Subsidiary protection in the context of climate change and natural disasters: From theory to practice

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1. *Introduction*

The legal regime currently applicable to climate and environmental migrants within the framework of International and EU law is still the subject of ongoing and lively debate.[1] Even the definitions of 'climate migrant' and 'environmental migrant' remain uncertain and are still under discussion in academic literature.[2] According to the International Organization for Migration (IOM), 'environmental migrants are persons or groups of persons who, predominantly for reasons of sudden or progressive change in the environment that adversely affects their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their

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[1] See, among others, B Mayer 'The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework' (2011) 22 Colorado J Intl Environmental L & Policy 2; B Felipe Pérez, 'Beyond the shortcomings of international law: a proposal for the legal protection of climate migrants' in S Behrman, A Kent (eds) *'Climate Refugees' Beyond the Legal Impasse?* (Routledge 2018) 214-230; A Kleiman 'Climate Displacement and Human Rights: Rectifying the Current Legal Protection Lacuna through International and Regional Solutions' (2023) 27 Intl J Human Rights 552.

[2] See SA Atapattu 'A New Category of Refugees? "Climate Refugees" and a Gaping Hole in International Law' in S Behrman and A Kent (eds), *'Climate Refugees' Beyond the Legal Impasse?* (Routledge 2018) 40; GS Goodwin-Gill and J McAdam, 'The Refugee in International Law' (Routledge 2021) 636-639; M Lulić, D Muhvić, I Rešetar Čulo, 'In Support of the Debate on the Terminology Related to the Terms Climate Refugees, Climate Migrants, Environmental Migrants, Environmentally Displaced Persons and Similar Terms' (2023) 7 EU and Comparative Law Issues and Challenges Series (ECLIC) 3.

country or abroad'.[3] On the other hand, the term 'climate migration' should refer to the same concept, with the only difference being that environmental degradation is a result of climate change.[4]

What is undisputed is that, to date, there is no legally binding instrument under International or EU law specifically dedicated to this category of persons, nor is any distinct legal status identifiable.

This legal gap persists despite the alarming global extent of the phenomenon and its steady rate of growth. It is estimated that around 9.8 million people are currently displaced due to natural disasters.[5] Furthermore, the IOM predicts that by 2050 around 216 million people could be forced to leave their homes largely due to climate change.[6]

So, the question is: what protection can be guaranteed to climate and environmental migrants?

Firstly, in mapping the legal frameworks potentially applicable in this regard, it is worth noting that International Human Rights Law has already demonstrated a certain degree of relevance. This has been made possible through an evolutionary interpretation of the rules protecting a series of fundamental rights, which can undoubtedly be compromised by environmental or climate factors, even in the absence of a specific mention of these aspects in the provisions under consideration.[7] In particular, in the context of human mobility due to climate change or natural disasters, quasi-judicial mechanisms and regional Courts for the protection of

[3] IOM, 'Discussion Note: Migration and the Environment' (2007) MC/INF/288; 'Climate Change, Environmental Degradation and Migration' in *International Dialogue on Migration* (2012) 18; 'Outlook on Migration, Environment and Climate Change' (2014).

[4] IOM, 'Warsaw International Mechanism, Executive Committee, Action Area 6: Migration, Displacement and Human Mobility – Submission from the International Organization for Migration' (2016); M Traore Chazalnoël, D Ionesco, 'Defining Climate Migrants – Beyond Semantics' (*IOM Weblog* 6 June 2016) <https://weblog.iom.int/defining-climate-migrants-beyond-semantics>.

[5] Internal Displacement Monitoring Centre, 'Global Report on Internal Displacement' (2025).

[6] IOM, 'World Migration Report?' (2024).

[7] Climate change can have an adverse and significant impact on the enjoyment of the most basic human rights, such as the right to life, to adequate housing, to food, to potable water, to cultural identity, to self-determination, and to nationality (as a prevention of statelessness). See recent HRC resolutions all titled 'Human Rights and Climate Change': UN Docs A/HRC/35/20 (2017); A/HRC/38/4 (2018); A/HRC/RES/41/21 (2019); A/HRC/RES/44/7 (2020); A/HRC/RES/47/24 (2021).

human rights have considered both the responsibility of the country of origin[8] – regarding the period during which individuals remain in the affected territory – as well as the responsibility of the country of destination[9] – for cases where people move to another country.

Turning to another regime and considering International Refugee Law, it should first be clarified that the term 'climate refugee' is misleading and technically incorrect.[10] The refugee definition, as set forth in Article 1 of the 1951 Geneva Convention,[11] does not generally apply to environmental and climate migrants. There are various reasons for this exclusion. Firstly, it is extremely problematic to identify a *persecution* in such situations, or to recognise any of the *grounds for persecution* exhaustively listed in the provision. Moreover, it should also be noted that this

[8] On 23 September 2022, the UN Human Rights Committee ruled in favour of a group of Torres Strait Islanders, concluding that Australia's decision to forcibly relocate them to another region as a consequence of insufficient or too late adoption of mitigation measures to combat climate change violated their rights to enjoy their culture (Art 27 ICCPR) and their right to private and family life (art 17 ICCPR). See: HRC, *Daniel Billy and others v Australia (Torres Strait Islanders)*, App no 3624/2019 (22 September 2022).

[9] The landmark case of *Teitiota v. New Zealand* has addressed the duties that may arise upon the State of destination in the context of climate change migration, including the principle of *non-refoulement*: the State concerned has the obligation not to return a person when the push-back to the country of origin implies a risk of irreparable harm, which could be identified with the total deprivation of a series of basic social, economic, and cultural rights as a consequence of climate change, leading to a general impossibility to conduct a 'decent life'. The threshold set is thus particularly high. See: HRC, *Teitiota v New Zealand*, App no 2728/2016 (24 October 2019). For a comment, see A Maneggia, 'Non-refoulement of Climate Change Migrants: Individual Human Rights Protection or 'Responsibility to Protect'? The Teitiota Case Before the Human Rights Committee' (2020) 2 Diritti Umani e Diritto Internazionale 635; 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' (2020) 75 QIL-Questions Intl L 7; E Sommario, 'When Climate Change and Human Rights Meet: A Brief Comment on the UN Human Rights Committee's Teitiota Decision' (2021) 77 QIL 57; L Salvadego, 'The Right to Enjoy a Life with Dignity and the Non-refoulement Obligation in the Context of Climate-induced Migration', in this Zoom-out.

[10] J McAdam, 'Moving beyond Refugee Law: Putting Principles on Climate Mobility into Practice' (2022) 34 Intl J Refugee L, 440-448; R Goyal, 'Environmental Refugees - Error 404: Not Found in International Law' *Border Criminologies* (13 July 2020) <www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/07/environmental>.

[11] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Geneva Convention) art1(a).

kind of migration is often internal to the State of origin, and that these persons do not always move out of necessity, but also by choice. These elements preclude the recognition of the refugee status. After all, expanding the definition of refugee to include climate-induced displacement would ultimately result in prioritising other risks (such as extreme poverty) over the climate-environmental factor, and therefore, does not seem to be the key to enhancing protection for this group of people.[12]

However, in some peculiar cases, the combination of the effects induced by climate change or natural disasters and other related political, social, and economic factors can lead to the fulfilment of the requirements of the refugee definition.[13] Such exceptions may concern, for example, cases where the effects of climate change could exacerbate alarming conditions of violence in certain contexts,[14] or cases where certain individuals are persecuted by their country of origin precisely because they are engaged in political campaigns to combat climate change.[15] Furthermore, certain ethnic, linguistic, or religious groups may face discrimination in their country of origin in the provision of essential goods and humanitarian assistance, which have become necessary due to natural disasters.

Apart from these exceptions, the application of the Geneva Convention seems to remain residual and limited to specific cases in the field of environmental and climate migration.

Another legal instrument that could be explored in this respect is the temporary protection regime under EU law, which was designed to deal with the mass influx of displaced persons from third countries who can-

[12] J McAdam, 'Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer' (2011) 23 Intl J Refugee L 13.

[13] UNHCR, 'Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters' (1 October 2020) para 2 <www.refworld.org/policy/legalguidance/unhcr/2020/en/123356>.

[14] An excellent example is the case of Sudan, where the combined effects of civil war, severe drought, and desertification have caused devastating consequences for the population. See A Laughlin, FA Galgano, 'Spatial and temporal patterns of drought and violence in Darfur, Sudan' (2025) 34 African Security Rev 60.

[15] See, for example, the frequent attacks and persecution directed to journalists engaged in political campaigns against climate change. See B Trionfi, 'Climate and Environmental Journalism under Fire: Threats to Free and Independent Coverage of Climate Change and Environmental Degradation' (International Press Institute 2024) 19-34.

not return to their country of origin and require immediate and temporary protection. Given the target group and the substantial purpose of this mechanism, it could, in theory, be useful to address environmental and climate migration.[16] However, upon considering its implementation in this specific context, this system presents significant limitations in terms of application requirements and procedure. Firstly, temporary protection requires a mass influx of people, meaning that individuals or groups of individuals fleeing severe environmental degradation are not eligible. Secondly, the protection is only temporary, whereas in several regions, natural disasters are frequent and have long-lasting effects due to a lack of resources for prevention, making the temporary nature of the protection inadequate. Thirdly, the activation of temporary protection necessitates a complex decision-making process involving the European Council and a proposal from the European Commission. This highlights the exceptional nature of the mechanism, which has only been activated once to date. Consequently, it is not currently capable of providing effective protection to climate and environmental migrants.[17]

Furthermore, within the framework of domestic legal systems, other forms of protection can be found in State practice. Indeed, States may decide to institute visas, and residence permits specifically dedicated to people displaced due to climate change or natural disasters.[18] However, the implementation of these measures varies significantly across countries in terms of the timing and modality of permit release, the requirements to be met, and the content and duration of the protection offered.

[16] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212/12 (Temporary Protection Dir). See arts 1(c) and 2(c).

[17] See G Morgese, 'Environmental migrants and the EU Immigration and Asylum Law: is there any chance for protection?' in GC Bruno, FM Palombino, V Rossi (eds), *Some Reflections on Current Legal Issues and Possible Ways Forward* (CNR Edizioni 2017) 55-56; F Passarini, 'La tutela dei migranti ambientali nel diritto dell'Unione europea: l'impatto dei recenti sviluppi della prassi giurisprudenziale nazionale e internazionale' (2024) 21 Diritto Pubblico Europeo - Rassegna Online 504.

[18] One example is the residence permit for natural disasters introduced in Italy in 2018. On the shortcomings of this instrument, see C Scissa, 'Il permesso di soggiorno per calamità: un aggiornamento sulla sua applicazione, numeri e beneficiari' *QuestioneGiustizia* (20 November 2024) <www.questionegiustizia.it/articolo/permesso-soggiorno-calamita>.

Moreover, with regard to inter-State relations in this field, various regional instruments and programmes[19] have been adopted over the last decade, and specific 'human mobility pathways' have been established between two or more States through bilateral agreements.[20]

In this highly diversified and constantly evolving context, which will not be analysed exhaustively, this paper aims to examine the applicability of subsidiary protection under Article 2(f) of the EU Qualification Directive[21] to the category of climate and environmental migrants. To this end, after providing an overview of this legal instrument (section 2), this paper seeks precisely to verify its concrete scope of application in the context of climate and environmental migration, through an analysis of its constituent elements and the relevant European and national case law developed on the matter (section 3).

2. *Subsidiary protection: An overview*

According to Article 1(f) of Directive 2011/95/EU ('Qualification Directive'):

> '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

[19] See *The Nansen Initiative* (Geneva, 12–13 October 2015); *Regional Guidelines on Protection and Assistance for Persons Displaced across Borders and Migrants in Countries affected by Disasters of Natural Origin* (South American Conference on Migration, 2018); *Kampala Ministerial Declaration on Migration, Environment and Climate Change* (Intergovernmental Authority on Development, the East African Community, and States of the East and Horn of Africa, 29 July 2022); *Pacific Regional Framework on Climate Mobility* (Rarotonga, Cook Islands, 10 November 2023).

[20] One example is the 'human mobility pathway' established between Australia and Tuvalu through the bilateral 'Falepili Union Treaty', signed on 9 November 2023 and entered into force on 28 August 2024, which aims to address the progressive sea-level rise and coastal erosion in Tuvalu. See C Schofield, F Anggadi, 'The Australia-Tuvalu Falepili Union Treaty: Opportunities and Controversies' (2024) 9 Asia-Pacific J of Ocean L & Policy 85, 89-90.

[21] 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) [2011] OJ L 337/9 (Qualification Dir).

> concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering *serious harm* as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country'.[22]

Subsidiary protection, therefore, applies in cases where the conditions for granting refugee status are not met and return would expose the individual to a 'real risk of suffering *serious harm*'.[23] The types of serious harm are exhaustively listed in the Directive. These are death penalty or its execution,[24] torture or other inhuman or degrading treatment or punishment,[25] and, finally, a serious and individual threat to a civilian's life or person because of indiscriminate violence in situations of international or internal armed conflict.[26]

The Directive also requires the perpetrator of the serious harm to be identified. In other words, for serious harm to be recognised as such and lead to the granting of subsidiary protection, it must be caused by one of the following three actors: '(a) the State; (b) parties or organisations controlling the State or a substantial part of the territory of the State; (c) non-State actors – if it can be demonstrated that the actors mentioned in points (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7'.[27]

According to some authors, it is precisely because of this element that subsidiary protection should not be considered the most appropriate instrument for ensuring adequate protection to environmental and climate migrants. It would indeed be difficult to prove that climate, environmental degradation, or a natural disaster is the result of a specific and intentional conduct of the country of origin[28] or that it depends on a man-

[22] Qualification Dir (n 21) art 2(f).
[23] ibid.
[24] ibid art 15(a).
[25] ibid art 15(b).
[26] ibid art 15(c).
[27] ibid art 6(c).
[28] See Passarini (n 16) 503-504.

made behaviour.[29] However, these situations could be the consequence, at least in part, of *human behaviour* in the form of specific government policies, the absence or inadequacy thereof, and their consequent environmental impact, as will be discussed in more detail below. Furthermore, under Article 6 of the Qualification Directive, it is not mandatory to identify the State as the perpetrator of the serious harm[30]. Therefore, the State of origin must be recognised as *responsible*, either for contributing to the serious harm or for failing to protect its citizens against it when caused by a different party.

Article 6 also applies to the concept of persecution, which qualifies the refugee definition. However, an important difference between persecution and serious harm is that the latter is independent of the reasons that caused it. By contrast, persecution is only relevant if strictly linked to one of the grounds of persecution.[31] It is a significant detail in this context as subsidiary protection exempts the applicant from proving that he or she would suffer serious harm due to an individual condition. This would be challenging to demonstrate in the case of climate or environmental migration, since these phenomena indiscriminately affect populations residing in certain territories.

In any case, the only types of serious harm that could be relevant in this context are those referred to in Articles 15(b) and (c).

About serious harm under Article 15(b) ('torture or other inhuman or degrading treatment or punishment'), it should first be noted that the letter of this provision reflects Article 3 ECHR. This has led to questioning whether the scope of application of the provisions is the same, i.e. whether a person eligible for protection under Article 3 ECHR should automatically be granted subsidiary protection. Clearly, subsidiary protection implies additional constitutive elements, such as the identification

[29] S Borras-Pentinat, A Cossiri, 'La protezione giuridica dei migranti forzati per la causa climatica all'incrocio degli ordinamenti giuridici' (2024) 3 Diritto, Immigrazione e Cittadinanza <www.dirittoimmigrazionecittadinanza.it/archivio-saggi-commenti/saggi/fascicolo-n-3-2024-1/1606-la-protezione-giuridica-dei-migranti-forzati-per-causa-climatica-all-incrocio-degli-ordinamenti-giuridici/file>; Morgese (n 16) 53-54.

[30] Qualification Dir (n 21) art 6(c).

[31] 1951 Geneva Convention (n 11) art 1(a).

of the author of serious harm under Article 6 of the Qualification Directive. Consequently, the answer can only be negative.[32] However, the ECtHR case law on Article 3 ECHR is undoubtedly relevant for the criteria developed for identifying 'torture or other inhuman or degrading treatment or punishment'.[33]

It is also important to highlight the evolution of the CJEU case law on the matter. Initially, the CJEU explicitly stated that serious harm under letter (b) must result from the behaviour of a third party rather than simply arising from 'systemic deficiencies in the country of origin'.[34] Subsequently, the CJEU ruled that inhuman and degrading treatment under letter (b) may be recognised even in the absence of a direct action by the State, when an individual wholly dependent on State support finds himself 'irrespective of his wishes and personal choices, in a situation of *extreme material poverty* that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a *state of degradation incompatible with human dignity*'.[35] Therefore, the CJEU ruled that, when the situation in the country of origin exceeds a high threshold of severity, such as to constitute living conditions *incompatible with human dignity*, the serious harm must be positively ascertained, regardless of whether it is attributable to the State or other actors.

Therefore, in both cases, the CJEU requires recognition of a certain degree of responsibility of the country of origin, either in the form of direct and intentional action by the State in causing the serious harm, or in the form of the impossibility of protecting the applicant from serious harm not caused by the State itself. Both scenarios could arise in the case of climate and environmental migration.

[32] Case C-465/07, *Meki Elgafaji, Noor Elgafaji v. Staatssecretaris van Justitie* [2009] para 28, which states: 'Article 15(c) of the Directive is a provision, the content of which is different from that of Article 3 of the ECHR, and the interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR'.

[33] ibid.

[34] Case C-542/13 *Mohamed M'Bodj v Belgium* [2014] paras 35, 41; See also Case C-353/16, *MP v Secretary of State for the Home Department* [2018] para 51.

[35] Case C-163/17, *Abubacarr Jawo v Bundesrepublik Deutschland* [2019] para 92; see also *M.S.S. v Belgium and Greece*, App no 30696/09 (ECtHR, 21 January 2011) paras 252-263.

Firstly, the existence of State action could be presumed in cases where the State has concretely contributed to climate and environmental degradation or a natural disaster through its active or omissive conduct.[36] This may include the State's inability to prevent or mitigate natural disasters due to a lack of specific and adequate policies and programmes to this end.[37] It should be noted that the CJEU has never considered the State to be the perpetrator of serious harm in this sense under Article 6 of the Qualification Directive. However, some reflections on this point can be found in the domestic case law of EU Member States, as will be explained below.

The second scenario considered by the CJEU only pertains to situations involving *extreme material poverty*, where fundamental rights are severely impaired and the State is either unable or unwilling to provide effective protection. Such situations may also be entirely dependent on climate or environmental hazards, particularly in cases of extreme weather events or large-scale natural disasters. According to CJEU case law, although not directly related to this specific context, in such cases, it is not necessary to identify the author of the serious harm; thus, the applicant would be exempt from this burden of proof.[38]

With regard to the definition of 'serious harm' under letter (c) ('a serious and individual threat to a civilian's life or person because of indiscriminate violence in situations of international or internal armed conflict'), the CJEU set out some guidelines for interpreting this complex concept in the landmark *Elgafaji* case.[39] Notably, the Court determined that proof of a specific and individual threat relating to the applicant's

[36] V Kolmannskog, F Myrstad, 'Environmental Displacement in European Asylum Law', (2009) 11 Eur J Migration & L 321.

[37] This duty involves the implementation of measures such as the reduction of greenhouse gas emissions or water desalination plans, all aimed at making the territory of the State habitable for as long as possible, thus respecting the citizens' 'right to remain'. These preventive measures are also recalled by art 7 of the 2015 Paris Agreement (Paris, 12 December 2015, entered into force on 4 November 2016). Even the ECtHR has elaborated a series of positive obligations for States parties in terms of preventing the adverse effects of climate change (see *Klima VereinSeniorinnen Schweitz v Switzerland*, App no 53600/20 (ECtHR, 9 April 2024) paras 332-336).

[38] See (n 35).

[39] Case C-465/07, *Meki Elgafaji, Noor Elgafaji v. Staatssecretaris van Justitie* [2009].

situation is not required if the level of indiscriminate violence is particularly high. Conversely, this proof is necessary when the degree of violence does not reach such a severe level.[40]

The CJEU has therefore elaborated the *sliding scale* theory[41], according to which: '[…] the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection'.[42]

Section 3.2. will explore the specific relevance of this concept when climate and environmental factors interact with, or exacerbate, an existing internal or international conflict or a post-conflict situation to recognise subsidiary protection under letter (c).

3. *Granting subsidiary protection to climate and environmental migrants*

This section examines how the concepts of *serious harm* under letters (b) and (c) can apply to climate-related and environmental migration and how Member States' domestic Courts have interpreted them. Some rulings from Italy and Austria will be analysed in this respect. It should be recalled that the instrument of subsidiary protection, being provided in an EU directive, obviously needs to be transposed into national legislation in order to become operational.[43] Consequently, its implementation necessarily depends on the national transposing legislation, which may be more or less consistent with the directive itself, as will be discussed in the following paragraphs.

[40] ibid para 35.

[41] See UNHCR, 'Safe at last? Law and Practice in selected EU Member States with respect to asylum-seekers fleeing indiscriminate violence' (2011) 49-54; A Guerrieri, 'La valutazione dell'intensità degli scontri ai fini del riconoscimento della protezione sussidiaria 'lettera c'' (2022) 2 Diritto, Immigrazione e Cittadinanza 35-38; C Querton, 'Protection from Indiscriminate Violence in Armed Conflict: The Scope of Subsidiary Protection in the European Union' (2025) 20 Intl J Refugee L 1.

[42] Case C-465/07, *Meki Elgafaji, Noor Elgafaji v Staatssecretaris van Justitie* [2009] para 39; Case C-285/12, *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides* [2014] para 31.

[43] In Italy the Qualification Dir has been transposed through the Legislative Decree No 18 of 21 February 2014. Austria fulfilled its obligation to implement Dir 2011/95/EU through amendments and additions to the Asylum Act 2005.

3.1. *Domestic case law recognising subsidiary protection under letter (b)*

The analysis of domestic case law will start with an overview of some Italian cases in which subsidiary protection under letter b) was granted, taking into account climatic and environmental factors.

A landmark ruling in this regard was issued by the Court of Appeal of Naples on 22 May 2019.[44] The case concerned an applicant forced to leave Nigeria after his father and three brothers were killed by the village chief's men for refusing to give up part of their land, on which an oil field had been discovered (a phenomenon known as *land grabbing*).

The Court firstly described the oil exploitation system in the Niger Delta, highlighting the significant environmental, social, and economic damage caused by multinational oil companies operating in the region. In particular, it emphasised that oil extraction had caused pollution of the water basin and land, spread disease, destroyed subsistence crops, and expropriated land from local communities, thereby creating tensions and clashes among the population.[45] In this context, the Court granted subsidiary protection under letter (b)[46] based on a series of elements. Firstly, the fact that, upon return, the applicant would have been certainly exposed to inhuman and degrading treatment by the village chief's men (the same reserved for his family). Secondly, the Court emphasised that this situation would have been aggravated by the natural disasters affecting the region (environmental factor). Lastly, the Court recognised the responsibility of the State of origin based on lack of protection in relation to both issues.[47]

In summary, both the environmental factor and the danger to life posed by the alleged reprisals of the village king's men were decisive. These circumstances were closely interlinked: the violent appropriation

[44] Court of Appeal of Naples, Judgment No 2798/2019 (22 May 2019).

[45] ibid 2-4.

[46] Legislative Decree No 251/2007 art 14(b).

[47] Court of Appeal of Naples, Judgemt No 2798/2019 (22 May 2019) 4. However, in a subsequent ruling on a very similar case, the Court of Cassation found that the conditions for subsidiary protection were not met and recognised humanitarian protection (Court of Cassation, Judgment No 5022/2021). For a critique, see A Del Guercio, 'Migrazioni connesse con disastri naturali, degrado ambientale e cambiamento climatico: sull'ordinanza n. 5022/2020 della Cassazione italiana' (2021) 15 Diritti Umani e Diritto Internazionale 531.

of land was motivated by intensive oil exploitation in the region. Therefore, the Court rightly considered the two situations together and identified them as serious harm under letter (b).

In a more recent judgment, the Tribunal of Milan recognised the same form of protection (subsidiary protection under letter (b)) to a Bangladeshi applicant, this time primarily considering the consequences of natural disasters.[48] The facts concern a citizen from Bangladesh who lived there with his family and had been forced to move several times due to the continuous flooding in the area since 1998, incurring debt each time to rebuild his home. The Court observed that '[…] the various (gradual or sudden) environmental and natural phenomena […] affecting the applicant's area of origin, may have the effect of compromising a wide range of rights, both civil (right to life, physical integrity, health and a healthy environment) and socio-economic rights (right to food, housing and minimum living conditions) […] so the applicant, suffering the negative effects of floods and atmospheric phenomena, […], in the event of a return, would find himself living *without the means of subsistence* and in […] a *degrading existential condition*'.[49] This overall situation, entirely dependent on continuous flooding, has therefore been classified as inhuman and degrading treatment. The Court also stated that Bangladesh was not taking sufficient measures to prevent, mitigate, or respond to climate change, or to protect its citizens from its impact. Consequently, the Tribunal recognised serious harm under letter (b), considering, on the one hand, the deprivation of basic rights due to the effects of climate change, and, on the other hand, the inaction or inadequate action of the State.[50]

The interesting aspect of this ruling, therefore, lies in the emphasis placed on the State's contribution to causing environmental degradation and natural disasters through its omissions or insufficient action. This aspect was highlighted even though the situation to which the applicant would have been exposed in case of return would likely qualify as *extreme*

[48] Tribunal of Milan, Decree 13 March 2024. For a comment, see also F Biondi Dal Monte, C Scissa, 'Forme di protezione internazionale e complementare per fattori climatico-ambientali di migrazione' in M Di Pierri, M Marano, *Migrazioni ambientali e crisi climatica* (Le rotte del clima IV edn 2025) 182-184.

[49] Tribunal of Milan, Decree 13 March 2024, 16 (translated by the author).

[50] Art 6 of the Qualification Dir on 'Actors of persecution or serious harm' was transposed into Italian law through art 5 of Legislative Decree No 251/2007.

material deprivation, for which the CJEU does not require identifying the serious harm's author.[51]

With regard to the Austrian case law, it is worth highlighting a series of rulings concerning Somali applicants,[52] in which the climate-environmental factor (recurrent droughts) played a decisive role in recognising subsidiary protection under letter (b), without the need to explore other grounds.[53]

In particular, in these cases, the precarious living conditions in Somalia – characterised by food crises, extremely inadequate healthcare, lack of access to drinking water, and the absence of a functioning sewage system, all consequences of recurrent droughts – have been classified as inhuman and degrading treatment under letter (b). Furthermore, the decisions of Austrian Courts regarding Somali applicants have evolved alongside changes in weather conditions in the region. For instance, after the spring of 2018, when the drought was alleviated by rainfall, appeals were rejected more frequently,[54] confirming that the climate-environmental factor was the key element in the recognition of subsidiary protection in this context.

However, one criticism towards these judgments is that, in all cases, the legal reasoning failed to address the question of identifying the author of the serious harm. This is because Austrian legislation does not require this element, as Article 6 of the Qualification Directive has not been transposed into national law.[55] Consequently, in the Austrian legal system, the relevant threshold for granting subsidiary protection aligns with that of Article 3 ECHR.[56] In other words, if returning an individual to

[51] See (n 35).

[52] Cases: W 149 14168447-1 (2016); W251 2137996-1 (2017); W211 2172503-1 (2018); W236 2166107-1 (2018)

[53] W211 2172503-1 (2018).

[54] M Mayrhofer, M Ammer, 'Climate Mobility to Europe: The Case of Disaster Displacement in Austrian Asylum Procedures' (2022) Frontiers in Climate 13.

[55] See art 8 of the 2005 Austrian Asylum Act. On the issue, see M Ammer, M Mayrhofer, M Scott, 'SYNTHESIS REPORT. ClimMobil - Judicial and Policy Responses to Climate Change-related Mobility in the European Union with a Focus on Austria and Sweden (KR18AC0K14747)' (2022) 5-6.

[56] See (n 55) 13. On the relationship between the principle of non-refoulment under art 3 ECHR and subsidiary protection under Austrian law, see M Ammer, M Mayrhofer, 'Cross-Border Disaster Displacement and *Non-Refoulement* under Article 3 of the ECHR: An Analysis of the European Union and Austria' (2023) 35 Intl J Refugee L 322.

their country of origin entails a real risk of ill-treatment as defined in Article 3 ECHR, it is presumed that subsidiary protection would be granted automatically.[57]

Therefore, Austrian case law should be considered with extreme caution, bearing in mind its exceptional nature, which stems from a deficient implementation of the Qualification Directive.

3.2. *Interactions between conflicts and climate change in the recognition of subsidiary protection under letter (c)*

The negative consequences of climate change can exacerbate an already devastating reality characterised by ongoing conflict or worsen the living conditions of displaced communities. In both scenarios, this impact could be disproportionate, resulting in a shortage of basic resources such as stable housing, security, institutional support, and access to essential services. Moreover, those facing internal or international conflict, or displaced as a result of it, clearly struggle to prepare for, adapt to, or recover from natural disasters such as floods, droughts, storms, cyclones, and heatwaves.[58]

Therefore, it is interesting to explore the cases in which the interconnection between climate change and conflict has resulted in the granting of subsidiary protection under letter (c), which relates to a serious harm defined as 'an individual threat to a civilian's life or person because of indiscriminate violence in situations of international or internal armed conflict'.

The analysis of Italian case law seems quite relevant in this regard.

[57] Examining the ECtHR's case law in relation to a potential repatriation of individuals to Somalia, a recognition, albeit minimal, of the impact of environmental degradation on the overall conditions in that country was evident in *Sufi and Elmi v United Kingdom*. The Court acknowledged that recurring drought had contributed to Somalia's insecurity and instability, although armed conflict was recognised as the main cause of the State's worrying humanitarian conditions. See: *Sufi and Elmi v United Kingdom*, App nos 8319/07 and 11449/07 (ECtHR, 28 June 2011) paras 282, 291; see also 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?' (2014) 26 Intl J Refugee L 404.

[58] UNHCR, *No Escape – On the frontlines of climate change, conflict and forced displacement* (2024).

For example, on several occasions, subsidiary protection has been granted under letter (c) to applicants from the Niger Delta region. This has been possible due to the coexistence of the following elements: *i*) internal conflicts between rebel groups and the national army over oil extraction by companies in the Niger Delta; *ii*) frequent oil spills in the area resulting in serious pollution (environmental factor); *iii*) the State of origin's inability to carry out clean-up operations and take adequate measures to address environmental degradation (omissive conduct), as well as its collusion with oil companies (active conduct).[59]

However, it is noteworthy that Italian Courts have recently adopted a different stance on the situation in the Niger Delta.[60] Although the climate of high violence, formerly designated as 'oil violence', persists as a concern, it appears to have diminished, thus no longer justifying the granting of subsidiary protection under letter (c). Recent international reports,[61] considered reliable by Italian Courts, have highlighted an improvement in the overall situation in the Niger Delta region. Consequently, the region is no longer classified as experiencing 'indiscriminate violence' under Article 15(c). This shift has been attributed, at least in part, to Nigeria's adoption in recent years of repressive and preventive measures concerning internal conflicts. However, no substantial progress has been observed in terms of State measures to address environmental degradation.

The link between climate and environmental factors, on one side, and internal conflicts, on the other, as a basis for granting subsidiary protection under letter (c) has also been observed in other Italian cases.

This form of protection has been granted to applicants from Mali due to the overlapping actions of armed groups, stemming from the conflict

[59] Court of Appeal of Trieste, Judgment No 7/2016; Tribunal of Palermo, Judgment of 26 February 2019; Tribunal of Trento, Judgment No 13/2018. See also Biondi, Dal Monte, Scissa (n 51) 184-185.

[60] Court of Appeal of Perugia, Judgment No 549/2024; Court of Appeal of Palermo, Judgments Nos 1050/2023, 624/2023; Court of Appeal of Venice, Judgment No 847/2023; Court of Cassation, Judgment No 5192/2023; Court of Appeal of Catanzaro, Judgment No 112/2023.

[61] Human Rights Watch, 'World Report 2023: Nigeria' (2023); EASO, 'Country Guidance: Nigeria' (2021).

in the north and centre of the country, and the proliferation of inter-community conflicts over access to land, particularly affecting rural areas.[62] These conflicts, related to the definition of land ownership and subsequent use for agricultural or pastoral activities (sectors that employ the majority of the population), have intensified due to the negative effects of climate change, which have rendered the land increasingly infertile.

Additionally, subsidiary protection under letter (c) was granted to an applicant from Burkina Faso, as his region of origin was experiencing a 'lethal combination of armed conflict, climate change and other natural disasters'.[63] This combination was deemed relevant as it exacerbated an already critical situation of severe food insecurity and high rates of malnutrition.

In all these judgments, the coexistence of internal armed conflicts and the negative impact of climate change has led to a level of indiscriminate violence for which, according to the *sliding scale* theory,[64] it is not necessary to examine the individual position of the applicant.

In particular, in the first group of cases (Niger Delta cases), the climate change impact was identified in the pollution caused by the oil spills and their collateral effects. In the second group of cases (Mali cases), climate change was considered relevant because it caused inter-community conflicts over access to land. In the third case (Burkina Faso case), natural disasters due to climate change occurring in the region were generally taken into account.

Finally, a recent ruling by the Italian Court of Cassation[65] overturned the decision of a Court of first instance for failing to consider the alleged climatic reasons for migration in order to grant subsidiary protection under letter (c). In particular, the applicant, who came from Punjab, claimed that his area of residence had been hit by severe flooding since 2013, resulting in serious health and economic consequences for his family of origin. However, the Court of first instance rejected the possibility

[62] Tribunal of Catanzaro, Decree 11 July 2022; Tribunal of Catanzaro, Decree 18 July 2022.

[63] Tribunal of Bari, Decree 19 March 2021, 3.

[64] See (nn 39-41).

[65] Court of Cassation, Judgment No 6964/2023. See also G Briganti, 'Cassazione: ai fini della protezione sono rilevanti i mutamenti climatici nel Paese di origine?' *MeltingPotEuropa* (11 April 2023) <www.meltingpot.org/2023/04/cassazione-ai-fini-della-protezione-sono-rilevanti-i-mutamenti-climatici-nel-paese-di-origine/>.

that the socio-political situation in Pakistan constituted 'indiscriminate violence' under letter (c), without taking these aspects into account.[66] Such an assessment could have led to a different decision on the merits, at least in abstract terms. More precisely, had the court considered not only the socio-political situation in Pakistan but also the climatic and environmental factors of continuous flooding, the combination of the two might have met the required threshold of gravity.

4. *Concluding remarks*

The precise scope of subsidiary protection in the context of climate and environmental migration remains uncertain. This depends, firstly, on how this legal instrument is transposed into domestic legal systems, and secondly, on how is implemented by national Courts, bearing in mind the progressive clarifications provided by the CJEU on the correct interpretation of its constitutive elements. Nevertheless, the case law analysed in this study suggests that subsidiary protection under letters (b) and (c) of the Qualification Directive should not be excluded in this context.

The first hypothesis encompasses all cases where the adverse consequences of natural disasters have such a significant impact on the applicant's living conditions that they qualify as inhuman or degrading treatment. The most problematic aspect in this case appears to be identifying the actor responsible for the serious harm, as required by Article 6 of the Qualification Directive. However, two important considerations should be highlighted.

Firstly, the CJEU has ruled that this identification is unnecessary when the applicant would experience a *total material deprivation* upon return, meaning the inability to meet basic needs such as access to food, water, medical care, and adequate accommodation. Such a situation may well arise as a result of large-scale natural disasters or extreme weather events, which are considered likely to occur with increasing frequency in the future,[67] as they can no longer be considered 'exceptional'.

[66] ibid paras 3 and 3.1.

[67] World Meteorological Organization (WMO), 'WMO Global Annual to Decadal Climate Update 2025-2029' (2025) and 'State of the Climate in Africa. 2024' (2025).

Secondly, where fundamental rights are impaired to a lesser degree, the causal contribution of the State of origin in determining the serious harm should be assessed. This evaluation should consider any failure or inadequacy on the part of the State to adopt policies to prevent, mitigate, and combat natural disasters or climate change, also taking into account any international obligations in this respect to which the State in question is bound.

Regarding the recognition of subsidiary protection under letter (c), it is evident that the climate-environmental factor does not play a central role in this context. However, it must be considered alongside the presence of internal or international armed conflicts in the relevant region. This element may be relevant (or even decisive) in reaching the level and scope of indiscriminate violence that exempts the applicant from the burden of proving the existence of an *individual* threat, according to the *sliding scale* theory.

In conclusion, evaluating the impact of climate and environmental variables on the recognition of subsidiary protection is a complex assessment that can only be carried out on a case-by-case basis, as it depends on the specific circumstances of the case and how this legal instrument has been transposed into the domestic legal system of the State concerned.

Abstract: This article examines the applicability of subsidiary protection under Article 2(f) of the EU Qualification Directive to climate and environmental migrants. It first situates the discussion within the broader context of international and EU law, highlighting the absence of a dedicated legal status for those displaced by environmental degradation or climate change. The analysis distinguishes subsidiary protection from refugee status, noting that the latter rarely applies in this context except in cases where climate impacts intersect with persecution on recognised grounds. Focusing on serious harm under Articles 15(b) and 15(c), the study assesses European Court of Justice jurisprudence and national case law from Italy and Austria. It identifies two main pathways: recognition under Article 15(b) where climate-related harm results in inhuman or degrading treatment—whether through state action, omission, or extreme material deprivation—and recognition under Article 15(c) when environmental degradation exacerbates armed conflict to the point of indiscriminate violence. The research underscores the challenges of attributing harm to specific actors, the variable national transpositions of the Directive, and the need for a case-by-case assessment. Ultimately, it argues that subsidiary protection, though underutilised, offers a viable legal avenue for protecting those displaced by climate and environmental crises.

Keywords: Climate migration; Subsidiary protection; Environmental displacement; EU asylum law; Qualification Directive.