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Analysing National Responses to Environmental and Climate-Related Displacement: A Comparative Assessment of Italian and French Legal Frameworks [1]

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Abstract

Interlinkages between climate change, environmental degradation and displacement have been widely recognized by academics and States. However, unlike other categories of forced migrants, environmental and climate-displaced people crossing an international border are not entitled to any ad hoc protection regime under current conventional law. Nevertheless, it has been argued that International Human Rights Law and, to a minor extent, International Refugee Law forbid the expulsion of those migrants who are unable to return to their country in dignity and safety due to environmental reasons.

While the role of International Law in dealing with environmental and climate-related displacement has been widely investigated by legal researchers, national immigration and asylum systems could be further examined. This paper aims at examining the existing legal options for the protection of environmental and climate-related displaced persons under the Italian and French legal frameworks.

The Italian legal framework has been selected since it is characterized by two distinct kinds of complementary protection, both potentially addressing displacement induced by environmental hazards: the 'special protection' – which substituted the 'humanitarian protection' – and the 'residence permit for calamity'. While no explicit reference is made to climate and environmental reasons in the French legal framework concerning the residence of third-country nationals, a recent judgement issued by the Bordeaux Appeal Court could pave the way for a gradual inclusion of such phenomena under the umbrella of the possible reasons justifying the issuance of a residence permit to those at risk of displacement for environmental and climate-related reasons.

Such a comparative analysis has the objective of giving more practical thickness to the legal issues arising from environmental and climate-related displacement with the aim of identifying legal solutions to the new challenges posed by climate change and environmental degradation.

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Disaster displacement, climate refugees, environmental migration, non-refoulement, complementary protection

1. Introduction

Environmental and climate-related displacement has been defined as one of the biggest humanitarian challenges of the 21st century (The Nansen Initiative, 2015: 6). The Internal Displacement Monitoring Centre estimates that, in 2020 alone, about 30 million people have been internally displaced as a result of disasters caused by natural hazards such as floods, tropical storms, earthquakes, landslides, droughts, saltwater intrusion, glacial melting, glacial lake outburst floods, and melting permafrost (IDMC, 2021: 7). While the vast majority of environmental and climate-related displaced persons remain in their country of origin, some are forced to cross an international border (The Nansen Initiative, 2015: 14; Apap, 2021).[4] Unlike other categories of forced migrants, environmental and climate-displaced people crossing an international border are not entitled to any ad hoc protection regime under current conventional law.

Over the last few years, a growing body of legal literature and research has dealt with the issue of the protection of those displaced as a result of environment and climate-related phenomena. While the role of international law is well investigated, the solutions offered by national legal frameworks seem, to date, to be still overlooked in the field of legal scholarship (Cantor, 2021). For this reason, this paper aims at examining the existing legal options for the protection of environmental and climate-related displaced persons under the Italian and French legal immigration and asylum frameworks in a comparative fashion. Such an analysis has the objective of giving more practical thickness to the legal issues arising from environmental and climate-displacement from the particular angle of France and Italy. The comparison between these two countries is relevant in the light of their membership in the EU – including the Common European Asylum System – and their geographical proximity, but also to the substantial differences between the two countries, namely their legal framework with regard to international protection and complementary protection regimes.

In this light, the paper will be structured as follows. The first section will deal briefly with this issue in international law, in order to frame the topic within a more general context. The second section will examine the core topic of this paper, that is, the protection provided at the national level by Italy and France. Finally, the last section will summarise the main findings of the contribution and outline a number of conclusions in the light of the aforementioned, with the aim of fostering the debate on the issue and the role of national policies to provide protection to those displaced as a result of climate and environmental hazards.

2. A Brief Outline of the Issue in International Law

The debate in international law has revolved around various kinds of questions. Firstly, one main issue is related to the link between climate change and displacement. A body of

[4] Due to a lack of systematic monitoring of cross-border displacement and in the absence of consensus on their definition it is impossible to determine how many people are displaced out of their country of origin in environmental and climate-related disaster contexts.

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literature embraces the idea that climate change is to be seen as the main cause of the displacement, and that this would entail a growing number of displaced people around the globe (Myers, 1993; Mokhnacheva et al. 2017; Christian Aid, 2007; Kraler et al., 2020; Government Office for Science, 2011). On the other hand, many argue that climate change and environmental hazards are not the main factors pushing people to cross an international border, and in this light, they do not foresee an augmentation of the number of displaced people around the world (Piguet, 2008; Morrisey, 2009). However, in the recent past interlinkages between climate change, environmental degradation and displacement have been widely recognized by the international community.[5]

The causal relationship linking climate change to migration has an impact on the possibility of applying existing instruments in international human rights law and international refugee law to address this phenomenon.

While the 1951 Refugee Convention[6] mentions quite strict requirements in order for a person to fulfil the refugee definition, academics argued that it could prove useful in certain situations where climate change and environmental issues were not the direct cause of displacement but one factor within the general situation of persecution (UNHCR, 2020), that could be embedded within the different elements of the refugee definition within Article 1(A)(2) of the Refugee Convention.[7] As an example, New Zealand granted refugee status to a woman who had a well-founded fear of being persecuted for having helped people hit by cyclone Niagara with humanitarian actions through money given to her by the opposition party in Myanmar.[8] However, very few refugee claims based predominantly or exclusively on the impacts resulting from climate change or environmental degradation have been successful to date.[9]

[5] UN General Assembly, Resolution No. 1 (LXXI), New York Declaration for Refugees and Migrants, adopted 3 October 2016; UN General Assembly, Resolution No. 151 (LXXXIII), Office of the United Nations High Commissioner for Refugees, adopted 10 January 2019; UN General Assembly, Resolution No. 195 (LXXIII), Global Compact for Safe, Orderly and Regular Migration, adopted 11 January 2019.

[6] Convention relating to the Status of Refugees (adopted 28/7/1951 in Geneva, entered into force 22/4/1954, Geneva Convention or Refugee Convention).

[7] "(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well founded fear, he has not availed himself of the protection of one of the countries of which he is a national."

[8] Refugee Appeal No 76374, Decision of 28 October 2009: https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref_20091028_76374.pdf.

[9] A comprehensive review of Australia's and New Zealand's case laws has been provided by Scott, 2020. However, Scott contends that most refugee status determination (RSD) decisions are "based on an interpretation of the refugee definition that appears to cast the temporal scope too narrowly and the personal scope too widely." According to the author, a recalibrated interpretation of 'discrimination' should be consolidated by adequately taking into account the effect of climate change as a multiplier of threats and vulnerability.

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In this regard, according to a part of the literature, forcing such a new category of migrants within the international protection regime could also lower protection standards, as it would not be sufficient, alone, to address the specificity of climate-related displacement (UNHCR, 2012).

With regards to international human rights law, despite the fact that it does not provide for a structured protection regime, it does impose on States a negative obligation not to expel, remove or extradite a person to a country where the latter would face torture or cruel, inhuman or degrading punishment or treatment. Indeed, environmental and climate-related disasters might reach the threshold required under such an obligation, as it might cause 'intense suffering' and harsh living conditions in the country of origin treatment (Borges, 2019: 45-115; McAdam, 2012: 39-98; McAdam, 2021; Ragheboom, 2017: 293-398).[10]

This interpretation has been confirmed by the pivotal views of the Human Rights Committee in the Teitiota v. New Zealand case, where it is affirmed that: "Both sudden-onset events (such as intense storms and flooding) and slow-onset processes (such as sea-level rise, salinization, and land degradation) can propel the cross-border movement of individuals seeking protection from climate change-related harm. The Committee is of the view that without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6[11] or 7[12] of the Covenant,[13] thereby triggering the non-refoulement obligations of

[10] As an example, the Austrian Constitutional Court in 2011 annulled a decision by the Asylum Tribunal concerning the return of a rejected asylum-seeker, to Pakistan, his country of origin, on the basis that the Tribunal had failed to examine the claim under Article 3 ECHR that the person concerned would have to go back to areas affected by the floods of 2010 or would have been able to find a reasonable relocation alternative. Bundesverfassungsgericht (Österreich), Decision U84/11 of 19 September 2011. www.ris.bka.gv.at/Dokumente/Vfgh/JFT_09889081_11U00084_00/JFT_09889081_11U00084_00.pdf.

[11] "1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."

[12] "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

[13] International Covenant on Civil and Political Rights (adopted by the UN General Assembly 16/12/1966, entered into force 23/3/1976, ICCPR).

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sending states. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realised."[14] It has also been argued that, in "very exceptional cases" (McAdam, 2021: 81), other rights – including the right to respect for private and family life (Scott, 2014: 417-420, 424-427) – could also protect environmental and climate-related migrants from forced repatriation, giving rise to complementary protection.

In this light, it can be argued that the principle of non-refoulement, being a wide encompassing concept covering a wide range of situations, might prove useful to address the phenomenon of climate-related displacement for two reasons. Firstly, it is an obligation incumbent on States that need to apply it within their legal framework. Secondly, its flexibility allows different situations to be brought within its scope. For this reason, the following sections will analyse national responses to environmental and climate-related displacement.

3. The Italian Legal Framework on Immigration and Asylum

The Italian legal framework consists of a number of protection regimes for third-country nationals: the refugee status, within the meaning of the 1951 Geneva Convention; the subsidiary protection, complying with the EU 'Qualification Directive';[15] and other national forms of complementary protection, such as the 'humanitarian protection', pursuant to Article 5.6 of the Consolidated Immigration Act (Legislative Decree no. 286/1998),[16] recently replaced by the 'special protection' under Art. 19 of the Consolidated Immigration Act, the 'residence permit for calamity' (Art. 20 bis), the 'residence permit for health care' (Art. 19 para. 2, d-bis, and Art. 36), and others.

As previously mentioned, the refugee definition provided by Art. 1(A)(2) of the 1951 Convention is rarely met in the event of displacement induced by climate change and environmental degradation. This is confirmed by the Italian practice, given that no case of refugee recognition as a direct consequence of environmental or climate-related hazards in the country of origin is known.

Similarly, the applicability of the subsidiary protection under the EU legal framework appears to be excluded in this context. The EU Qualification Directive, in fact, lays down that "a person eligible for subsidiary protection" means "a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former

[14] UN Human Rights Committee (UN HRC), views of 7/1/2020, Ioane Teitiota v. New Zealand, CCPR/C/127/D/2728/2016: https://www.refworld.org/cases,HRC,5e26f7134.html (see further McAdam, 2020).
[15] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast), OJ L 337 of 20 December 2011.
[16] Legislative Decree of 25 July 1998, No. 286, *Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero* (G.U. No. 191 of 18 August 1998), D. Lgs. 286/1998 or 'Consolidated Immigration Act'.

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habitual residence, would face a real risk of suffering serious harm as defined in Article 15 (…) and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country". Article 15 provides an exhaustive definition of 'serious harm', which includes "(a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict".

Although it is arguable that in certain cases the negative effects resulting from climate change could constitute inhuman or degrading treatment (McAdam, 2012: 63-79; Scott, 2014: 412-417, 420-424), the Italian Supreme Court of Cassation[17] has so far excluded that vulnerability caused by environmental and climate-related hazards should be included within the definition of 'serious harm' under the EU and the Italian Law.[18]

3.1 The Applicability of Humanitarian Protection and Special Protection in the Event of Environmental and Climate-related Disasters

Those situations of vulnerability, however, are not irrelevant to the Italian legal framework. According to the Supreme Court of Cassation, environmental disasters, either man-made or not, may give rise to the prohibition of the expulsion of an individual coming from the affected areas. Therefore, the Court of Cassation affirmed that, in the event of an environmental disaster, humanitarian protection under Art. 5 para. 6 of the Italian Consolidated Immigration Act could be granted to the foreigner.[19]

This legal provision, however, has to be referred only to asylum applications submitted before 4 October 2018, since, during the current Legislature of the Italian Parliament (XVIII), it has been subject to two distinct amendments. The original Art. 5 para. 6, applicable until the entry into force of Decree-Law No. 113/2018,[20] was intended to comply with any international obligations (especially the *non-refoulement* principle) and constitutional rules (particularly, Art. 2 of the Italian Constitution on fundamental human

[17] Supreme Court of Cassation, 1st Civil Section, Order of 20 March 2019, No. 7832.
[18] See Art. 14 of the Italian transposition law of the EU Qualification Directive, Legislative Decree of 19 November 2007, No. 251, *Attuazione della direttiva 2004/83/CE recante norme minime sull'attribuzione, a cittadini di Paesi terzi o apolidi, della qualifica del rifugiato o di persona altrimenti bisognosa di protezione internazionale, nonche' norme minime sul contenuto della protezione riconosciuta* (G.U. No. 3 of 4 January 2008), D. Lgs. 251/2007 or 'Qualification Decree'.
[19] Supreme Court of Cassation, 1st Civil Section, Order of 20 March 2019, No. 7832. The case dealt with a Bangladeshi asylum seeker who complained that the catastrophic situation caused by the flood in his region of origin had not been adequately taken into consideration by the Territorial Commission for the Recognition of the International Protection and by the Appeal Judge. The Cassation confirmed that the environmental disaster occurred in the region could have given rise to the application of the humanitarian protection, but it refused to grant the applicant any form of protection since he was not able to demonstrate any direct link between the catastrophe and his individual situation in the event of return to his country of origin.
[20] Decree-Law of 4 October 2018, No. 113, *Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell'interno e l'organizzazione e il funzionamento dell'Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata* (G.U. No. 231 of 4 October 2018), converted into Law of 1 December 2018, No. 132 (G.U. No. 281 of 3 December 2018), Decree-Law No.113/2018 or 'Salvini Decree'.

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rights[21] and Art. 10 para. 3 dealing with political asylum)[22], which would forbid the expulsion of the alien.[23] The application of Art. 5 para. 6 automatically led to the recognition of a 'humanitarian protection' to the asylum seeker, usually as an outcome of a refugee status determination procedure.

Humanitarian protection represented, therefore, a typical example of complementary protection (McAdam, 2007), aiming at protecting migrants, who could not be qualified as refugees or subsidiary protection beneficiaries, but in respect of whom a removal order would have violated other international and constitutional obligations. Both the administrative practice and the jurisprudence gradually included environmental and climate-related hazards within the meaning of humanitarian protection because of the application of the *non-refoulement* principle under international human rights law.

In 2015, the National Commission for the Right to Asylum, the highest administrative body in the context of refugee status determination (RSD) procedures, delivered to the Territorial Commissions for the Recognition of the International Protection an internal circular that examined in which cases humanitarian protection should have been recognized (National Commission for the Right to Asylum, 2015). The document, by directly recalling Articles 3[24] and 8[25] of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[26] and Article 7 of the International Covenant on Civil and Political Rights (ICCPR), included "serious natural calamities or any other local factor that hampers a safe and dignified repatriation" [27] (*Ivi*, p. 2) among the conditions leading to the application of Art. 5 para. 6 of the Legislative Decree No. 286/1998.

The applicability of humanitarian protection in the event of environmental disasters was later confirmed by a verdict of the Supreme Court of Cassation (Perrini, 2021). The Court

[21] "The Republic recognises and guarantees the inviolable rights of the person, as an individual and in the social groups where human personality is expressed, and expects that the fundamental duties of political, economic and social solidarity be fulfilled" (translated into English by the author).
[22] "The foreigner who is denied the effective exercise of the democratic liberties guaranteed by the Italian Constitution in his or her own country has the right of asylum in the territory of the Italian Republic, in accordance with the conditions established by law" (translated into English by the author).
[23] Art. 5 para 6 laid down that "The refusal or the revocation of the residence permit can also be adopted on the basis of international agreements or conventions, made executive in Italy, when the alien does not satisfy the conditions of residence applicable in one of the contracting States, *unless there are serious reasons, in particular of humanitarian nature or resulting from constitutional or international obligations of the Italian State* [emphasis added]" (translated into English by the author).
[24] "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."
[25] "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others" (translated into English by the author).
[26] Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4/11/1950 in Rome, entered into force 3/9/1953, ECHR).
[27] Translated into English by the author.

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ordered the release of a humanitarian residence permit in favour of a foreign citizen coming from the Niger Delta Region, whose area is characterized by a situation of serious environmental instability. The Cassation recalled in its decision the interpretation of Article 6 of the ICCPR provided by the Human Rights Committee in the Teitiota v. New Zealand case. As stated by the Court of Cassation, the judge, in addition to ascertaining the existence of an armed conflict in the country of origin, must assess whether the asylum seeker would be forcibly returned to "any context that is suitable for exposing his/her rights to life, freedom and self-determination to the risk of elimination or reduction below the minimum threshold, expressly included (…) the cases of environmental disaster, climate change and the unsustainable exploitation of natural resources"[28] (Supreme Court of Cassation, 1st Civil Section, Order of 12 November 2020, No. 5022).

Humanitarian protection was one of the main subjects of debate during the 2018 parliamentary election campaign, with right-wing parties heavily criticising its existence, which would have contributed to the 'invasion of illegal migrants'. As soon as a new government was established by the populist parties 'League' and 'Five Stars Movement' (M5S), the Minister of Interior Matteo Salvini put an end to this institution. Article 1 of Decree-Law No. 113/2018 (also known as 'Salvini Decree') repealed the humanitarian protection, removing any reference to serious humanitarian reasons and the constitutional and international obligations from Article 5 para. 6 of the Legislative Decree No. 286/1998. At the same time, the decree established a new 'special protection' (Art. 19)[29] only for victims of torture, persecution, and massive violations of human rights, narrowing the number of potential beneficiaries when compared to the previous humanitarian protection (Morandi, 2020).

In 2019, the government collapsed and was replaced by a new government with the participation of the M5S, the Democratic Party, and other left-wing parties. The new government – although chaired by the same Prime Minister, Giuseppe Conte – withdrew some of the provisions of the Salvini Decree. By enacting Decree-Law no. 130/2020 ('Lamorgese Decree')[30], a comprehensive form of complementary protection was reintroduced by substantially broadening the application and the content of special protection (Corsi, 2021; Rossi, 2021: 78-83).

[28] Translated into English by the author.

[29] "1. In no case whatsoever can the alien be expelled or rejected toward a State in which he or she can be object of persecution due to race, sex, language, citizenship, religion, political opinions, personal or social conditions, or can risk to be sent to another State in which he or she is not protected from persecution.
1.1. The rejection, expulsion or extradition of a person to a State is not permitted if there are reasonable grounds for believing that he or she would be in danger of being subjected to *torture* [emphasis added]. In assessing these reasons, the existence, in that State, of systematic and serious violations of human rights is also taken into account" (translated into English by the author).

[30] Decree-Law of 21 October 2020, No. 130, *Disposizioni urgenti in materia di immigrazione, protezione internazionale e complementare, modifiche agli articoli 131-bis, 391-bis, 391-ter e 588 del codice penale, nonché misure in materia di divieto di accesso agli esercizi pubblici ed ai locali di pubblico trattenimento, di contrasto all'utilizzo distorto del web e di disciplina del Garante nazionale dei diritti delle persone private della libertà personale* (G.U. of 21 October 2020, No. 261), converted into law of 18 December 2020, No. 173 (G.U. of 19 December 2020, No. 314), Decree-Law No. 130/2020 or 'Lamorgese Decree'.

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The modified special protection under the amended Art. 19 of the Consolidated Immigration Act[31] shall be granted to any individual whose return would contravene international and constitutional rules, including – but not limited to – prohibition of torture, inhuman or degrading treatment, prohibition of any form of discrimination and right to respect for private and family life (Carbone, 2021).

In the intention of the Legislator, special protection is likely to inherit at least the subjective applicability of humanitarian protection (Zorzella, 2021). Therefore, it can be assumed that protection of environmental and climate-displaced people, originally ensured by humanitarian protection, must similarly derive from the new provisions on special protection, as a direct consequence of the applicability of the *non-refoulement* principle to this category of displacement.[32]

Furthermore, the amended special protection grants a two-year residence permit and is convertible into a residence permit for work purposes, similarly to the previously in force humanitarian protection.

3.2. The New Residence Permit for Calamity

As previously outlined, the 'Salvini Decree' aimed at specifying and circumscribing exceptional cases of temporary residence permits for humanitarian needs, including by

[31] "1. In no case whatsoever can the alien be expelled or rejected toward a State in which he or she can be object of persecution due to race, sex, sexual orientation, gender identity, language, citizenship, religion, political opinions, personal or social conditions, or can risk to be sent to another State in which he or she is not protected from persecution.
1.1. The rejection, expulsion or extradition of a person to a State is not permitted if there are reasonable grounds for believing that he or she would be in danger of being subjected *to torture or to inhuman or degrading treatment or if the obligations referred to in Article 5, paragraph 6 are met* [emphasis added]. In assessing these reasons, the existence, in that State, of systematic and serious violations of human rights is also taken into account. The refoulement or expulsion of a person to a State is also not permitted if there are reasonable grounds for believing that removal from the national territory would involve a violation of the *right to respect for his or her private and family life* [emphasis adeded], unless it is necessary to reasons of national security, public order and security and health protection [...]. For the purposes of assessing the risk of violation referred to in the previous period, the nature and effectiveness of the family ties of the person concerned, his or her effective social integration in Italy, the duration of his or her stay in the national territory as well as the existence of family, cultural or social ties with his or her country of origin are taken into consideration.
1.2. In the event of rejection of the application for international protection, where the requisites referred to in paragraphs 1 and 1.1 are met, the Territorial Commission transmits the documents to the Quaestor for the issue of a residence permit for special protection. In the event that an application for the issue of a residence permit is submitted, where the requirements referred to in paragraphs 1 and 1.1 are met, the Quaestor, after consulting the Territorial Commission for the recognition of international protection, issues a residence permit for special protection *"* (translated into English by the author).

[32] To date no case-law has been registered on this regard. This is probably due to the brief period of time passed since the entry into force of the new provisions on special protection, since the previous legal framework on humanitarian protection has been applied to all cases related to international protection applications registered before 4 October 2018. See Supreme Court of Cassation, 1st Civil Section, No. 4890/2019.

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introducing a 'residence permit for calamity'.[33] The residence permit for calamity was issued "when the country to which the foreigner should return [was] in a situation of contingent and exceptional calamity that [did] not allow the return and stay in safe conditions", as laid out by the new Article 20 *bis* of the Consolidated Immigration Act.[34] The residence permit for calamity had a duration of six months, was renewable once, and was not convertible into a residence permit for work purposes.

Decree-Law No. 130/2020 intervened in the innovations made by Decree-Law no. 113/2018, without completely overturning its normative scheme (Biondi Dal Monte et al., 2021). The new government – similarly to what has been observed with regard to the special protection – maintained the residence permit for calamity but expanded its potential beneficiaries and increased its protection measures: Decree-Law no. 130/2020 replaced the formulation "contingent and exceptional" with "serious" calamity, removed the limitation referred to the renewal and introduced the possibility of conversion into a residence permit for work reasons.[35]

This intervention, although favourable in its aim, risks being counterproductive from the perspective of potentially affected migrants. As previously argued, the case of displaced people, for whom a calamitous situation (be it contingent or persistent, exceptional or serious) does not allow the return and stay in the country of origin, seems to be sufficiently covered by the new special protection, falling among those obligations of international law which lead to the application of the amended Art. 19. The application of Art. 20 *bis*, therefore, would result in unfair treatment, leading to the release of a six month-residence permit instead of a protection status with a duration of two years, severely reducing the possibility of integration of environmental and climate-displaced persons.[36] Paradoxically, the previous restrictive rule introduced by former Minister Salvini, limiting the scope of the residence permit for calamity to *contingent and exceptional* disasters, would seem to be

[33] It should be noted that the Government, both during the Parliamentary debate and within the legislative report, referred to the residence permit for calamity as permit for 'natural calamity'. However, it has been argued that Art. 20 bis of the Immigration Law could be applied both to natural and man-made disasters (Benvenuti, 2019: 27-28).

[34] "1. Without prejudice to the provisions of article 20, when the country to which the foreigner should return is in a situation of *contingent and exceptional calamity* [emphasis added] that does not allow the return and stay in safe conditions, the Quaestor issues a residence permit for calamity.
2. The residence permit issued pursuant to this article has a duration of six months, and is *renewable for a further period* [emphasis added] of six months if the conditions of exceptional calamity referred to in paragraph 1 remain; the permit is valid only in the national territory and allows to carry out work activities, *but cannot be converted into a residence permit for work reasons* [emphasis added]"

[35] "1. Without prejudice to the provisions of article 20, when the country to which the foreigner should return is in a situation of serious calamity [emphasis added] that does not allow the return and stay in safe conditions, the Quaestor issues a residence permit for calamity.
2. The residence permit issued pursuant to this article has a duration of six months, and is *renewable* [emphasis added] if the conditions of serious calamity referred to in paragraph 1 remain; the permit is valid only in the national territory and allows to carry out work activities" (translated into English by the author).

[36] In this regard, assuming the existence of two vulnerable applicants, one of which is affected by a serious calamity in his/her country of origin, any unfavourable treatment that would apply to the latter pursuant to Art. 20 bis would cause unfair discrimination between two similar situations.

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more adequate, applying only to provisional on-set disasters allowing repatriation in safety in the short run and, therefore, justifying a shorter duration of the residence permit.

Turning to procedural rules, the difference between the two residence permits is not negligible: both can be requested before the Quaestor or obtained as a result of a judicial appeal, but the special protection is usually recognized in the framework of a refugee status determination procedure, while the decision on the residence permit for calamity seems to be left to the discretion of the police authorities. In this regard, it is arguable that the Quaestor has neither the expertise nor the competence set by law to verify the condition in the country of origin and, therefore, it is unknown how the calamitous situation could be assessed. On the contrary, special protection is usually recognized at the end of a subjective evaluation of the applicant's vulnerability conducted by RSD experts.

The very little jurisprudence produced so far in the matter of residence permits for calamity has not clarified yet the innovative scope of Art. 20 bis and its difference from special protection. In the only related judicial decision known to date, a residence permit for calamity was granted to an Albanian national, taking into account that the applicant was "resident since 2018 in Italy together with her family (…) being integrated into the Italian social context" and "following the 2019 seismic event involving Albania, (…) lost her home". Therefore, "in the event of a return to her country of origin, she would [have been] exposed to a serious survival situation" [37] (Justice of the Peace of Bari, Order of 30 June 2021, No. 450). However, in line with the above, it can be argued that the Justice of the Peace of Bari could have reached another verdict, as this legal case likely met the requirements for the application of special protection provisions under Art. 19 of the Consolidated Immigration Act, including on the basis of her right to respect for private and family life pursuant to Art. 8 of the European Convention on Human Rights.

4. The French Legal Framework on International Protection and Residence of Third Country Nationals

4.1 General Legal Framework

The French legal system does not provide for a specific protection addressing climate-related displacement, nor does it mention any 'humanitarian protection' based on the non-refoulement or the prohibition of torture principle in general (Conte, 2021). It does provide for a number of residence permits dealing with specific grounds against expulsion.

The French doctrine and legal academy debated on the issue of climate-related displacement and the possibility of providing a specific form of protection to those displaced as a result of climate and environmental hazards. However, such a debate revolved mainly around international law and the possibility of conceiving an *ad hoc* status for this category of migrants, inspired by the structure of the 1951 Refugee Convention, namely the status of "réfugié climatique" (Cournil, 2007). However, the debate was confined to international law and did not affect the domestic legal framework, which has never seriously addressed the issue of climate and environmental displacement.

As none of the existing protection statuses would qualify for cases involving climate change and environmental disasters, the only possible route to encompass such phenomena under some forms of protection seems to establish grounds to ban

[37] Translated into English by the author.

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deportation of people facing the consequences of natural and climate disasters or atmospheric pollution (Cournil, 2005; Gonin et al., 2002; Gouget, 2006).

The French protection system is composed of four types of protection: first of all, the refugee status on the basis of the 1951 Refugee Convention;[38] secondly, the refugee status provided in the French Constitution, which, compared to the one based on the Refugee Convention, has a more political dimension and is oriented to protect those who take "an action to protect freedom" in their countries and are persecuted for this reason,[39] which means that concrete and proactive activity is required to have been taken from the applicant in order to fall within this status; there is the subsidiary protection, based on the relevant EU law provisions; and, finally, French law provides for a special status for those who fall within the mandate of the United Nation High Commissioner for Refugees (UNHCR). Under this status, the applicant is given a right to have full asylum status in France (based on articles 6 and 7 of the UNHCR Statute), like any other person recognised as a refugee by the Office Français de Protection des Réfugiés et des Apatrides (OPFRA) (Bourriez, 2022). To date, none of these statuses has been applied to cases involving climate and environmental disasters as a ground for their recognition (Cournil et al., 2015).

4.2 Residence permit for private and family life for health reasons: the decision of the Cour Administrative d'Appel de Bordeaux, 2ème chambre, of 18 December 2020

Beyond international protection, the French legal system provides a number of short-term/temporary residence permits covering specific situations.[40] Among these different residence permits, the relevant one for the object of this paper is the residence permit for 'private and family life'.[41] Such a permit is issued under a number of different conditions: third-country nationals in France for family reunification; third-country nationals living in France since the age of 13 with one or both parents; third-country nationals living in France or having completed at least one academic cycle; finally, third-country nationals whose state of health needs treatment.[42] In particular, the latter has revealed relevant for the topic of this paper.

Indeed, article 313-11 CESEDA states that "Unless their presence constitutes a threat to public order, the temporary residence permit bearing the mention 'private and family life' is issued automatically: To foreigners usually residing in France, if his/her state of health requires medical care, the failure of which could have exceptionally serious consequences for him/her and if, given the provision of care and the characteristics of the health system

[38] Art. L 511-1-L 511-9, Code de l'Entrée et du Séjour des Étrangers et du Droit d'Asile (CESEDA).
[39] Article L 711-1 CESEDA. The French National Court on Asylum has not provided a precise definition of the concept of 'action for freedom'. It includes different types of action made to protect rights and freedoms of people. However, it does have to include a personal, individual and proactive role of the applicant in order to fall under such a category (Lecoutre, p. 219).
[40] Such as, residence permit for study reasons; family reunification; internship; work reasons; professional activity; victims of human trafficking and smuggling (Morri, 2012; Pinto, Lamine, 2001).
[41] Article L 313-11 CESEDA, translated into English by the author.
[42] Article L 313-11- L 313-15 CESEDA; Articles R 313 -20 -R 313-34-4 CESEDA.

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in the country of origin, he/she could not effectively receive appropriate treatment there".[43]

The substantive requirements in order to obtain such a residence permit lie on the evaluation of the following criteria: a distress situation of exceptional gravity; the absence of treatments in the country of origin; having resided in France for at least one year.[44] The guidelines of the Ministry of public health indicate that the evaluation is based on individual analysis and the examination of different sources and documents related to the situation of the country of origin and takes into account the clinical state of the applicant together with the situation in the country of origin and the treatments available (Ministère des Affaires sociales et de la Santé, 2017).

The procedure to be followed in order to apply for this residence permit includes two levels of intervention: a medical one and an administrative one. The procedure starts with an application to the prefecture, which must include a medical certificate. The doctor having the applicant in charge shall then provide a medical opinion on the case, which has to be validated by the Ministerial Committee of Doctors (OFII) that has also to produce a medical opinion on the case. Eventually, the prefecture takes the final decision. The residence permit has a two year-duration, renewable according to the envisaged duration of the treatments for a maximum of 4 years (Veisse, 2006).

In December 2020, the administrative tribunal of Bordeaux examined a case that the media have defined "the first French climate refugee" (Bendasdon, 2021), even though the case might better fit the category of "environmentally-impacted migrant" (Tower, Plano, 2021), as the case related much more to environmental and pollution issues than on climate change strictly speaking.

The applicant, originally from Bangladesh, arrived in France in 2011 claiming he was fleeing persecution but stayed in the country as a rejected refugee, being able however to obtain a health residence permit on the ground of a respiratory disease requiring special treatment that was not available in his country of origin. In 2017, the Haute Garonne prefecture decided not to renew his residence permit and in 2019 issued him with a deportation order, as doctors following the applicant's case argued that adequate treatment was available in Bangladesh. The applicant appealed the decision and the tribunal of Bordeaux overturned it. The grounds for the tribunal's decision included an evaluation of the environmental conditions of the country of origin. In particular, the Bordeaux tribunal decided to renew the 'sick foreigner' residence permit that the applicant originally had as the pollution in Bangladesh would have worsened the applicant's respiratory disease and that the applicant would not have access to adequate treatment in his country of origin.

The case seems relevant in the light of a number of elements: first of all, it represents the first decision of this kind in France acknowledging the role of atmospheric and environmental elements against expulsion; secondly, for the first time in France, a tribunal

[43] Translated into English by the author.
[44] The lack of this requirement shall not constitute a ground for refusal, as article 313-24 CESEDA provides that the applicant may be issued a temporary renewable authorisation to reside on French territory for the duration of the treatments (*Ministère de l'Intérieur*, 2017).

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recognised that the environmental degradation may cause a violation of the right to health of the applicant and used it as a leading argument.

However, it must be acknowledged that the judgement reveals several limitations. As a number of lawyers and scholars observed, while the case is a step in the protection of environmental migrants, it is unlikely that this outcome will become frequent unless the criteria for asylum are broadened. Indeed, the requirements to fit in the residence permit of the case are quite strict and do not consider a broad spectrum of consequences on the life of the applicant, but only extreme consequences on his state of health (Bendasdon, 2021).

5. Conclusion

Decree-Law No. 113/2018 has radically changed the legislative landscape of international protection in Italy. The subsequent Decree-Law no. 130/2020 intervened to correct some of the distortions that had been created, in particular by re-establishing a comprehensive form of complementary protection (special protection). The residence permit for calamity was introduced in 2018 to fill the protection gap created by the repeal of humanitarian protection. However, by broadening the scope and content of the special protection under Article 19, the new government has removed that gap and the residence permit for calamity appears to be unnecessary or even dangerous. At a closer look, two different conceptions of protection for environmental and climate-related migrants could be identified: On the one hand, there is the evaluation of the objective cause considered as triggering displacement, responding to the need to typify protection, usually leading to a restrictive application (i.e. residence permit for calamity). On the other hand, we witness the assessment of the applicant's subjective condition through a human rights-based determination process, consisting of a comprehensive analysis of his/her vulnerability (i.e. humanitarian and special protection).

The French case is of a different nature. Indeed, beyond international protection statuses, the domestic legal framework does not provide for a broad non-refoulement-based protection, but rather offers a highly specific and typified list of residence permits protecting third-country nationals from expulsion. Because each of these residence permits is based on a narrow list of grounds, and none of them mentions climate or environmental reasons, there is little room for including the latter as reasons to issue such residence permits. This represents the main criticism with regards to the Bordeaux tribunal decision. It is indeed evident that the decision is based on a number of factors specific to the applicant's case, involving first and foremost the requirement that his or her health be involved and negatively affected in case of return to the country of origin. It is obvious that not all people fleeing their country as a result of climate and environmental phenomena would satisfy such a requirement, and that consequences on health represent only one aspect of the general issue. Eventually, this means that the decision will positively affect a minority of persons displaced for such reasons, showing all the limitations of the absence of a comprehensive and broad-spectrum protection.

The comparison between Italian and French approaches to the phenomenon of climate and environmental-related displacement suggests that complementary protection regimes having a broader spectrum, and complying with International Human Rights Law would likely prove more efficient for those displaced people.

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Protection regimes based on a comprehensive evaluation of individual vulnerability - rather than on the severity of the environmental or climate-related event (such as the Italian residence permit for calamity) or on certain specific adverse effects arising from it (including the French residence permit for private and family life) - seem to be more adequate to fill the protection gaps in International Law. This is due to several reasons.

Firstly, environmental and climate disasters function as a multiplier of pre-existing vulnerabilities, in addition to triggering new threats. This means that the same disaster is likely to have a different impact on involved individuals, depending on their pre-existing conditions (Ionesco et al., 2017: 90-91; Hunter et al., 2011), resilience and adaptive capacity (IPCC, 2014; McLeman et al., 2010). Therefore, a protection or deportation decision based exclusively on the severity of the event would not adequately take into account this differentiated impact.

Secondly, the decision to migrate is a complex choice, involving both economic and non-economic factors (Geddes et al. 2012). The distinction between voluntary and forced migration in the context of environmental and climate hazards is extremely difficult (Hugo, 1996). This evaluation must be carried out by considering pre-existing and arising individual vulnerabilities.

The need for protection, therefore, should be determined through a comprehensive and comparative assessment, taking into consideration all human rights potentially at risk in the event of repatriation. Any partial assessment would not reflect the indivisibility and interdependency of human rights.

The Italian special protection under Art. 19 of the Consolidated Immigration Act seems the most appropriate protection tool which has been examined as it explicitly takes into account the individual human rights of the asylum seekers (including, but not limited to, the right to respect for private and family life) as well as the level of integration in the host country.

This lesson can arguably be extended to additional national systems as well as to the international legal framework. Rather than proposing *ad hoc* protection regimes by adopting new international protocols, conventions or guidelines on environmental and climate-displacement, which could prove useless or counterproductive, an evolutive interpretation of current international legal tools and customary norms (in particular, the *non-refoulement* principle) through a human rights-based approach should be consolidated, extending their applicability to vulnerabilities emerging from climate change and environmental degradation.

Legal research might play a key role in this process by refocusing its efforts from the objective cause assumed as triggering displacement to the arising individual vulnerability. As a first result, this would entail the irrelevance and the overcoming of certain defining issues, which have characterised and partially congested the doctrinal debate on environmental migration and climate displacement to date. Furthermore, assessing immigration and asylum systems according to the level of protection afforded to environmental and climate-displaced people and promoting best practices would contribute to fostering a dynamic interpretation of existing legal tools.

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