org.

111. OHCHR, Human rights and the global water crisis: water pollution, water scarcity and water-related disasters, A/HRC/46/28, 19 January 2021, para. 4.

threshold is required to assess a violation of Article 3 on the prohibition of torture, inhuman or degrading treatment or punishment, where an environmental disaster would result in extreme material deprivation without relief. The role that the principle of non-refoulement can play in protecting these rights under the ECHR in the context of climate change and other environmental factors is still to be determined and all the more relevant in times of globally worsening climate conditions.

3.9. Middle East: Regional application of the principle of non-refoulement

Countries in the Middle East have endorsed different approaches towards refugee protection[112]. Most of them are not parties to the 1951 Refugee Convention or 1967 Protocol, while some are members of UNHCR's EXCOM and seem to have accepted the strong political authority of its Conclusions on the International Protection of Refugees. Within the region, Janmyr and Stevens observe «a clear bifurcation between Arab States, when acting as the LAS [League of Arab States], and the three non-Arab States of Israel, Iran, and Turkey»[113]. Arguably, Arab States reveal a preference for inter-Arab State instruments and regional principles, as opposed to international refugee law.

The League of Arab States is the oldest regional organization in the region. Founded in March 1945, the League is a confederation of 22 Arab nations, whose mission is to improve coordination among its members on matters of common interest, especially economic growth and partnership. There are no binding regional instruments *concretely* addressing refugee law in the Middle East. The 1965 Casablanca Protocol on the Treatment of Palestinian Refugees, indeed, is a regional agreement that addresses refugee issues in the region, but only concerns Palestinians in Arab States. Plus, the Protocol is poorly implemented and has been severely weakened after a failed attempt to revitalize it[114]. However, from a human rights perspective, all Middle East countries have ratified or acceded to at least some key international human rights treaties[115]. Moreover, there is only one regional human rights treaty that also refers to refugee's rights, that is the Arab Charter on Human Rights adopted by the League. Article 26.2 of the Arab Charter limits the expulsion of regular migrants to cases decided by law and after the individuals concerned have been allowed to submit a petition to the competent authority, unless compelling reasons of national security preclude it. Collective expulsion is prohibited under all circumstances,

112. For the purposes of the present analysis, the Middle East region includes Arab States and Israel.

113. M. Janmyr, D. Stevens, *op. cit.*, p. 4.

114. L. Takkenberg, *The Status of Palestinian Refugees in International Law*, Oxford, Oxford University Press, p. 141.

115. M. Rishmawi, The League of Arab States Human Rights Standards and Mechanisms. Towards Further Civil Engagement: A Manual for Practitioners, in Open Society Foundations/Cairo Institute for Human Rights Studies, 2015, p. 76.

pursuant to Article 26.3. Article 28 statutes the right to asylum, but only on account of political persecution. It specifies that political refugees shall not be extraditable, while those facing prosecution for an offense under ordinary criminal law are excluded from such a protection.

Soft-law human rights instruments include: the 1982 Universal Islamic Declaration of Human Rights, which stipulates the right of persecuted or oppressed people to seek asylum irrespective of their race, religion, colour and sex; the 1992 Declaration on the Protection of Refugees and Displaced Persons in the Arab World, which reaffirms the importance of the principle of non-refoulement to a country where refugees' life or freedom will be at risk and considers this principle as an imperative rule of the international public law; the Cairo Declaration on Human Rights in Islam, whose Article 12 enshrines the right to asylum and the duty of the country of refuge to ensure refugees' protection until they reaches safety; and the 1966 Bangkok Principles. While these regional agreements target important problems in the refugee governance in the Middle East, these objectives have mostly not been achieved[116].

3.10. The principle of non-refoulement and environmental migration in the Middle East's law and jurisprudence

The 1994 Arab Convention on regulating status of refugees in the Arab countries, although adopted by the League, never entered into force due to the low rate of adhesion and ratification. However, it would have constituted a remarkable step in advancing the regional refugee definition so to cover environmental causes of migration. In fact, the refugee definition in the text expressly mentioned those who fled «because of sustained aggression against, occupation and foreign domination of such country or because of the occurrence of natural disasters or grave events resulting in major disruption of public order in the whole country or any part thereof». The inclusion of natural disasters would have well provided a basis for refugee protection on environmental grounds, in addition to non-refoulement protection to be no less than for other foreign residents. Still, in recent years, the League has started to redraft the Arab Convention and, in 2018, UNHCR announced that a final version should be adopted in the near future. The new Arab Convention is said to endorse the extended refugee definition contained in the AU Convention, and to include persons fleeing disasters or grave events disrupting public order[117].

116. L. El Chemali, The Arab Refugee Paradox: An overview of refugee legislations in the Arab Middle East, in Völkerrechtsblog, 14 November 2016, available at www.voelkerrechtsblog.org.

117. UNHCR, Inter-Parliamentary Union, A Guide to International Refugee Protection and Building State Asylum Systems. Handbook for Parliamentarians No 27, 2017, p. 21.

As for the case law, there is very limited research on the jurisprudence in the region concerning refugees and their rights. Janmyr and Stevens report some judgements that removed irregular entry charges for several Syrian refugees in Lebanon with reference to the right to seek asylum as set out in article 14 of the UDHR, while the Israeli Supreme Court have protected asylum-seekers from forced deportation to third States[118]. No case law concerning non-removal due to dire environmental circumstances in the country of origin have been found.

3.11. Oceania: Regional application of the principle of non-refoulement

No regional refugee or human rights system exists in Oceania and ratification rates of key international refugee law instruments are pretty low[119]. Of the 16 States of the region, only eight have ratified the 1951 Refugee Convention and Protocol[120]. As for human rights treaties, also enshrining the principle of non-refoulement, 7 States are parties to the ICCPR and eight to the Convention Against Torture.

3.12. The principle of non-refoulement and environmental migration in Oceania's law and jurisprudence

In 2016, Tuvalu launched a proposal for a new UN resolution to create a legal protection framework for persons displaced due to climate change[121]. In 2017, most countries of Oceania attended the Pacific Islands Forum and considered a proposal for a UN Climate Change Displacement Resolution[122]. In 2019, Tuvalu issued a proposal for a UN resolution to encourage the creation of an international binding instrument of legal protection for persons displaced by the impacts of climate change[123]. During the same year, the Pacific leaders adopted the Kainaki II Declaration in which they «reaffirmed climate change as the single greatest threat to the livelihoods, security and wellbeing of the peoples of the Pacific», that is driving displacement and loss of homes and livelihoods[124]. However, these efforts have not been pursued further at the UN level. Moreover, no solution coordinated at the regional level has been so far envisaged. At the judicial level, the issue of adapting the international refugee regime to environmental causes of migration has been

118. M. Janmyr, D. Stevens, *op. cit.*, p. 13.

119. This contribution embeds a definition of Oceania that comprehends all States within Polynesia, Micronesia, Melanesia, Australia, and New Zealand.

120. M. Foster, A. Hood, *op. cit.*, p. 1.

121. M. Rowling, Tuvalu PM Urges New Legal Framework for Climate Migrants, in Reuters, 24 May 2016, available at www.reuters.com.

122. Forty-Eighth Pacific Islands Forum, Forum Communiqué, PIFS(17)9, 5-8 September 2017, para 52.

123. General Assembly, Providing legal protection for persons displaced by the impacts of climate change, Tuvalu: draft resolution, 30 July 2019, A/73/L.105, www.digitallibrary.un.org.

124. Pacific Islands Forum, Kainaki II Declaration, 13-16 August 2019, para 14.

particularly addressed by national Courts, especially in New Zealand, in the absence of a judicial body at the regional level.

4. Conclusion

The case *Teitiota v New Zealand* stimulated deeper reflections upon the role of the principle of non-refoulement as regional protection instrument in cases of environmental migration at the core of this contribution. In particular, this article aimed to explore the role that the principle of non-refoulement could play in impeding the removal to a migrant' country of origin in case of dire environmental conditions. The analysis was framed at the regional level, and focused on Africa, the Americas, Asia, Europe, Middle East, and Oceania. The study presented the regional application of the principle of non-refoulement in respective refugee and human rights law. It then explored the (potential) application of the principle of non-refoulement to cases of environmental migration, by leveraging existing regional law and jurisprudence, where available. The legal analysis reveals widely divergent approaches to the principle of non-refoulement and different extents of implementation.

The Americas, Africa and Europe have mostly ratified the 1951 Geneva Convention and embedded its most relevant provisions, including the principle of non-refoulement, in their regional instruments. Africa and Europe have both a comprehensive regional refugee and human rights system, composed of binding and non-binding arrangements, that contribute to substantiate States' obligations in the field. Although the Americas have not shaped a regional refugee protection framework, the Inter-American Court found that non-refoulement is an essential component of both refugee and human rights law, thus broadening its scope of application to specific human rights that might be damaged by climate change and environmental disasters. From the analysis of relevant provisions and case law, although the monitoring bodies in the Americas, Africa and Europe have not yet dealt with non-refoulement obligations in the context of environmental migration, they all have regarded the right to life as, on the one hand, threatened by adverse climate change impacts and, on the other hand, as linked to a healthy environment, recently recognized as human right[125]. These interpretations led the respective regional monitoring bodies to establish a link between the protection of life and of the environment, which includes protection from environmental harm and disasters where the risk is known. Other core human rights may be able to trigger State's non-refoulement obligations, such as the prohibition of torture or the right to private and family life, in case of serious environmental

125. UN General Assembly, The human right to a clean, healthy and sustainable environment, Resolution A/76/L.75, 26 July 2022, available at www.digitallibrary.un.org.

disasters not prevented by the State or where its authorities failed to adequately protect people from the consequences of such disasters. It might be expected that, in the future, the judicial organs in these three regions may adopt a flexible and dynamic approach to interpret the respective regional law provisions so to extend existing protection instruments, particularly the scope of the principle of non-refoulement, to environmental migrants, where the environmental and climate conditions of the country of origin are deemed able to breach such basic human rights.

Conversely, the Middle East, Asia and Oceania do not possess a regional refugee framework and the number of ratifications of international refugee and human rights treaties is considerably lower. Concerned about the principle of non-interference in matters of national sovereignty, the countries of these regions offer fewer guarantees from refoulement and often limit its application to very few cases. Their monitoring bodies have dealt to migration cases to a much lesser extent and no cases concerning environmental migration have been found in the context of the present research. As most of these States are still bound by the ICCPR, the views recently adopted by its Human Rights Committee in the case *Teitiota v. New Zealand* may nevertheless promote initial reflections on non-refoulement in the context of climate change, especially given that Middle East, Asia and Oceania are extremely vulnerable to the adverse impacts of climate change and may soon receive migrants from other environmentally vulnerable areas within and beyond their respective region.