

# THE LEGAL STATUS AND PROTECTION OF CLIMATE REFUGEES IN THE EU<sup>1</sup>

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## Abstract

In the near future, climate change will challenge the tackling mechanism of many countries and overwhelm some by aggravating current difficulties such as extreme weather events, food safety, shortage of water, etc., while putting fundamental human rights in a jeopardy. There is growing evidence that climate change-related occurrences are specifically affecting the underdeveloped countries and the EU Member States will be the lowest affected. Even though taking refuge in another country is a last resort solution to dealing with the effects of climate change, human flows to the EU are going to be inevitable if no measures will be taken. In accordance with its underlying values, the EU has a crucial role in reaching a consensus on finding a solution not only to this problem, but also to recognition and legal protection of climate refugees. The article addresses the need to recognition and protection of climate refugees and actions to be taken by the EU to reduce negative consequences of climate change.

## Keywords

Climate Change, Climate Refugees, Legal Status, Legal Protection.

## AVRUPA BİRLİĞİ'NDE İKLİM MÜLTECİLERİNİN HUKUKİ STATÜSÜ VE KORUNMASI

## Öz

Yakın gelecekte iklim değişikliği temel insan haklarını tehlikeye atmak yanında, birçok ülkenin doğuracağı sorunlarla başa çıkma mekanizmasına tehdit oluşturacak ve aşırı hava olayları, gıda güvenliği ve su kıtlığı gibi mevcut zorlukları ağırlaştırarak bazı ülkelere galebe çalacaktır. İklim değişikliğine bağlı olayların özellikle az gelişmiş ülkeleri etkilediğine ve AB Üye Devletlerinin en az etkilenen ülkeler olduğuna dair artan kanıtlar bulunmaktadır. Başka bir ülkeye sığınmak, iklim değişikliğinin etkileriyle başa çıkmak için son çare olsa dahi, herhangi bir önlem alınmadığı takdirde AB'ye insan akışı kaçınılmaz olacaktır. Temel değerlerine uygun olarak, AB sadece bu soruna değil, aynı zamanda iklim mültecilerinin tanınması ve yasal olarak korunmasına ilişkin bir çözüm üretilmesi noktasında uzlaşmaya varılmasında çok önemli bir role sahiptir. Makale, iklim mültecilerinin tanınması ve korunmasına yönelik ihtiyaca ve iklim değişikliğinin olumsuz sonuçlarının azaltılması için AB tarafından atılabilecek adımlara değinmektedir.

## Anahtar Kelimeler

İklim Değişikliği, İklim Mültecileri, Hukuki Statü, Hukuki Koruma.

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## INTRODUCTION

The Climate Vulnerability Index<sup>1</sup> rated 193 countries on their perceived risk from climate change by assessing the physical impacts of climate change, the vulnerability of citizens and the level of adaptability of the countries. While twenty-seven European countries are classified as low-risk, the Sub-Saharan Africa region is home to ten of the most vulnerable countries.<sup>2</sup> The most vulnerable countries have not been among the countries that created the challenges caused by climate change as the average metric tons of CO<sub>2</sub> produced in 2014 both by European (6.4) and Sub-Saharan African (0.8) countries<sup>3</sup> show, but the European countries, which breach the no-harm principle of international environmental law, since climate change-induced effects have been aggravated mainly by their actions, as being industrialised countries of the North, are the most responsible for the global warming and climate change.<sup>4</sup> Furthermore, the EU positions in a region having a growing climate change-induced immigration propensity and in the Mediterranean region as being a bridge for migration between Sub-Saharan Africa, North Africa and the Middle East.<sup>5</sup> Even though the ongoing refugee crisis in the EU demonstrates the consequences of their failure and unpreparedness,<sup>6</sup> the EU Member States are responsible for taking leadership in global efforts to mitigate climate change, minimise the damage caused to the other regions/and countries of the earth, strengthen those countries' economies to prevent forced migration due to worsening their climate change-induced conditions and inevitably providing international cooperation for ensuring the human rights protection of displaced individuals and legal protection for those who ultimately manage, even clandestinely, to enter into the EU borders.<sup>7</sup>

<sup>1</sup> "Climate Change Vulnerability Index", Verisk Maplecroft, Erişim Tarihi: Mart 25, 2020, <https://www.maplecroft.com/risk-indices/climate-change-vulnerability-index/>.

<sup>2</sup> Ciara Nugent, "The 10 Countries Most Vulnerable to Climate Change Will Experience Population Booms in the Coming Decades", Erişim Tarihi: Mart 25, 2020, <https://time.com/5621885/climate-change-population-growth/>.

<sup>3</sup> "CO<sub>2</sub> emissions (metric tons per capita)", The World Bank, Erişim Tarihi: Nisan 21, 2020, <https://data.worldbank.org/indicator/EN.ATM.CO2E.PC>.

<sup>4</sup> United Nations General Assembly, Human Rights of Migrants: Note by the Secretary-General, A/67/299, 2012, 19-20, para. 80; Benjamin J. Richardson; Heather McLeod-Kilmurray; Yves Le Bouthillier and Stepan Wood, (Eds), *Climate Law and Developing Countries: Legal and Policy Challenges for the World Economy*, (Cheltenham UK, Northampton MA: Edward Elgar Publishing, 2009), 8; Rina Kuusipalo, "Exiled by Emissions Climate Change Related Displacement and Migration in International Law: Gaps in Global Governance and the Role of the UN Climate Convention", *Vermont Journal of Environmental Law*, Vol. 18, 4 (2017): 614-647.

<sup>5</sup> Michael Werz and Max Hoffman, "Europe's twenty-first century challenge: climate change, migration and security", *European View*, 15, 1 (2016): 148; Stéphane Hallegatte; Raphaël Billé; Alexandre Magnan and François Gemenne, *The future of the Mediterranean from impacts of climate change to adaptation issues*, (France: IDDRI, 2009), 26-27.

<sup>6</sup> Sophie Reynaud, "Climate Refugees - To a Global Legal Statute", (2017): 44, University of San Diego, Erişim Tarihi: Şubat 15, 2020, [https://www.researchgate.net/publication/321451128\\_Climate\\_Refugees\\_-\\_To\\_a\\_Global\\_Legal\\_Statute](https://www.researchgate.net/publication/321451128_Climate_Refugees_-_To_a_Global_Legal_Statute).

<sup>7</sup> United Nations General Assembly, A/67/299, 19-20, paras. 80-81; Walter Kälin, "Conceptualising Climate-Induced Displacement", in Jane McAdam (ed.), *Climate Change and Displacement Multi-*

Though there are already some worth-mentioning attempts in the policy field,<sup>8</sup> as the Parliamentary Assembly of Council of Europe (PACE) reiterated, the lack of legal status primarily should be considered a barrier to developing certain policies to protect those individuals.<sup>9</sup> The article in that regard addresses the legal status and protection of climate-induced displaced individuals in the EU. Its focus is not the preventive policies in cooperation with the countries of origin or internally climate-induced displaced individuals within their countries but mainly the recognition and provision of that status and legal protection especially in the EU for climate refugees fleeing their countries in order to draw attention to lacuna in their recognition and legal protection framework at the international, regional and national levels.

## I. EU LEGAL FRAMEWORK FOR THE RECOGNITION AND LEGAL PROTECTION OF CLIMATE REFUGEES

With regard to initiatives taken in the EU, the EU's concern on climate change-induced migration was initiated by the European Parliament's mention about climate refugees in an official document in 1999.<sup>10</sup> Since then, it has organised several seminars, workshops and hearings on this subject with the aim of drawing the attention of the EU and international institutions to climate change-induced migration and the lack of legal recognition with a human rights-based approach.<sup>11</sup>

The European Commission also addressed the issue in 2007 through sponsoring the Project entitled "Environmental Change and Forced Migration Scenarios (EACH-FOR)" which aims to encourage Europe on its policies regarding forced migration scenarios significantly raised by climate change.<sup>12</sup> The paper entitled "*Climate Change and International Security*" and drafted for the European Co-

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disciplinary Perspectives, (Oxford and Portland, Oregon: Hart Publishing, 2010), 103; The European Commission, Climate change, environmental degradation, and migration, Brussels: SWD(2013) 138 final, 2013, 16; Margit Ammer; Monika Mayrhofer; Alex Randall and Jo Salsbury, Time to Act: How the EU can lead on climate change and migration, (Belgium: Heinrich-Böll-Stiftung, European Union, 2014), 9, 32; Werz and Hoffman, "Europe's twenty-first century challenge", 148; "Global Footprint Network", Erişim Tarihi: Ocak 21, 2020, <https://data.footprintnetwork.org/#/>.

<sup>8</sup> Reynaud, "Climate Refugees", 10.

<sup>9</sup> Marie-Christine Verdier-Jouclas, A legal status for "climate refugees", Parliamentary Assembly, Doc. 14955, 2019, 3, para. 3.

<sup>10</sup> The European Parliament, Resolution on the environment, security and foreign policy, Official Journal of the European Communities, C 128, 1999, 93; The European Commission, SWD(2013) 138 final, 6.

<sup>11</sup> The European Commission, SWD(2013) 138 final, 6, fn. 15.

<sup>12</sup> The European Commission, SWD(2013) 138 final, 6; Oli Brown, Migration and Climate Change IOM Migration Research Series No. 31, (Geneva: International Organization for Migration, 2008), 37; "Environmental Change and Forced Migration Scenarios (EACH-FOR)", United Nations University Migration Network, Erişim Tarihi: Mayıs 9, 2020, <https://migration.unu.edu/research/migration-and-environment/environmental-change-and-forced-migration-scenarios-each-for-2.html#outline>.

uncil by the High Representative and the European Commission in 2008, defined climate change-induced migratory pressure as a threat to Europe and so emphasised the importance of the EU's leadership in the international arena to promote security by developing its migration policy.<sup>13</sup> In a White Paper drafted in 2009, having provided a policy context to minimise the EU's vulnerability to climate change-induced effects, the Commission described the EU as a facilitator of national-level actions specifically for global problems and underlined that most of the measures can only be initiated by the Member States.<sup>14</sup>

The Commission also presented and analysed the various policies as a comprehensive answer to the call of the European Council in 2009 through the Stockholm Programme<sup>15</sup> on carrying out the exploration of climate change-induced cross border migration and its impact on the EU.<sup>16</sup> In 2011, it also comprehensively analysed protection gaps, policy responses and the EU's current legislative and policy framework. Having pointed out different protection-related actions required for temporary, permanent, internal or external migration types, the study suggested that the EU can take the lead in the field of international law, use resettlement as an option and inspire others by amending Article 15(c) of the Qualification Directive and by using the Temporary Protection Directive during a mass influx.<sup>17</sup> The Commission recently in a proposal for a regulation in 2020 mentioned the long-term EU climate-neutrality objective, achieving net-zero greenhouse gas emissions by 2050 and clarified that there is not any firm policy determined on climate change-induced migration and climate refugees.<sup>18</sup>

Having underlined in 2011 that as a global threat climate change carries significant implications related to access to basic needs such as food, water, etc. that creates tensions for migration, the Council called the EU for immediate action to minimise these risks.<sup>19</sup> In 2013, the Council also gave a call to the EU and the

<sup>13</sup> "Climate Change and International Security, S113/08", The High Representative and the European Commission, Erişim Tarihi: Mayıs 9, 2020, [https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/reports/99387.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/reports/99387.pdf).

<sup>14</sup> Commission of the European Communities, White Paper on Adapting to climate change: Towards a European framework for action, COM(2009) 147/4; Hallegatte; Billé; Magnan and Gemenne, *The future of the Mediterranean*, 26-27.

<sup>15</sup> Council of the European Union, *The Stockholm Programme - An open and secure Europe serving and protecting the citizen*, Brussels, 17024/09, 63.

<sup>16</sup> The European Commission, SWD(2013) 138 final.

<sup>17</sup> Albert Kraller; Tatiana Cernei and Marion Noack, *Climate refugees: Legal and policy responses to environmentally induced migration*, DGIPOL Policy Department C: Citizens' Rights and Constitutional Affairs Study, (Brussels: European Parliament, 2011), 74.

<sup>18</sup> The European Commission, Proposal for a Regulation of the European Parliament and of the Council, establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law), Brussels: COM(2020), 80 final, 2020/0036 (COD), 1-3.

<sup>19</sup> Council of the European Union, *Council Conclusions on EU Climate Diplomacy*, Brussels, 3106<sup>th</sup> Foreign Affairs Council meeting, 2011, 1, paras. 1-2.

Member States to address and adopt policies in regard of climate change-induced migration, particularly in the light of the development and humanitarian assistance.<sup>20</sup>

It is clear that the EU cares about climate change by considering it as an initiator of various types of crises such as environmental, security-related and humanitarian and has taken concrete steps over a decade. It even became a party to the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol and Paris Agreement as the only regional organisation.<sup>21</sup> The EU's contributions to the Global Compact for Migration and the Sendai Framework for Disaster Risk Reduction 2015-2030 are also significant. However, the EU has no comprehensive and solid policies and legislative framework yet for climate change-induced migration, but focused on the *ad hoc* and short term solutions.

It is needed to discover the potential protection mechanism for climate refugees that exist in the EU territory and finding a way to fill the legal and protection gap. The protection is related to facilitating an environment that the asylum seekers will enjoy their basic human rights when waiting for a durable solution to the inhuman or degrading treatment or other types of dangers that happened or could have happen in the country of origin.

As regards the EU legal framework, Articles 2 and 21 of the Treaty on European Union (TEU) declare that the EU is built on respecting human rights and whose external relations should be guided by that principle universally and indivisibly. Article 3(5) of the TEU also reminds the EU of its role and responsibility to protect human rights worldwide. Therefore, the EU must abide by its role and responsibilities in order to respect and protect the human rights of climate refugees. The Charter of the Fundamental Rights of the European Union (the Charter) provides protection regarding the right to healthcare in Article 35 and the right to a healthy environment in Article 37.

The European Convention on Human Rights (the ECHR) and the European Court of Human Rights (the ECtHR) case law have a special spot in EU human rights law. According to Article 6(3) of the TEU, "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common

<sup>20</sup> Council of the European Union, Conclusions of the Council and of the Representatives of Governments of the Member States meeting within the Council on the 2013 UN High-Level Dialogue on Migration and Development and on broadening the development-migration nexus, Brussels: 12415/13, 6, 13 and paras. 10, 44.

<sup>21</sup> "UNFCCC Process and meetings - Parties", United Nations Climate Change, Eriřim Tarihi: Eylöl 12, 2020, <https://unfccc.int/node/61063>; United Nations, United Nations Framework Convention on Climate Change, UNTS Volume Number 1771, 1992; United Nations, Kyoto Protocol to the United Nations Framework Convention on Climate Change, UNTS Volume Number 2303, 1998; United Nations, Paris Agreement, No. 54113, 2015.

to the Member States, shall constitute general principles of the Union's law." Also in the case that the EU manages to access to the ECHR under the obligation of Article 6(2) of the TEU, the Convention shall be binding as an agreement concluded by the EU itself and form an integral part of EU law.<sup>22</sup> Furthermore, the CJEU also held that fundamental rights form an integral part of the general principles of EU law and in safeguarding these rights, the Court is bound to draw inspiration not only from constitutional traditions common to the Member States, but also from international treaties, as the ECHR, for the protection of human rights concluded by the Member States.<sup>23</sup> Lastly, under Article 52 of the Charter, the meaning and scope of the rights enshrined in the Charter shall be the same as the corresponding rights laid down by the ECHR. In that respect, there are several articles in the ECHR that can be interpreted as providing protection for asylum seekers and so might provide the same level of protection for climate refugees. For instance, the principle of non-refoulement applied in the cases relevant to Article 2 (right to life)<sup>24</sup> and Article 3 (prohibition of torture, inhuman or degrading treatment or punishment)<sup>25</sup> can help in filling some protection gap in the legal protection of climate refugees. Also, according to Article 4 of Fourth Protocol to the ECHR, States cannot expel those individuals collectively.

There is however no distinct and specific EU act applicable to climate refugees. Since the primary components of the postwar global refugee protection regime, established by the Geneva Convention and 1967 Protocol, have been incorporated into the EU's asylum policy and EU human rights law under Article 78 of the Treaty on the Functioning of the European Union (the TFEU),<sup>26</sup> not only the international framework of refugee protection, but also current asylum policy and EU human rights law stay behind the global climate-induced necessities.

There are two important directives framing the status and legal protection for asylum seekers in the EU. First, Qualification Directive 2011/95/EU sets provisions for applicants to apply for refugee status or subsidiary protection and specifies the rights granted to applicants of such status, while encouraging the Member States to establish or maintain more favourable conditions than those stipulated in its provisions.<sup>27</sup> The scope of the Qualification Directive is limited to individuals

<sup>22</sup> Case 181/73 *Haegeman v. Belgium* EU:C:1974:41.

<sup>23</sup> Case 4/73 *Nold* EU:C:1974:51.

<sup>24</sup> Case *M.A.R. v. the United Kingdom*, Application No. 28038/95, decision of 16 January 1997.

<sup>25</sup> Case *M.S.S. v. Belgium and Greece*, Application No. 30696/09, decision of 21 January 2011, para. 365.

<sup>26</sup> Kelsey Leigh Binder, "Cutting the Wire: A Comprehensive EU-Wide Approach to Refugee Crises.," *Brook. J. Int'l L.*, 41 (2015): 1339-1392.

<sup>27</sup> 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. 337/9-337/26.



in need of international protection, which excludes climate refugees in general, unless they need protection against conflicts triggered by climate change-induced disasters, since it is expressly based on the 1951 Geneva Convention outdated as to climate change concerns. The Commission already proposed in 2016 the Qualification Regulation by changing the type of the act for the purpose of avoiding breaches made by the Member States on the transposition and providing the same degree protection across the EU.<sup>28</sup> The Commission, on a New Pact on Migration and Asylum in September 2020, reiterated that proposal and made five new proposals for adopting new regulations for improving EU's legislative framework on migration and asylum.<sup>29</sup>

Second, Temporary Protection Directive 2001/55/EC<sup>30</sup> lays down a unique mechanism that allows for immediate and temporary protection for internationally displaced populations, being unable to return to their country of origin, to be used exceptionally and temporarily when there is a risk that the international protection mechanism will struggle to cope with the sudden massive influx merely.<sup>31</sup> In light of Article 2 (ii) of Temporary Protection Directive, displacement occurred by climate change-induced disasters can be considered as a serious risk or systematic or generalised violations of human rights,<sup>32</sup> even though this protection mechanism is simply non-functional and has never been used due to requiring a Council decision with a qualified majority.<sup>33</sup> Moreover, to include mass influx of climate refugees within the scope of the Temporary Protection Directive was even absent in the comprehension of the Commission in 2015-

<sup>28</sup> The European Commission, Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, Brussels, COM(2016), 466 final, 2016/0223 (COD), 4-6.

<sup>29</sup> The European Commission, Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund], Brussels: SWD(2020), 207 final {COM(2020) 610 final}, 65-66.

<sup>30</sup> 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.212/12-212/23.

<sup>31</sup> "Temporary protection if there is a mass influx of displaced people", EUR-Lex, Erişim Tarihi: Mayıs 5, 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:I33124&from=EN>.

<sup>32</sup> Albert Kraller, Marion Noack and Tatiana Cernei, "Climate Refugees: Legal and Policy Responses to Environmentally-Induced Migration", Paper prepared for the ClimMig Conference on Human Rights, Environmental Change, Migration and Displacement, Vienna 20-21 September 2012, Erişim Tarihi: Mart 10, 2020, [https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/9980/Paper\\_ICMPD\\_2012-10-15.pdf?sequence=1&isAllowed=y](https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/9980/Paper_ICMPD_2012-10-15.pdf?sequence=1&isAllowed=y).

<sup>33</sup> Lara Krayem, "The EU Response to the 2015 Refugee Flows: A Missed Opportunity to Use the Temporary Protection Directive?", IALS Student Law Review, Vol. 7, No. 1, Spring (2020): 33; Kraller, Cernei and Noack, Climate refugees, 55.

2016s.<sup>34</sup> Furthermore, this directive focuses on the return and can only be benefited from this status for one year (extended by up to two years) which limits the protection for the more disastrous situations. Consequently, in a New Pact on Migration and Asylum in September 2020, the Commission proposed that this Directive must be cancelled since it has procedural inefficiency and could not answer the current needs.<sup>35</sup> Briefly, that Directive is appropriate neither for the determination of individual status, nor for durable situations, nor for refugees fleeing slow-onset climate-induced degradation in the country of origin. It could be argued that it does not have a future in the EU asylum system let alone being a useful tool for protecting climate refugees.

Within the context of the EU Migration and Asylum Policy, managing the possible climate change-induced migratory flows to the EU in the near future continues to invoke legal protection concerns with regard to the status of climate refugees as asylum seekers. Given the drawbacks on current types of protection, the implementation of the existing law by the Member States and the EU's stance on the asylum policies and procedures should be noticed.

The Member States can decide who can enter and stay in their territories and who should return to their countries, though this power must be exercised in accordance with EU law.<sup>36</sup> However, the EU's asylum law is powerful on theory, but ineffective on distribution, since the 1951 Geneva Convention and its 1967 Additional Protocol only necessitate the Member States to examine applications of asylum, whilst allowing them to decide on granting with the status in light of their perception of acknowledgments of required criteria for refugee status at the time.<sup>37</sup> In practice, management of the assessment procedures allows the asylum policy to be adjusted with the complexity of economic and diplomatic interests, as a result, the numbers and categories of asylum seekers permitted to enter their territories are significantly controlled primarily by the Member States whose interests on protection from massive migration flow prevail over basic human rights of individuals.<sup>38</sup> In other words, the right to asylum is intertwined with the discretion of the Member States during the assessment procedure, the fact of which paves the way for restricting people's movement on cross border.

<sup>34</sup> The European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A European Agenda on Migration, Brussels, COM(2015) 240 final; Hanne Beirens; Sheila Maas; Salvatore Petronella and Maurice van der Velden, Study on the Temporary Protection Directive - Final Report, (Brussels: European Commission, Directorate-General for Migration and Home Affairs, 2016).

<sup>35</sup> The European Commission, SWD(2020), 207 final, COM(2020) 610 final, 13-14, 64.

<sup>36</sup> Guy S. Goodwin-Gill, "The International Law of Refugee Protection", The Oxford Handbook of Refugee and Forced Migration Studies, (Oxford: Oxford University Press, 2014), 36.

<sup>37</sup> Reynaud, "Climate Refugees", 21-22; Jane McAdam, "The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection", Forced Migration, Human Rights and Security, (London: Hart Publishing, 2008), 267.

<sup>38</sup> Reynaud, "Climate Refugees", 22-23; Verdier-Jouclas, "A legal status", 9-10, para. 34.



The recent political instability of the Middle East, specifically the unrest in Syria, Iraq and Libya, resulted in a massive increase in asylum applications in the EU, which projected the unwillingness of Member States to welcome refugees and the prior humanitarian asylum policy has thus turned into security-focused one. The disputes among the Member States have also risen as well as a grown lack of cooperation within the EU to the point that certain Member States have failed to fulfil their responsibilities under the EU legislative framework.<sup>39</sup>

Moreover, under the Dublin Regulation the applicant's country of entry is responsible as a rule for examining asylum applications.<sup>40</sup> The existing migratory routes indicate that the responsibility of coping with the massive amount of asylum applications can only be tackled to a considerable extent by the Member States bordering the Mediterranean (Greece, Malta, Italy, and Spain) the fact of which is contradictory to the principle of solidarity.<sup>41</sup>

Although the resettlement procedure can be a permanent solution for asylum seekers by enabling asylum seekers to arrive in Europe through legal and safer ways to protect them from resorting to illegal trafficking channels and endangering their lives on risky unconventional routes, only a handful of Member States consider resettlement as an option. The Member States' unwillingness and weak efforts to participate can be seen explicitly at the low number of resettled individuals.<sup>42</sup> In addition, the fact that the priorities of the UNHCR limit the scope of resettlement to almost solely for vulnerable groups noticeably by age, gender and disability within the refugees<sup>43</sup> makes resettlement a solution for all problematic. The EU's current asylum policies could therefore pose another burden on climate refugees since it is already difficult to seek asylum for the individuals that could fit the "standard" refugee status.

For the foregoing reasons, to be able to seek asylum in dignity, in addition to a clear legal framework and policies the change in the stance of Member States is also needed. However, as the latest proposals of the Commission showed, even though the EU is aware of the flaws, it still solely wants as a fortress to protect

<sup>39</sup> Verdier-Jouclas, "A legal status", 10, paras. 35, 37.

<sup>40</sup> Article 7, Regulation (EU) No 604/2013 the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013], OJ L. 180/31-180/59.

<sup>41</sup> Blanca Garcés-Mascareñas, "Why Dublin 'doesn't work'", Notes internacionales CIDOB, 135 (2015): 2-3; Verdier-Jouclas, "A legal status", 10, paras. 38-39.

<sup>42</sup> Kraler, Noack and Cernei, "Climate Refugees", 11-12; The European Commission, Resettlement: Ensuring Safe and Legal Access to Protection for Refugees, 2017; "Resettled persons - annual data - persons", Eurostat, Erişim Tarihi: Nisan 21, 2020, <https://ec.europa.eu/eurostat/tgm/table.do?tab=table&plugin=1&language=en&pcode=tps00195>.

<sup>43</sup> Minos Mouzourakis; Kris Pollet and Ruben Fierens, The concept of vulnerability in European asylum procedures, (Brussels: European Council on Refugees and Exiles, 2017), 9-10.

itself and its Member States rather than the individuals who need effective human rights protection. The main attitude is controlling migration and avoiding asylum seekers, instead of respecting the human rights of the displaced individuals and providing them safer and controlled legal channels into the EU. Although the border countries did not abide by EU law, the EU recently focuses on protecting them by removing Dublin Regulation,<sup>44</sup> proposing new regulations<sup>45</sup> and offering money to the other States for the relocation of asylum seekers as if it is a transactional matter.<sup>46</sup>

## II. ACTIONS TO BE TAKEN?

In the legal literature, various suggestions have been made as to the legal status and protection of climate refugees. At the regional level, in the EU suggestions were around the amendment of Article 15(c) of the Qualification Directive by including the environmental disasters, using the Temporary Protection Directive during a massive influx and considering resettlement as an option.<sup>47</sup> In the Council of Europe, a Framework Convention for the Recognition of Status and Rights of Environmental Migrants and initiating an additional protocol to the ECHR to include the right to a healthy and safe environment for climate refugees were suggested.<sup>48</sup>

At the international level, amending the 1951 Geneva Convention relating to the Status of Refugees, 1967 Protocol relating to the Status of Refugees and correspondingly the mandate of the United Nations High Commissioner for Refugees, as the primary agency in the UN for the welfare and international legal protection of refugees, to encompass climate change as persecution by expanding the ambit of its subjects regarding the protection of climate refugees was put forward.<sup>49</sup> An international convention on climate refugees was also set forth.<sup>50</sup>

<sup>44</sup> The European Commission, SWD(2020), 207 final, COM(2020) 610 final, 69.

<sup>45</sup> The European Commission, SWD(2020), 207 final, COM(2020) 610 final, 70.

<sup>46</sup> The European Commission, SWD(2020), 207 final, COM(2020) 610 final, 77.

<sup>47</sup> Kraller, Cernei and Noack, Climate refugees, 74; Walter Kälin and Nina Schrepfer, Protecting People Crossing Borders in the Context of Climate Change-Normative Gaps and Possible Approaches, (Switzerland: Division of International Protection UNHCR, PPLA/2012/01, 2012).

<sup>48</sup> Council of Europe Parliamentary Assembly Committee on Migration, Refugees and Population, Environmentally induced migration and displacement: a 21<sup>st</sup> century challenge, Report, Doc. 11785, 2008; Parliamentary Assembly, Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment. Recommendation 1885, 2009; Parliamentary Assembly, Environment and human rights. Recommendation 1614, 2003; Parliamentary Assembly, Future action to be taken by the Council of Europe in the field of environment protection. Recommendation 1431, 1999.

<sup>49</sup> Norman Myers, "Environmental Refugees", Population and Environment: A Journal of Interdisciplinary Studies, Vol. 19, No. 2 (1997): 176-177; Angela Williams, "Turning the tide: recognizing climate change refugees in international law", Law & Policy, 30, 4 (2008): 502-529.

<sup>50</sup> Jane McAdam, "Swimming Against the Tide: Why a Climate Change Displacement Treaty is Not the Answer", International Journal of Refugee Law, Vol. 23, No. 1 (2011): 26; Bonnie Docherty and Tyler Giannini,

There are significant actions the EU can take as a powerful actor in the international, regional and national arenas. The EU has a role and responsibility to protect human rights worldwide since human rights standards are binding for the EU itself and its Member States.<sup>51</sup> Human rights principles are the core values of the EU. The Treaties declare that the EU is built on respecting human rights and its external relations should be guided by that principle universally and indivisibly. Article 21(2) of the TEU stipulated that the EU shall define and pursue its common policies and actions with a high degree of cooperation in all fields of international relations in order to consolidate and support human rights and assist populations, countries and regions confronting natural or man-made disasters. According to Article 4 of the TFEU, the EU and the Member States can use their shared competences if exclusive competence does not arise in creating legal instruments (e.g. an international agreement) under Article 3(2) of the TFEU for climate change.<sup>52</sup>

An individual could only be guaranteed legal protection with a legal provision providing for an individual right by enabling that the subject matter is therefore covered by law.<sup>53</sup> Without an adequate definition under international law within the consideration of the common responsibility of the international community such refugees remain almost invisible not only in the international system,<sup>54</sup> but also in the EU legal order. In that respect, in the EU, the concepts of recognition and legal protection should mean using the legal tools in the sphere of EU law which stipulate the obligations of the EU institutions and the Member States and correspondingly the rights of asylum seekers.<sup>55</sup>

### **A. To Initiate Protocols or International Conventions within the Framework of Regional and International Organisations**

For legal technical reasons, human rights vocabulary has not yet encompassed climate-change dynamics.<sup>56</sup> The ECHR does not set any provisions regarding the right to a healthy environment, however, the ECtHR has considered the right to a healthy environment indirectly bound to application of other human rights

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"Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees", *Harv. Envtl. L. Rev.* 33 (2009): 349-403; Frank Biermann and Ingrid Boas, "Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees", *Global Environmental Politics*, 10, 1 (2010): 60-88.

<sup>51</sup> Paul Craig and Gráinne de Búrca, *EU Law Text, Cases, and Materials*, (USA: Oxford University Press Fifth Edition, 2011), 362.

<sup>52</sup> C. van Duren, *The legal obligations for the European Union to protect climate-induced migrants crossing European borders*, Master's Thesis LL.M International and European Law Tilburg Law School, 2018, 14-15.

<sup>53</sup> Joanna Apap, *The concept of 'climate refugee' Towards a possible definition*, European Parliament Briefing, 2019.

<sup>54</sup> Brown, *Migration and Climate Change*, 15.

<sup>55</sup> Goodwin-Gill, *The International Law of Refugee Protection*, 37.

<sup>56</sup> Christel Cournil, "The protection of 'environmental refugees' in international law", in Étienne Piguet, Antoine Pécoud and Paul de Guchteneire (eds), *Migration and Climate Change* (Cambridge, Cambridge University Press, 2011), 366.

stipulated in the Convention.<sup>57</sup> This can be seen clearly in the several judgments of the ECtHR which finds a connection between environment-related degradation and human rights. For instance, both in *Öneryıldız v Turkey*<sup>58</sup> and *Budayeva and Others v Russia*<sup>59</sup> cases, the link between environmental degradation and Article 2 of the ECHR was stipulated. Furthermore, in the *López Ostra v Spain* case,<sup>60</sup> the ECtHR decided that the State has violated its positive obligation to secure the rights to home, private and family life arising from Article 8 of the ECHR since the severe risks on life and health arise from environmental pollution.<sup>61</sup> However, despite its recognition of these environment-related rights in the Convention, the ECtHR reiterates that the ECHR cannot be a direct tool for giving protection for the right to a healthy environment.<sup>62</sup> With respect to this problem, the PACE continuously made important suggestions to the Committee of Ministers of the Council of Europe for the recognition of the right to a healthy and safe environment by drafting an additional protocol to the ECHR.<sup>63</sup> The PACE also reminded that the States have responsibilities under Article 2, Article 3 and Article 8 of the ECHR towards environmental degradation.<sup>64</sup>

Environment and human rights are closely intertwined and several human rights including the right to life and the right to respect for private and family life are in danger of jeopardisation by environmental degradation.<sup>65</sup> It is also argued by Gemenne that it would be consistent to consider climate refugee matter inherently connected with the environmental policy and adaption strategy of the world, in particular the EU, to the environmentally induced challenges from a different paradigm according to which “migration in the context of climate change was no longer a disaster to avoid at all costs but a strategy that ought to be encouraged and facilitated.”<sup>66</sup>

<sup>57</sup> José Mendes Bota, Drafting an additional protocol to the European Convention on Human Rights, concerning the right to a healthy environment, Parliamentary Assembly, Doc. 12003, 2009, 1, 4-6; van Duren, The legal obligations, 34.

<sup>58</sup> Case *Öneryıldız v. Turkey*, Application No. 48939/99, Decision of 30 November 2004.

<sup>59</sup> Case *Budayeva and Others v. Russia*, Application Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, decision of 20 March 2008.

<sup>60</sup> Case *López Ostra v. Spain*, Application No. 16798/90, decision of 9 December 1994.

<sup>61</sup> Kashif Abbas, The development of the right to a healthy environment through the case Law of the European Court of Human Rights, Master’s Thesis, University of Oslo, 2013, 22; van Duren, The legal obligations, 37-38; Bota, Drafting an additional protocol, 4-5.

<sup>62</sup> Erkan Duymaz, “Avrupa İnsan Hakları Mahkemesi’nin Çevrenin Korunmasına Katkısı”, İstanbul Üniversitesi Siyasal Bilgiler Fakültesi Dergisi, No: 47 (2012): 125.

<sup>63</sup> Parliamentary Assembly, Recommendation 1885; Parliamentary Assembly, Recommendation 1614; Parliamentary Assembly, Recommendation 1431; Tina Acketoft, Environmentally induced migration and displacement: a 21<sup>st</sup> century challenge, Parliamentary Assembly, Doc. 11785, 2008.

<sup>64</sup> Bota, Drafting an additional protocol, 2.

<sup>65</sup> Bota, Drafting an additional protocol, 3.

<sup>66</sup> François Gemenne, “The Refugees of the Anthropocene”, in Benoît Mayer and François Crépeau (eds), Research Handbook on Climate Change, Migration and the Law, (Cheltenham: Edward Elgar Publishing, 2017), 399.

There is nevertheless no political will of the States and so no concrete steps have been taken on drafting an additional protocol for the right to a healthy and safe environment ever since the suggestion of the PACE over twenty years.<sup>67</sup> Regulating the right to a healthy and safe environment in an additional protocol to the ECHR would also be an influential way of bringing explicit protection for climate refugees across the Contracting Parties, in particular in the EU Member States. The protocol would help the ECtHR examine the claims more systematically and comprehensively and so benefit the individuals for having a specific protection mechanism for their specific problem. As being the major human rights protection mechanism of Europe, the Council of Europe should be aware that in the near future climate change-induced human rights violations will arise before the ECtHR.<sup>68</sup> This additional protocol and the judgments of the ECtHR can inspire other regional organisations and increase worldwide awareness to the issue.

The Geneva Convention and 1967 Protocol were formulated after the Second World War with the goals and tasks corresponding to the geopolitical situation without the conception of climate change-induced refugees and remain far away from meeting the current expectations arising from climate change. The fact that the implementation of the Geneva Convention has already become very delicate due to the persecution factors the massive number of individuals face and the general attitude of the parties towards those individuals already lowers the expectation of providing legal protection for climate refugees through this Convention.<sup>69</sup> Even though it would be easier in principle to benefit from an existing operational system, given this persecution problem, adding climate change as persecution on that Convention could result in weakening or undermining over all other persecutions and lowering standards of their protection and counter-productive, or vice versa.<sup>70</sup> In addition to their limitations, dilution of protection for traditional refugees, creation of unnecessary tensions between traditional refugees and climate refugees and political resistance because of concerns of overwhelming the institutional capacities of UNHCR could be set as specific grounds against expansion of the mandates existing legal regimes.<sup>71</sup>

<sup>67</sup> Parliamentary Assembly, Future action to be taken by the Council of Europe in the field of environment protection. Recommendation 1431, 1999.

<sup>68</sup> "Achieving justice and human rights in an era of climate disruption: Climate change justice and human rights task force report", International Bar Association, Erişim Tarihi: Temmuz 26, 2020, <https://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx>.

<sup>69</sup> Ali Özdemir, Göçmen-Mülteci İkliminde Yeni Bir Kavram: "İklim Mültecileri", I. Uluslararası Göç ve Mülteci Kongresi Bildirileri, (Düzce: Düzce Üniversitesi Yayınları, 2018), 153.

<sup>70</sup> Biermann and Boas, "Preparing for a Warmer World", 60-88; Verdier-Jouclas, "A legal status", 16-17; Michel Prieur, "Draft convention on the international status of environmentally-displaced persons", *The Urban Lawyer* (2010): 247-257.

<sup>71</sup> Docherty and Giannini, "Confronting a Rising Tide", 349-403.

A distinct, autonomous, specific and sui generis multilateral convention on climate refugees will help in focusing on the problem more comprehensively by avoiding the limits of existing legal frameworks.<sup>72</sup> The UN has consistently drafted special human rights framework mechanisms for vulnerable groups, such as for refugees through the Convention on the Status of Refugees, for women through the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>73</sup> for children through the Convention on the Rights of the Child (CRC)<sup>74</sup> and for disabled through the Convention on the Rights of Persons with Disabilities (CRPD)<sup>75</sup> in order to remove the barriers on enjoying human rights in the same degree with others.<sup>76</sup> It shows that the UN also has the ability to shed light on the legal status and protection of climate refugees by drafting a Convention on the Status and Protection of Climate Refugees.

The EU is home to the wealthiest and most stable countries in the world and has a related mechanism to help the most vulnerables. Given the urgent need for legal recognition and protection for climate refugees, the EU should acknowledge legal status for climate refugees and create legal and safe channels for their migration and protection. The EU should stand as an active leader during an unprecedented global crisis and present the understanding of climate change-induced migration as a way of reducing vulnerability for both at the international, regional and national levels. The EU can do this as one of the most powerful actors in the international area, i.e. the UN, under Article 220 of the TFEU. The EU and the UN can act together and maximize the effort for solving a global problem while avoiding differences, conflict or repetition.

The EU can become, alongside its Member States, a party of that Convention, so as a mixed agreement, pursuant to its prior example in the case of the CRPD. The EU and UN have been established during the same problematic period of history and both organisations have similar values on certain subjects including peace, development and human rights.<sup>77</sup> For instance, the EU is a party

<sup>72</sup> Margit Ammer; Manfred Nowak; Lisa Stadlmayr and Gerhard Hafner, *Legal Status and Legal Treatment of Environmental Refugees*, (Germany: Federal Environment Ministry, Dessau-Roßlau, 2010), 12; Esra Tekin, "Uluslararası Hukuk Bağlamında İklim Mültecilerinin Korunması Sorunu", *TBB Dergisi*, 147 (2020): 330; Biermann and Boas, "Preparing for a Warmer World", 60-88; Docherty and Giannini, "Confronting a Rising Tide", 349-403.

<sup>73</sup> United Nations, *Convention on the Elimination of All Forms of Discrimination against Women*, UNTS Volume Number 1249, 1979.

<sup>74</sup> United Nations, *Convention on the Rights of the Child*, UNTS Volume Number 1577, 1990.

<sup>75</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, UNTS Volume Number 2515, 2008.

<sup>76</sup> Maija Mustaniemi-Laakso; Mikaela Heikkilä; Eleonora Del Gaudio; Sotiris Konstantis; Maria Nagore Casas; Dolores Morondo; Venkatachala G. Hegde and Graham Finlay, *The protection of vulnerable individuals in the context of EU policies on border checks, asylum and immigration*, (Brussels: European Commission, 2016), 2.

<sup>77</sup> Alfonso Medinilla; Pauline Veron and Vera Mazzara, "EU-UN cooperation: Confronting change in the multilateral system", *ECDPM Discussion Paper*, No. 260 (2019): 4.



to the UNFCCC, the Kyoto Protocol and Paris Agreement as the only regional organisation.<sup>78</sup> While the EU carries “enhanced observer status” in the UN, which does not allow it to vote or suggest policies, but merely to express opinions and work in close cooperation, it can involve voting and suggesting policies through the medium of its Member States.<sup>79</sup> It can be said that the EU already has an active role in the creation and implementation of the international human rights framework through the actions of the Member States in the UN.<sup>80</sup>

In this context, for abiding by its human rights policies and following the responsibilities imposed by the Treaties, the EU should lead a cooperation for the conclusion of an international convention within the framework of the UN regarding the legal status and effective legal protection of climate refugees. The EU should focus on the links between climate change and migration as a starting point for a response and consider how to efficiently and carefully ensure and protect climate refugees’ human rights. Due to the absence of a legally binding definition of climate refugees, the first step needed is to develop a new legal definition while setting up comprehensive rules during the process of asylum-seeking. As offered by us, the definition of climate refugees could be as follows: “Individuals who were forced or choose to leave their country of origin temporarily or permanently and thus cross the borders due to sudden-onset events and/or slow-onset climate-induced changes that affect their lives or living conditions in a serious manner.”<sup>81</sup>

The provisions of the multilateral convention must contain the rights to life, health and an adequate standard of living, accompanied by a combination of negative obligations for Contracting Parties to refrain from taking action that would interfere with rights and positive obligations for them to fulfil the protection of rights. The legal guarantees must be stipulated to ensure that all persons are able to enjoy all those rights and freedoms in practice. The right to access justice or judicial remedies must be recognised and administrative and judicial proceeding mechanisms must be established in order to protect more efficiently against the possibility of violations of the Contracting Parties regarding fulfilling their obligations. The framework must ensure that the Parties will respect human rights throughout the asylum-seeking process and afterwards. Also, for abiding climate justice, the highest risk countries and their citizens in vulnerable groups, such as women, children, elderly and individuals who have disabilities or low-income

<sup>78</sup> “UNFCCC Process and meetings - Parties”, United Nations Climate Change, Eriřim Tarihi: Eylül 12, 2020, <https://unfccc.int/node/61063>.

<sup>79</sup> Medinilla, Veron and Mazzara, “EU-UN cooperation”, 4.

<sup>80</sup> United Nations, The partnership between the UN and the EU: The United Nations and the European Commission working together in Development and Humanitarian Cooperation, Brussels: United Nations System, 2006, 8.

<sup>81</sup> For different interpretations and analyses see Tomasz Branka, “Climate Refugees in the Contemporary World”, Immigration Crises, Borders and the European Union (2017): 79-94.

levels, should be the main focus when developing measures because of their low capacity to prevent, mitigate and adapt to the effect of climate change.

In the end, since the international agreements concluded by the EU form an integral part of EU law<sup>82</sup> and the common asylum policy must be in compliance under Article 78 of the TFEU with Geneva Convention and the 1967 Protocol and other agreements relating to the status of refugees, it would therefore improve the legal protection of climate refugees in the EU legal order. The right to asylum, as stipulated also in the Charter, shall be guaranteed with due respect for the rules of the Geneva Convention and the 1967 Protocol and in accordance with the TEU and TFEU.

## **B. To Improve Climate Refugees' Human Rights Standards at the EU Level**

Displacement is one of the most devastating consequences of disasters, particularly for the rights of individuals who are already in vulnerable situations with the lowest capacity to prevent, mitigate and adapt to the effect of climate change such as women, children, elderly and individuals who have disabilities or low-income levels. The disastrous effect and risks arising from displacement can be minimised by building and ensuring respect for human rights.<sup>83</sup> For this reason, the EU must fulfil its responsibilities, focus on the implementation of the human rights principles and provide that the asylum seekers are treated in accordance with human rights standards guaranteed under EU law. There are nevertheless some concerns for the legal protection of climate refugees given the failure in the EU in the protection of the “standard” refugees.

There are particular ways to improve the standards such as adoption of a regulation. The EU should use its competence conferred by Article 78 of the TFEU to adopt a new legislative act for a common asylum scheme, which is binding in its entirety and directly applicable in all Member States. According to that Article, the EU has mandate and shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. In this way, the EU can ensure that the legislative framework corresponds to the needs of climate refugees.

Article 296 of the TFEU stipulates that the EU institutions can choose the legal act that will be adopted according to the circumstances while taking into consideration the principle of proportionality if there is no specific legal act required by the Treaties. The two most common forms of the EU legal acts are regulations and directives. In comparison, for creating a legal channel for climate refugees in

<sup>82</sup> Case 181/73 *Haegeman v. Belgium* EU:C:1974:41.

<sup>83</sup> United Nations General Assembly, Resolution 70/1, Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1, 2015.

the EU and national level, regulations are more practical and effective compared to directives. Because regulations are fully binding while directives are binding as to their results to be achieved. This means that the Member States have discretion on the choice of form and method on the transposition of the directives.<sup>84</sup> So, although they are not superior to each other in the overall hierarchy, regulations which will not be transposed into national law, have a greater influence owing to their nature being applicable as they are in the Member States and granting rights or putting responsibilities in the same way as national law.<sup>85</sup> Becoming applicable after the transposition of the Member States also makes the implementation of directives later than regulations, which have immediate application.<sup>86</sup> The transposition process for the directives in every Member State evidently indicates that receiving protection for climate refugees may differ significantly from one Member State to another. Moreover, because of the national discretion on the choice of form and method of their transposition, divergences and so heterogeneity in the protection of climate refugees may arise. Furthermore, within the context of the implementation of directives, the Member States might not fully abide by them compared to regulations. There are many cases before the CJEU regarding the incomplete, incorrect, late transposition or even non-transposition of directives by the Member States and the transposition process of some directives signifies problematic.<sup>87</sup>

For the foregoing reasons, adopting a directive will not be as practical and effective as much as adopting a regulation. In that respect, amending and broadening the scope of a directive would not be a general solution at the EU level and might not effectively guarantee for the climate refugees the same level standards in their legal protection across the EU. It could be discerned in the studies and reports that analyse the transposition of the Qualification Directive, the Asylum Procedures Directive and the Reception Conditions Directive. Firstly, in 2009, after the Commission's proposal for amending the Qualification Directive, both the UNHCR and European Council on Refugees and Exiles (ECRE) prepared studies, which found a problem with regard to their transposition.<sup>88</sup> In particular, they have focused on the different approaches of the Member States towards the asylum seekers who even come from the same country and have similar grounds for

<sup>84</sup> Craig and de Búrca, EU Law, 106.

<sup>85</sup> Craig and de Búrca, EU Law, 70-71; Mustafa Tayyar Karayığit, "Are directives directly applicable?", Ankara Avrupa Çalışmaları Dergisi, Cilt 15, No. 2 (2016): 70.

<sup>86</sup> Allan Rosas and Lorna Armati, EU Constitutional Law: An Introduction, (Oxford and Portland, Oregon: Hart Publishing, 2018), 130-131.

<sup>87</sup> Michael Kaeding, "Active Transposition of EU Legislation", EIPAScope, 3 (2007): 3.

<sup>88</sup> UNHCR, UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, COM(2009)551, 2009, 2.

persecution.<sup>89</sup> For instance, in 2008, Greece did not grant international protection to the asylum seekers coming from Iraq, while Germany gave protection for the majority of them.<sup>90</sup> These flaws can be noticed not only in the academic literature regarding the implementation of asylum policy,<sup>91</sup> but also more comprehensively in the Commission's recent report, which indicated that for some provisions the Member States used different wording in national law, which resulted in different assessments while granting protection.<sup>92</sup>

Secondly, according to the report of the Commission in 2016, there were 70 open infringement procedures regarding the Common European Asylum System (CEAS) and 16 of them were about the "bad application" or "nonconformity" to the Qualification Directive, the Asylum Procedures Directive and the Reception Conditions Directive.<sup>93</sup> The danger here is that the infringement procedures have been mostly initiated against Greece, Italy and Cyprus, which carry the burden in the implementation of that Policy as the border countries of the EU. Overall, those facts affect the credibility and quality of the directive as an instrument in the field of asylum law for the individuals who suffered from similar persecution in their country of origin and make the protection mechanism uncertain and unstable.

Although harmonisation by the directives means more compatibility with the principle of subsidiarity, the studies made by the European Commission also give insight on why the Commission, in certain circumstances with regard to critical issues, should choose to adopt a regulation rather than a directive.<sup>94</sup> In that regard, the Commission already made a proposal in 2016 by changing the act type of Qualification Directive into the Qualification Regulation for avoiding breaches made by the Member States in the implementation of directives in order to ensure provision of a same degree protection across the EU.<sup>95</sup> As the latest proposals of the Commission on a New Pact on Migration and Asylum with five new regulations for the European migration and asylum legal framework in 2020 showed, adoption of regulation seems to be essential in order to create common asylum protection standards.<sup>96</sup>

<sup>89</sup> UNHCR, UNHCR comments on the European Commission's proposal, 2-3.

<sup>90</sup> UNHCR, UNHCR comments on the European Commission's proposal, 2-3.

<sup>91</sup> Sergio Carrera and Elspeth Guild, "Can the new refugee relocation system work? Perils in the Dublin logic and flawed reception conditions in the EU", CEPS Policy Brief, No. 332 (2015): 1-20.

<sup>92</sup> The European Commission, Evaluation of the application of the recast Qualification Directive (2011/95/EU), Final Report, Luxembourg, Publications Office of the European Union, 2019, 13.

<sup>93</sup> The European Commission, Managing the Refugee Crisis, Balancing Responsibility and Solidarity on Migration and Asylum, 2016, 2.

<sup>94</sup> Karayığit, "Are directives directly applicable?", 68.

<sup>95</sup> The European Commission, COM(2016), 466 final, 2016/0223 (COD), 4-6.

<sup>96</sup> The European Commission, SWD(2020), 207 final, COM(2020) 610 final, 70.

The fact that the implementation of common asylum law mainly on the shoulders of the Member States in the light of EU law means that the practice of the Member States plays an important role in ensuring human rights for asylum seekers. The European Commission should initiate against a Member State which fails to fulfil its obligations under the common asylum policy an infringement procedure, which can be an effective tool of public enforcement to provide implementation by the Member States of EU law in regard of the protection of asylum seekers by precluding the Member States from breaches of rights of climate refugees.<sup>97</sup> Moreover, the EU also has the ability to influence global governance by its policies and can shed light on migration as a way of reducing vulnerability to climate change.<sup>98</sup> The EU can do this by changing the perspectives of the Member States as to climate refugees in general and enforcing them to abide by human rights enshrined in EU law.<sup>99</sup>

It goes without saying that the influence of the EU citizens as a powerful group with competence in the field of policymaking cannot be overlooked too. The EU and its citizens can collaborate on creating a policy framework for the right to seek asylum and the right to a healthy and safe environment just like when they did in the initiative titled “*Right2Water*” that aimed the access to safe drinking water for safeguarding human dignity and an adequate standard of living for everyone.<sup>100</sup> As a result of a European Citizens’ Initiative under Article 11(4) of the TEU, the Commission can advocate for universal access for these rights and enforce the Member States to step up their efforts for guaranteeing them.<sup>101</sup>

## CONCLUSION

The policies in the EU show that they pay lip service rather than taking necessary actions for the individuals who were forced or choose to flee their homes temporarily or permanently due to sudden or slow-onset climate events that adversely affect their lives or living conditions. Whereas the topic has begun gaining growing interest from the EU institutions in recent years, climate change

<sup>97</sup> United Nations General Assembly, A/67/299, 19, para. 78; UN Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Regional study: management of the external borders of the European Union and its impact on the human rights of migrants, A/HRC/23/46, 2013, 22, para. 98; UN Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants, A/HRC/29/36, 2015, 21, para. 121.

<sup>98</sup> UN Human Rights Council, A/HRC/29/36, 17, para. 87.

<sup>99</sup> UN Human Rights Council, A/HRC/29/36, 21, para. 126; Ammer; Mayrhofer; Randall and Salisbury, Time to Act, 36.

<sup>100</sup> The European Commission, Communication from the Commission on the European Citizens’ Initiative: “Water and sanitation are a human right! Water is a public good, not a commodity!”, Brussels, COM(2014) 177 final, 2014, 2-3.

<sup>101</sup> The European Commission, COM(2014) 177 final, 13.

has been constantly regarded as an initiator of various types of crises such as environmental, security-related and humanitarian. However, apart from the above-mentioned policy responses, it is accurate to say that climate change-induced migration and climate refugees have been generally forgotten on the EU agenda with the consideration that climate change is not yet a legal crisis in the EU.

Safer and controlled legal channels should nevertheless be opened in order to protect the human rights of those individuals and for a better migration management. Otherwise, those individuals will be left alone in the Mediterranean Sea without a secure lifeboat both in law and fact. In that respect, the EU should stand as an active leader during an unprecedented global crisis and present the understanding of climate change-induced migration as a way of reducing vulnerability at the international, regional and national levels. The EU can do this by initiating an international cooperation for a multilateral convention on climate refugees within the framework of the UN as one of the most powerful actors in the international arena. Furthermore, at the regional level, regulating the right to a healthy and safe environment in an additional protocol to the ECHR would also be an influential and effective way of bringing explicit legal protection for climate refugees across the Contracting Parties, in particular in the EU Member States.

The EU can also draft a regulation regarding the protection of climate refugees. Due to the flaws arising from the implementation of directives in the area of common asylum policy, the national hesitance to accept asylum seekers and ignorance towards the implementation of human rights in that field, amending and broadening the scope of the existing directives (e.g. Qualification Directive) is not considered a general solution at the EU level for the effective legal protection of climate refugees. To be able to seek asylum in dignity, in addition to a clear legal framework and policies, the change in the stance of the EU and its Member States towards climate refugees is certainly a necessity.

With a holistic and fundamental rights-based paradigm towards the climate refugees, the matter should be comprehensively dealt with human rights, environmental, humanitarian and asylum laws and development and foreign and security policies. The EU as a normative power with its standards would therefore constitute an example of inspiration for others to improve their standards with respect to the recognition of status and legal protection of climate refugees.



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