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REFLECTIONS ON HUMAN RIGHTS LAW AS SUITABLE INSTRUMENT OF COMPLEMENTARY PROTECTION APPLICABLE TO ENVIRONMENTAL MIGRATION

by Susanna Villani

Abstract: *The impact of climate change and environmental degradation may result in large groups of people being forced to be displaced within their countries or abroad to avoid physical harm, health problems or, ultimately, loss of life. The work outlines the recent trends of how international law guarantees the protection of environmental migrants by stressing the role of human rights law as a suitable form of complementary protection applicable to environmental migration. By moving towards judicial protection, the analysis places environmental migration within the «climate change litigation» phenomenon as a starting point for an evaluation of the decision taken by the UN Committee on Human Rights in the Teitiota v. New Zealand case as well as of the recent caselaw of some European domestic courts that have recognised for their part the need to broaden the forms of national protection in favour of environmental migrants.*

Abstract: *Gli effetti del cambiamento climatico e del degrado ambientale possono comportare per taluni individui la necessità di migrare dando così concretezza al fenomeno della cd. migrazione ambientale. Il lavoro intende delineare le recenti tendenze del diritto internazionale per garantire la protezione ai migranti ambientali, sottolineando il ruolo del diritto dei diritti umani come forma adeguata di protezione complementare applicabile alla migrazione ambientale. L'analisi pone poi la migrazione ambientale all'interno del «contenzioso sul cambiamento climatico» come punto di partenza per una valutazione sulla decisione adottata dal Comitato delle Nazioni Unite per i diritti umani nella causa Teitiota c. Nuova Zelanda nonché sulla recente giurisprudenza di alcuni tribunali nazionali europei che hanno riconosciuto, da parte loro, la necessità di ampliare le forme di protezione a favore dei migranti ambientali.*

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SUMMARY: 1. Introduction. – 2. Recent trends for protecting environmental migrants at an international level. – 3. Environmental migration within climate change litigation. – 3.1. The UN Human Rights Committee on the *Teitiota v. New Zealand* case. – 3.2. Spotlights on the Human Rights Committee's decision. – 3.3. Environmental migration before domestic courts. – 4. Conclusive remarks.

1. Introduction

Climate change represents a serious global threat resulting in the intensification of extreme events affecting an important part of the population's possibility of enjoying clean water, food and natural resources, especially in countries lacking viable adaptation strategies. Indeed, statistics reveal that slow-onset events having geophysical, hydrological, climatological and meteorological nature, as well as related sudden-onset events, have been increasing dramatically over the last decades[1]. Furthermore, it cannot be neglected that also anthropic activities, such as massive mining or unregulated fishing, may negatively affect the natural habitat thus resulting, for instance, in declining biodiversity and soil/seabed erosion[2]. This entire spectrum of events affect human communities at a social level by aggravating in extreme cases pre-existing vulnerabilities, inequalities, poverty, exclusions and rights violations. In addition, during and after sudden-onset disasters, livelihoods like crops, productive assets and homes are often destroyed, making local shelter necessary. But, when the impact of these events is very serious and also prolonged, it may result in large groups of people being forced to be displaced within their countries or abroad to avoid physical harm, health problems or, ultimately, loss of life.

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1. World Meteorological Organisation, *State of the Global Climate 2020*, available at public.wmo.int.

2. On this point, see A. Oliver-Smith, *Debating Environmental Migration: Society, Nature and Population Displacement in Climate Change*, in *Journal of International Development*, 2012, p. 1058 ff.

Since 2008 an average of 26.4 million people have been displaced from their homes each year by natural disasters, equivalent to one person displaced every second[3]. In 2018 alone, 17.2 million of displacements associated with disasters in 148 countries were recorded and drought displaced 764,000 people in Somalia, Afghanistan and several other countries [4]. Generally, these movements are overwhelmingly short-term internal displacements, thus forming groups of internally displaced persons by environmental factors that often return to their previous homes[5]. The World Bank warns that extreme events will bring over 140 million people to move within their countries' borders by 2050[6]. However, affected people can also be forced to leave their country, thereby becoming cross-border displaced persons[7]. On the basis of available data, Africa, Central and South America have registered the largest incidences of cross-border disaster displacement[8]. A report issued by the Environmental Justice Foundation suggests that the number of displaced people will be in the range of hundreds of million by 2100[9]. Certainly, this scenario depends on multiple factors, including the gravity of the situation as well as its temporal extension and the individual economic opportunities. However, when the frequency of disasters increases the vulnerability of a population in combination with the incapacity (or unwillingness) of governments to develop and implement effective coping strategies, people may be forced to move away from their territory of origin because of the unsafe and overwhelming consequences of disasters and/or climate change.

Considering that such movements are likely to increase, over the last years the attention and public awareness on migration as a strategy of adaptation to actual or expected environmental hazards (further intensified by the process of climate change) has

3. See, Internal Displacement Monitoring Centre and Norwegian Refugee Council, *People Displaced by Disasters: Global Estimates for 2015*, available at www.internal-displacement.org.

4. See, Internal Displacement Monitoring Centre and Norwegian Refugee Council, *2019 Global Report on Internal Displacement*, available at www.internal-displacement.org, p. 6.

5. See, J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford, OUP, 2012; R. McLeman, F. Gemenne (eds), *Routledge Handbook of Environmental Displacement and Migration*, London, Routledge, 2018; A. Heslin, N.D. Deckard, R. Oakes, A. Montero-Colbert, *Displacement and Resettlement: Understanding the Role of Climate Change in Contemporary Migration*, in R. Mechler, L. Bouwer, T. Schinko, S. Surminski, J. Linnerooth-Bayer (eds), *Loss and Damage from Climate Change. Climate Risk Management, Policy and Governance*, Cham, Springer, 2019, p. 237 ff.

6. See, World Bank, *Groundswell: Preparing for Internal Climate Migration*, 2018, available at www.worldbank.org.

7. For instance, in order to escape the eruption of the volcano Montserrat in the West Indies that devastated much of the island in 1995, a large group of people migrated to the United Kingdom. For a comment, see C. Monteil, P. Simmons, *Immigration in Montserrat after the Volcanic Disaster: A Tool and a Challenge for the Recovery of the Island*, in *Migrants in Disaster Risk Reduction. International Organization for Migration & Council of Europe*, 2017, p. 104 ff.

8. The Nansen Initiative, *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change*, December 2015, available at disasterdisplacement.org.

9. Environmental Justice Foundation, *Beyond Borders: Our Changing Climate-Its Role in Conflict and Displacement*, 2017, available at ejfoundation.org.

strengthened. In 2007, the International Organisation for Migration (hereinafter: IOM) defined environmental migrants as those «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 country or abroad»[10]. As demonstrated by this quite broad definition, those fleeing because of environmental factors cannot be categorised in a clear-cut manner; rather, they are placed along a line that runs from the individual and free choice to leave towards a forced choice to do so. In legal terms, the most problematic issue is that where environmental migration is 'forced' because of, *inter alia*, the incapacity or unwillingness of the State of origin, the instruments at disposal for guaranteeing protection remain inadequate[11]. The framework is further complicated by the fact that in order to potentially elaborate an instrument of protection it is first necessary to clarify *ratione personae* the practical difference between «environmental» and «climate» migrants. Indeed, there is a blurred boarder between these two concepts: the former is more inclusive as it encompasses any kind of environment-related event, while the latter is less inclusive as it is associated only to slow-onset processes where, however, the causal link is difficult to identify. As specified by the IOM, the latter exclusively refers to «the movement of a person or groups of persons who, predominantly for reasons of sudden or progressive change in the environment due to climate change, are obliged to leave their habitual place of residence, or choose to do so, either temporarily or permanently, within a State or across an international border». Instead, the former has a broader scope as it is related to «a person or group(s) of persons who, predominantly for reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are forced to leave their places of habitual residence, or choose to do so, either temporarily or permanently, and who move within or outside their country of origin or habitual residence»[12]. Thus, climate migration is a subcategory of environmental migration; it defines a singular type of environmental migration, where the change in the environment is due to climate change[13].

10. IOM, *Migration and the Environment*, Discussion Note: MC/INF/288, prepared for the Ninety-fourth Session of the IOM Council, 27-30 November 2007, Geneva, available at governingbodies.iom.int.

11. See, R. Zetter, *Protecting Environmentally Displaced People: Developing the Capacity of Legal and Normative Frameworks*, Refugee Studies Centre, University of Oxford, 2011, available at www.refworld.org; K. Warner, T. Afifi, W. Kälin, S. Leckie, B. Ferris, S.F. Martin, D. Wrathall, *Changing Climate, Moving People: Framing Migration, Displacement and Planned Relocation*, Policy Brief No. 8, United Nations University Institute for Environment and Human Security (UNUEHS), 2013, available at migration.unu.edu; R. Zetter, J. Morrissey, *Environmental Stress, Displacement and the Challenge of Rights Protection*, in S. Martin, S. Weerasinghe, A. Taylor (eds) *Humanitarian Crises and Migration: Causes, Consequences and Responses*, London, Routledge, 2014, Chapter 9.

12. IOM, *Migration glossary*, 2019, available at www.iom.int.

13. For the purposes of the present work, the expression «environmental migrants» will be used to cover both those forced to move because of sudden-onset disasters and those who are affected by the impacts of climate change.

In respect of the existing instruments of protection, even though to some extent these people are forced to leave, they cannot be granted with the refugee *status* under the 1951 Refugee Convention[14] and its Protocol[15], which apply only to people who have «a well-founded fear of being persecuted on grounds related to race, religion, nationality or membership of a particular social group or political opinion, and are unable or unwilling, owing to fear of persecution, to seek protection from their home countries»[16]. Indeed, it is widely accepted that this definition is hardly applicable to people displaced because of environmental degradation for two main reasons. First of all, the impacts of climate change on the livelihoods are largely indiscriminate, rather than tied to particular characteristics as required by the mentioned definition. Secondly, it would be difficult to consider it as persecution in the sense it is used in the Refugee Convention[17]. In fact, it lacks one of the distinctive features that underpin the recognition of the refugee *status*, that is the human willingness of persecuting or not protecting that specific individual. Moreover, those displaced as a result of environmental change could, in theory, still rely on the protection of their national governments, while traditional refugees could not, as States are often the source of persecution. The UNHCR itself is opposed to the idea of including environmental migrants in the scope of the Refugee Convention in fear of the instrument being watered down, thus paradoxically limiting the effectiveness of its protection[18].

Against this background, the following sections intend to propose an overview of the recent trends of how international law guarantees the protection of environmental migrants by stressing the role of human rights law as suitable form of complementary protection applicable to environmental migration. Hence, the first part will focus on the objectives of the Global Compact for safe, orderly and regular migration that expressly address this

14. See, Convention relating to the *status* of refugees, adopted in Geneva on 28 July 1951 and entered into force on 22 April 1954, available at treaties.un.org.

15. See, Protocol Relating to the *Status* of Refugees, adopted in New York on 31 January 1967 and entered into force on 4 October 1967, available at treaties.un.org.

16. See, Article 1 A (2) of the 1951 Refugee Convention.

17. The debate on the opportunity to extend the scope of the notion of «refugee» to environmental migrants started at the beginning of the new century, see: B. Docherty, T. Giannini, *Symposium: Confronting a Rising Tide: A Proposal for a Climate Refugee Treaty*, in *Harvard Environmental Law Review*, 2009, p. 349 ff.; J. Morrissey, *Rethinking the 'Debate on Environmental Refugees' From 'Maximalists and Minimalists' to 'Proponents and Critics'*, in *Journal of Political Ecology*, 2012, p. 36 ff.; L. Nishimura, *Climate Change Migrants: Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies*, in *International Journal of Refugee Law*, 2015, p. 107 ff.; B. Mayer, *The Concept of Climate Migration: Advocacy and its Prospects*, London, Edward Elgar Publishing, 2016. For dissenting positions, see W. Kälin, N. Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches*, Legal and Protection Policy Research Series, PPLA/2012/01, February 2012, available at www.unhcr.org; H. Ayazi, E. Elsheikh, *Climate Refugees*: *The Climate Crisis and Rights Denied*, UC Berkeley: Othering & Belonging Institute, 2019, available at escholarship.org.

18. See, UNHCR, *Climate Change, Natural Disasters and Human Displacement: A UNHCR perspective*, 23 October 2009, available at www.unhcr.org, p. 9.

category of migrants, by comparing it with the Global Compact on Refugees (section 2). Then, the paper will offer an overview of the so-called «climate change litigation» phenomenon (section 3) as a starting point for an analysis of the decision taken on 20 January 2020 by the UN Committee on Human Rights in the *Teitiota v. New Zealand* case (section 3.1)[19]. In fact, even though the Committee dismissed Mr Teitiota's claims, at an international level it represents a landmark ruling as it deals for the first time with a complaint filed by an individual seeking protection because of environmental concerns due to climate change. Furthermore, attention will be placed on some domestic courts' most recent caselaw, which have recognised for their part the need to broaden the forms of national protection in favour of environmental migrants (section 3.2). Finally, some conclusions and recent developments will be addressed (section 4).

2. Recent trends for protecting environmental migrants at an international level

The international community has long been reluctant to include the reality of human mobility in the context of disasters and adverse effects of climate change within those legal documents specifically dedicated to migration issues. By way of illustration, neither EU law instruments nor the proposals of reform of the Dublin system envisage specific complementary forms of protection for environmentally-induced migrants at EU level[20]. However, the trend has progressively changed.

In 2015, the Nansen Initiative on Disaster-Induced Cross-Border Displacement and its successor, the Platform on Disaster Displacement, have been instrumental in putting climate change and disaster displacement on the global policymaking map. These State-led yet bottom-up consultative processes involving government officials, experts, affected communities, and civil society have helped to generate and coordinate research on disaster displacement, and have led to more nuanced understandings about the phenomenon. In turn, they have secured the inclusion of important references to disasters, climate change, and human mobility in a number of hard and soft law international instruments. They include: the Sendai Framework for Disaster Risk Reduction 2015-2030[21]; the 2030 Agenda for

19. See, UN Human Rights Committee, Views adopted by the Committee under Article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016, 7 January 2020, CCPR/C/127/D/2728/2016, available at www.refworld.org.

20. See, V. Kolmannskog, F. Myrstad, *Environmental Displacement in European Asylum Law*, in *European Journal of Migration and Law*, n.4, 2009, p. 313 ff.

21. The Sendai Framework for Disaster Risk Reduction 2015-2030 is the successor instrument to the Hyogo Framework for Action (HFA) 2005-2015: Building the Resilience of Nations and Communities to Disasters. It was adopted at the Third UN World Conference in Sendai, Japan, on 18 March 2015, as outcome of stakeholder consultations started in 2012 and inter-governmental negotiations from 2014, supported by the United Nations Office for Disaster Risk Reduction (UNDRR) at the request of the UN General Assembly.

Sustainable Development[22]; the Agenda for Humanity, annexed to the UN Secretary-General's report for the 2016 World Humanitarian Summit[23]; and the 2015 Paris Agreement[24]. As for the latter, it has to be noted that its preliminary versions contained an explicit reference to «climate change induced displacement, migration and planned relocation»[25], by also stressing the duty of States, in name of international cooperation and solidarity, to address the losses and damages associated with the drastic effects of climate change[26]. However, a number of States opposed such inclusion and any explicit reference to environmental migrants was left out. Indeed, in the final version just one and indirect reference appears in the preamble of the Paris Agreement, acknowledging that climate change is a common concern of humankind. Accordingly, «the Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants [...]». Despite this unsuccessful result and, following the entry into force of the Paris Agreement, a Task Force on Displacement was also launched in 2017 as part of the UNFCCC process «to develop recommendations for integrated approaches to avert, minimize, and address displacement related to the adverse impacts of climate change»[27].

22. In September 2015, the UN General Assembly adopted the 2030 Agenda for Sustainable Development, the milestone document for the future programme of sustainability, which outlines 17 goals and 169 related targets for the global community. In comparison to the Millennium Development Goals adopted in 2000, the 2030 Agenda explicitly acknowledges the importance of factoring migration into development strategies.

23. See, One Humanity: Shared Responsibility - Report of the Secretary-General for the World Humanitarian Summit, Doc. A/70/709, 2 February 2016, available at digitallibrary.un.org.

24. The Paris Agreement was adopted on 12 December 2015 at the twenty-first session of the Conference Climate Change held in Paris in 2015 and entered into force on 4 November 2016 (see: UNFCC, Paris Agreement on Climate Change, concluded at the 21st Conference of the Parties to the UN Framework Convention on Climate Change, 12 December 2015, FCCC/CP/2015/L.9/Rev.1, available at treaties.un.org). While the first international action to address the long-term challenge of climate change was set with the 2010 Cancún Agreements, the Paris Agreement adopted in 2015 intends to strengthen the global response by «[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C» (Article 2(1)). The mitigation measures provided for in the Agreement are based on a number of voluntary reduction commitments, called NDCs (Nationally Determined Contributions) and defined at national level by the Parties on the basis of scientific findings and on their national priorities. As of 2023, the Parties to the agreement are to undertake a global evaluation of the implementing measures every five years which will track progress and consider the level of emission reductions, as well as the adaptation strategies adopted. For a detailed analysis of the text of the agreement, see D. Klein, M.P. Carazo, M. Doelle, J. Bulmer, A. Higham (eds), *The Paris Agreement on Climate Change: Analysis and Commentary*, Oxford, OUP, 2017.

25. *Ad Hoc* Working Group on the Durban Platform for Enhanced Action, Second session, part twelve, Paris, 29 November to 5 December 2015 (available at unfccc.int); Draft Text on COP 21 agenda item 4 (b) Durban Platform for Enhanced Action (decision 1/CP.17). Adoption of a protocol, another legal instrument, or an agreed outcome with legal force under the Convention applicable to all Parties. Version 1 of 9 December 2015 at 15:00 (available at unfccc.int).

26. *Ivi*, Article 5 (provisional).

27. See, Decision adopted by the Conference of the Parties in Paris, 2015 1/CP.21, FCCC/CP/2015/10/Add.1, available at www.un.org, point 49.

Besides establishing a factual link between migration and environmental emergencies, over the very last years the international community has started to seriously wonder what kind of instruments could be used to guarantee some sort of legal protection to environmental migrants apart from the 1951 Geneva Convention. As well known, two new instruments concerning people in movement have been adopted in 2018: the Global Compact for Safe, Orderly and Regular Migration (Migration Compact) and the Global Compact on Refugees (Refugee Compact)[28].

The Migration Compact invites States to respect prohibitions against returning migrants to situations of irreparable harm, and to ensure the effective respect, protection, and fulfilment of their human rights. It was agreed that international cooperation on migration needs to be based on a «common understanding, shared responsibilities and unity of purpose regarding migration, making it work for all»[29]. The cooperative framework of the Global Compact is structured according to a total of 23 Objectives listed in a detailed way to guide the actions to be performed within the migration cycle[30]. More to the point of environmental migration, despite several opposing States, the positions taken by African, Latin America, the Pacific, some European countries and the EU have triggered the explicit recognition of the nexus between disasters caused by natural hazards and migration and the commitments to address the challenges of disaster-related human mobility. Drawing expressly on the recommendations of the Nansen Initiative[31], the Migration Compact sets out the need to: (a) strengthen information sharing and analysis to better understand and address mobility in the context of disasters, climate change, and environmental degradation; (b) develop adaptation and resilience strategies, which may include migration; (c) integrate

28. The Global Compact for Safe, Orderly and Regular Migration was adopted by the majority of UN Member States at the Intergovernmental Conference in Marrakesh and formally endorsed by the UN General Assembly on 19 December 2018 (Doc. A/RES/73/195, 19 December 2018), available at www.iom.int. Whereas the Migration Compact was drafted by States, the drafting of the Refugee Compact was led by UNHCR (Report of the United Nations High Commissioner for Refugees Part II Global compact on refugees, A/73/12 (Part II), 2 August 2018), available at www.unhcr.org. For insights, see: W. Kälin, *The Global Compact on Migration: A Ray of Hope for Disaster-Displaced Persons*, in *International Journal of Refugee Law*, n. 4, 2018, p. 664 ff.; J. McAdam, *The Global Compacts on Refugees and Migration: A New Era for International Protection?*, in *International Journal of Refugee Law*, n. 4, 2018, p. 571 ff.; T.A. Aleinikoff, S. Martin, *Making the Global Compacts work: What future for refugees and migrants?*, Policy Brief 6, April 2018, available at www.kaldorcentre.unsw.edu.au; A. Bufalini, *The Global Compact for Safe, Orderly and Regular Migration: What is its contribution to International Migration Law?*, in *Questions of International Law*, 2019, p. 5 ff; G. Cataldi, A. Del Guercio, *I Global Compact su migranti e rifugiati. il soft law delle Nazioni Unite tra spinte sovraniste e potenziali sviluppi*, in questa *Rivista*, n. 2.2019, p. 189 ff.

29. See, Global Compact for Safe, Orderly and Regular Migration, cit., Preamble, para. 9.

30. See, Global Compact for Safe, Orderly and Regular Migration, cit., para. 16 ff.

31. The Nansen Initiative, based on the outcome of the Nansen Conference on Climate Change and Displacement in Oslo in 2011 and launched by Switzerland and Norway, is a State-led, bottom-up consultative process intended to build consensus on the development of a protection agenda addressing the needs of people displaced across international borders in the context of disasters and the effects of climate change.

displacement considerations into disaster preparedness strategies; (d) ensure access to humanitarian assistance and promote sustainable outcomes that increase resilience and self-reliance; and (e) develop coherent approaches to address the challenges of migration in this context.

The Refugee Compact consists of the comprehensive refugee response framework, that reflects the different stages of the refugees' movements, and the programme of action to implement it. In this context, the Refugee Compact focuses on States' burden and responsibility sharing in preventing and managing large-scale refugee movements and protracted displacement together with other international relevant stakeholders. More specifically, it seeks to: «(a) ease pressures on host countries; (b) enhance refugee self-reliance; (c) expand access to third country solutions; and (d) support conditions in countries of origin for return in safety and dignity»[32]. Indeed, considering that low and middle-income countries bear the largest burden and responsibility in hosting refugees, according to the Refugee Compact, «it is imperative that these countries obtain tangible support of the international community as a whole in leading the response»[33]. To meet this goal, the practical arrangements identified mainly consist of «financial, material and technical assistance» thus representing an important supplement to the Refugee Convention and its Protocol that are limited to identify the obligations of the host countries without addressing the role of the international community in this field.

With regard to environmental migration, the Migration Compact includes a number of goals that can be directly or indirectly related to this kind of mobility. In particular, Objective 2 sets out the possible actions to achieve these goals by clustering them under the unique thematic subtitle «Natural disasters, the adverse effects of climate change, and environmental degradation», which deals with the prevention of displacement and the preparedness for such events[34]. Objective 5 refers to people forced to move across borders in the context of disasters and climate change by putting them on the same footing as «migrants in a situation of vulnerability»[35]. Even though the notion of temporary or long-term protection is not explicitly included, such an objective envisages some specific actions, such as providing humanitarian visas or temporary work permits to people displaced across borders in the context of sudden-onset disasters «where adaptation in or return to their country of origin is not possible»[36]. With regard to readmission, Objective 21 recalls upholding the prohibition of forcible return of migrants in cases of a foreseeable risk «not

32. See, Global Compact on Refugees, cit., para. 7.
33. See, Global Compact on Refugees, cit., para. 14.
34. See, Global Compact for Safe, Orderly and Regular Migration, cit., para.18.
35. See, Global Compact for Safe, Orderly and Regular Migration, cit., para. 21 and 21(h).
36. See, Global Compact for Safe, Orderly and Regular Migration, cit., para. 21(g).

only of death, torture, and other cruel, inhuman, and degrading treatment but also other irreparable harm»[37]. While the first typologies of risk fall in the classical determination of the refugee *status*, the latter notion may be extremely significant with regard to environmental migration. Indeed, by bearing in mind that the notion of 'irreparable harm' has a flexible meaning in international law[38], it opens the door to a non-exhaustive list of situations that could also include the occurrence of a (or a series of) calamitous event that makes the territory of origin unhealthy or uninhabitable, thereby resulting in an irreparable individual harm and, in extreme cases, in loss of life.

The institutional arrangements established by the Migration Compact also provide a number of opportunities for sustained dialogue and work to enhance the protection of people at risk of displacement or who otherwise move across borders in the context of disasters and, in a broader perspective, the adverse effects of climate change. Building an effective protection regime at all levels for such people requires multiple and systematic efforts, but it must be recalled that the Compact is a soft law instrument. The preamble expressly stipulates that the Migration Compact presents a «non-legally binding» cooperative framework that builds on the commitments agreed upon by Member States in the New York Declaration for Refugees and Migrants[39]. In addition, it is also stressed that it is aimed at fostering international cooperation among all relevant actors on migration by respecting States' sovereignty. This means that the Global Compact creates neither obligations for States, for example, to facilitate the entrance of migrants, nor rights for individuals to migrate to another country but essentially rely on States' good will and voluntary contributions. *Par contre*, States are the main responsibility holders for their citizens' protection; therefore, they should apply human rights-based approaches as their citizens move due to environmental or climatic drivers.

However, the comprehensive and detailed manner in which the Migration Compact addresses also the issue of environmental mobility in all its forms and phases (evacuation, planned relocation, voluntary migration, and displacement) may be extremely relevant in the future analysis. Moreover, it reflects a wide-ranging and inclusive approach in addressing the multifaceted dimensions of migration thus comparing favourably with the Global Compact on Refugees that, instead, is limited to replicating the definition of refugee

37. See, Global Compact for Safe, Orderly and Regular Migration, cit., para. 37.

38. See, J. McAdam, *Climate Change, Forced Migration, and International Law*, cit., p. 80.

39. See, Resolution adopted by the UN General Assembly on the New York Declaration for Refugees and Migrants, Doc. A/RES/71/1, 13 September 2016, available at www.un.org.

under the 1951 Convention [40]. Indeed, the Migration Compact just confirms that environment-related events are not included in the list of grounds to be invoked to receive the refugee *status*. Only those migrants fleeing from persecution in contexts exacerbated by environmental hazards, and crossing international borders, can qualify as refugees and receive the protection that this recognition entails[41]. Hence, in this case, environmental evaluations are just ancillary to the reconstruction of the situation in the country of origin,

but are not among the autonomous grounds for granting the *status*. Instead, since the Migration Compact introduces a broader perspective on human mobility that takes into account the basic rights of individuals and the main international human rights instruments also with regard to environmental migrants, it is bound to be the centre of gravity for future discussions and actions on this topic.

The perspective to separate the two legal regimes and to link environmental migration to the classical patterns of migration by excluding an extension of the scope of the 1951 Geneva Convention has been also acknowledged by IOM[42]. Indeed, rather than applying the refugee regime also to environmental migrants, it would be more suitable to encourage the establishment of a specific legal *status*, parallel to the existing refugees' *status*. The idea is, indeed, to establish a general framework that takes into account the existing vulnerabilities and ensures protection against additional human rights violations and abuses[43].

This reasoning has been followed by the Parliamentary Assembly of the Council of Europe that in October 2019 adopted a resolution[44] acknowledging the necessity to develop measures to «protect people who are forced to move as a consequence of climate change», but refrained from proposing to extend the level of protection guaranteed to asylum seekers as intended by the 1951 Geneva Convention to environmental migrants. Rather, according to the Assembly, it would be more useful to reflect on the opportunity to strengthen resilience and capacity to adapt to climate-related hazards and natural disasters in the native countries according to a human rights-based approach.

As a matter of fact, this is not a completely brand-new orientation. Indeed, over the last decades, the interconnections between environmental degradation, forced migration and

40. See, V. Chetail, *International Migration Law*, Oxford, OUP, 2019, p. 336 ff.; S. Angenendt, N. Biehler, *On the Way to a Global Compact on Refugees. The "Zero Draft": A Positive, but Not Yet Sufficient Step*, SWP Comment 2018/C, 18 April 2018, available at www.swp-berlin.org.

41. See, UNHCR, *Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective*, 23 October 2008, www.unhcr.org.

42. See, Head of the Migration, Environment and Climate Change Division at the IOM, *Let's Talk About Climate Migrants, Not Climate Refugees*, 6 June 2019, www.un.org.

43. See, Framework Principles of Human Rights and the Environment issued by the UN Special Rapporteur on human rights and the environment in 2018, available at www.ohchr.org, Principle 14 h.

44. See, Parliamentary Assembly of the Council of Europe, Resolution 2307 (2019), adopted on 3 October 2019 (34th Sitting), available at assembly.coe.int.

potential human rights violations have been increasingly recognised by multiple actors. For instance, the Office of the UN High Commissioner for Human Rights (OHCHR) noted that «the UN human rights treaty bodies all recognise the intrinsic link between the environment and the realisation of a range of human rights, such as the right to life, to health, to food, to water and to housing»[45]. Ultimately, that perfectly falls within the current trend that is inherent to climate change litigation, that is the set of actions connected in general terms to climate change matters[46].

3. Environmental migration within climate change litigation

As detailed in the *Global Climate Litigation Report* prepared by the UN Environmental Programme (UNEP) in 2020[47], in recent years there has been a significant increase of disputes brought by individuals and NGOs to national and supranational courts or quasi-judicial bodies to complain about States' failure to comply with their positive obligations to limit the effects of climate change established, *inter alia*, by the 2015 Paris Agreement. However, since the exact legal content and scope of the States' commitments to combat climate change are quite uncertain, they have been progressively read alongside those arising from legal sources set outside that specific regulatory regime, such as human rights law. In fact, the mapping of the cases of climate litigation that have been filed identifies a common ground that is based on the integration of the legal corpus on human rights within environmental-related arguments[48]. The Paris Agreement itself recognises this relationship by reminding the Parties that, when they take action to tackle climate change, they should respect, promote and consider their respective human rights obligations thereby confirming that a systemic integration should be practiced in the interpretation of States' obligations, both at a national and international level. Such a need to ensure systemic integration when

45. See, United Nations, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, A/HRC/10/61, 15 January 2009, available at digitallibrary.un.org.

46. For insights, see J. Peel, H.M. Osofsky, *Climate Change Litigation*, Cambridge, CUP, 2015; I. Alogna, C. Bakker, J.P. Gauci (eds), *Climate Change Litigation: Global Perspectives*, Leiden, Brill-Nijhoff, 2021.

47. UNEP, *Global Climate Litigation Report: 2020 Status Review*, available at www.unep.org.

48. See, S. Humphreys, *Human Rights and Climate Change*, Cambridge, CUP, 2010; L. Rajamani, *The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change*, in *Journal of Environmental Law*, 2010, p. 391 ff.; A. Savaresi, *Climate Change and Human Rights: Fragmentation, Interplay and Institutional Linkages*, in S. Duyck, S. Jodoin, A. Johl (eds), *Routledge Handbook of Human Rights and Climate Governance*, London, Routledge, 2017, p. 31 ff.; S. Duyck, S. Jodoin, A. Johl (eds), *Handbook on Human Rights and Climate Governance*, London, Routledge, 2018; S. Duyck at al., *Human Rights and the Paris Agreement's Implementation Guidelines: Opportunities to Develop a Rights-Based Approach*, in *Carbon & Climate Law Review*, 2018, p. 191 ff.; A. Boyle, *Climate Change, the Paris Agreement and Human Rights*, in *International and Comparative Law Quarterly*, 2018, p. 1 ff.; A. Sumudu, S. Andrea, *Human Rights and the Environment: Key Issues*, London, Routledge, 2019; E. Akyüz , *The Development of Environmental Human Rights*, in *International Journal of Environment and Geoinformatics*, 2021, p. 218 ff.

interpreting the obligations of States both at a national and international level in environmental matters is then consistent with the provisions of Article 31, para. 3, of the Vienna Convention on the Law of Treaties.

More in detail on the judicial proceedings, the applicants' arguments relating to potential human rights violations associated with climate change are intended to claim either a State's failure to act which results in human rights violations or certain States' actions leading to human rights violations. Within these two main lines of recourse, several plaintiffs have filed cases of "pure" compensation for damages by prompting the State to give redress for harm to persons, property, or the environment associated with the impact of climate change, while major attention has been recently reserved to the States' efforts to reduce greenhouse gas emissions thus reflecting the preventive approach enshrined in the Paris Agreement. For their part, the national and supranational courts as well as the quasi-judicial bodies that were asked to decide on the proceedings have relied both on the obligations related to substantive human rights (including the right to life, adequate housing, food, the highest attainable level of health) and on procedural ones (such as the right to remedies) when having specific implications in relation to climate change.

Among the most famous climate disputes to date, the *Urgenda* case[49] deserves to be mentioned. In this occasion, the Dutch Government was challenged for not taking sufficiently ambitious actions to reduce greenhouse gas emissions, relying on human rights law arguments and, in particular, on the right to life and to private and family life enshrined in Articles 2 and 8 of the European Convention on Human Rights (hereinafter ECHR), respectively[50]. In December 2019, the Supreme Court of Netherlands determined that the Dutch government had a duty of care in favour of those under its jurisdiction for preventing

49. District Court of The Hague, *Urgenda Foundation v The State of the Netherlands*, case C/09/456689/ HAZA 13-1396, 24 June 2015, available at climatecasechart.com.

50. E. Stein, A. G. Castermans, *Case Comment - Urgenda v. State of the Netherlands: the "Reflex Effect" - Climate Change, Human Rights, and the Expanding Definitions of the Duty of Care*, in *McGill Journal of Sustainable Development Law*, 2017, p. 303 ff.; K. De Graaf, J.H. Jans, *The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change*, in *Journal of Environmental Law*, 2017, p. 517 ff.; J. Fahner, *Climate Change before the Courts: Urgenda Ruling Redraws the Boundary between Law and Politics*, in *EJIL:Talk!*, 16 November 2018, www.ejiltalk.org; E. Corcione, *Diritti umani, cambiamento climatico e definizione giudiziale dello standard di condotta*, in *Diritti Umani e Diritto Internazionale*, 2019, p. 197 ff.; J. Verschuuren, *The State of the Netherlands v Urgenda Foundation: The Hague Court of Appeal upholds judgment requiring the Netherlands to further reduce its greenhouse gas emissions*, in *Review of European, Comparative and International Environmental Law*, 2019, p. 94 ff.; A. Nollkaemper, L. Burgers, *A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case*, in *EJIL:Talk!*, 06 January 2020, www.ejiltalk.org; M. Meguro, *State of the Netherlands v. Urgenda Foundation*, in *American Journal of International Law*, 2020, p. 729 ff.; T. Scovazzi, *La decisione finale sul caso Urgenda*, in *Rivista giuridica dell'ambiente*, 2020, p. 419 ff.; J. Spier, *"Strongest" Climate Ruling Yet': The Dutch Supreme Court's Urgenda Judgment*, in *Netherlands International Law Review*, 2020, p. 319 ff.; B. Mayer, *Climate Change Mitigation as an Obligation Under Human Rights Treaties?*, in *American Journal of International Law*, 2021, p. 409 ff.

the occurrence of the risks linked to climate change[51]. Moreover, in 2018, the UN Special Rapporteur on Human Rights and the Environment, unprecedentedly intervened in the *Climate Case Ireland* before an Irish court[52], drawing attention to the State's «clear, positive and enforceable obligations» to protect its citizens against the infringement of human rights caused by climate change[53].

While domestic claims promoted by citizens against their own governments are very common worldwide, it does not represent the only expression of the human rights-based climate litigation that is much more composite. Indeed, even though it cannot be properly developed here, there is an increasing caselaw both before domestic and regional/international (quasi) judicial courts regarding the applicability of extraterritorial jurisdiction to transboundary environmental harm and to the foreseeable human rights harm caused by climate change[54]. In addition, since climate change also represents an important contributor to displacement and migration from countries unprepared to cope with it, cases concerning the recognition of third States' protection obligations in terms of fundamental human rights in favour of forced environmental migrants are emerging both at supranational and national level.

3.1. The UN Human Rights Committee on the Teitiota v. New Zealand case

On 7 January 2020, the UN Human Rights Committee issued its decision on the case *Teitiota v. New Zealand*[55], by confirming the necessity to reflect on environmental migration

51. Supreme Court of the Netherlands, *Netherlands v. Urgenda* (Climate case Urgenda), Case No. 19/00135, 20 December 2019, available at climatecasechart.com, point 5.2.2.

52. Supreme Court of Ireland, *Friends of the Irish Environment CLG v. Ireland*, [2020] IESC 49, 31 July 2020, available at climatecasechart.com.

53. Special Rapporteur on Human Rights and the Environment, *Statement on the Human Rights Obligations related to Climate Change with a Particular Focus on the Right to Life*, 2018, available at www.ohchr.org.

54. J.E. Viñuales, *A Human Rights Approach to Extraterritorial Environmental Protection?: An Assessment*, in N. Bhuta (ed.) *The Frontiers of Human Rights*, Oxford, OUP, 2016, p. 177 ff.; A. Savaresi, A. Juan, *Climate Change Litigation and Human Rights: Pushing the Boundaries*, in *Climate Law*, 2019, p. 244 ff.; M. La Manna, *Cambiamento climatico e diritti umani delle generazioni presenti e future: Greta Thunberg (e altri) dinanzi al Comitato sui diritti del fanciullo*, in *Diritti umani e diritto internazionale*, 2020, p. 217 ff.; C. Bakker, '*Baptism of fire?' The first climate case before the UN Committee on the Rights of the Child*, in *Questions of International Law*, 2021, p. 5 ff., www.qil-qdi.org; S. Theil, *Towards the Environmental Minimum: Environmental Protection through Human Rights*, Cambridge, Cambridge University Press, 2021.

55. For comments, see: G. Citrone, *La stagione dell'ambiente del Comitato delle Nazioni Unite dei diritti umani*, in *Rivista giuridica dell'ambiente*, 2020, p. 1 ff.; J. Hamzah Sendut, *Climate Change as a Trigger of Non-Refoulement Obligations Under International Human Rights Law*, in *EJIL:Talk!*, 6 February 2020, www.ejiltalk.org; G. Reeh, *Climate Change in the Human Rights Committee*, in *EJIL:Talk!*, 18 February 2020, www.ejiltalk.org; A. Maneggia, *Non-refoulement of Climate Change Migrants: Individual Human Rights Protection or 'Responsibility to Protect'? The Teitiota Case Before the Human Rughts Committee*, in *Diritti umani e diritto internazionale*, 2020, p. 635 ff.; F. Mussi, *Cambiamento climatico, migrazioni e diritto alla vita: le considerazioni del Comitato dei diritti umani delle Nazioni Unite nel caso Teitiota c. Nuova Zelanda*, in *Rivista di diritto internazionale*, 2020, p. 826 ff.; E. Sommario, *When climate*

from a legal point of view. The case originates from the action brought by Mr Teitiota, a citizen of the Republic of Kiribati, in the Pacific Ocean of the South, who sought asylum with his family in New Zealand because of the increasingly unstable and precarious situation due to sea level rise deriving from climate change effects. Being the first case concerning the relationship between environmental issues and migration brought before the Committee, it deserves to be analysed in a deep and comprehensive way by reporting firstly the context of the dispute and the legal grounds for invoking the intervention of the UN body (a) and then the reasoning of the Committee behind its final decision (b).

a. Factual background

The Republic of Kiribati is an island nation located in the central tropical Pacific Ocean. It comprises 32 atolls and one island, including the island of Tarawa, where Mr Teitiota comes from, that consists of sand and reef rock and islets of atolls or coral islands that rise but a few metres above sea level. Despite the fact that soils are generally poor and infertile, over the last decades the population of Tarawa became overcrowded due to the influx of residents from outlying islands not having the same level of services. As emerged in the reconstruction made by the UN Human Rights Committee, this has gradually provoked social tensions because of the scarcity of land and of fresh water due, in their turn, to the effects of climate change-related events, including sea level rise. Indeed, coastal erosion and accretion as well as storm surges and high spring tides started to affect housing, land, and property. Besides affecting transportation across the island, the high content of salt in the water deposited on the ground resulted not only in contaminated drinking water but also in the destruction of crops. This has provoked a serious deterioration of the health of the population with vitamin A deficiencies, malnutrition, fish poisoning, and other ailments. Since environmental and population pressures seem to be widespread conditions affecting the whole territory of the Republic, internal relocation appears quite unfeasible, and citizens are forced to migrate abroad.

Against this background, in 2007 Mr Teitiota and his family migrated in New Zealand, where he irregularly remained after the residence permits expired in 2010 and, in 2012, he made a claim to be recognised as a refugee and/or protected person. However, the Refugee and Protection Officers, by making reference to the Immigration Act 2009[56], denied the

change and human rights meet: A brief comment on the UN Human Rights Committee's Teitiota decision, in *Questions of International Law*, 2021, p. 51 ff., www.qil-qdi.org.

56. See, Public Act 2009 No 51 adopted on 16 November 2009. According to the New Zealand Immigration Act, there are two different *status* that could be granted: that of refugee and that of protected person. While the former falls in the scope of the 1951 Geneva Convention, the latter can be recognised when either the Convention against Torture

claim because there were not sufficient substantial grounds for believing that he and his family would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand. After the Immigration and Protection Tribunal also denied his claim[57], he appealed to the New Zealand High Court which, again, found that the current impacts of climate change on Kirabati did not qualify Mr Teitiota as a refugee according to the Geneva Convention[58]. The decision was confirmed both by the Court of Appeal[59] and the Supreme Court of New Zealand[60]. Indeed, according to the Courts, he did not objectively face a real risk of being persecuted if returned to Kiribati. First of all, he had not been subjected to any land dispute in the past and there was no evidence that he faced a real chance of suffering serious physical harm from acts of violence linked to housing/land/property disputes in the future. Secondly, there was no evidence that he had no access to potable water, or that the environmental conditions that he faced or would face on return were so perilous that his life would be jeopardized. For these reasons, he was not a «refugee» as defined by the Geneva Convention. At the same time, the judges of the Supreme Court did not rule out the possibility that «environmental degradation resulting from climate change or other natural disasters could create a pathway into the Refugee Convention or protected person jurisdiction»[61]. In fact, the New Zealand Immigration Act, despite granting special protection to those cases falling under the Convention against Torture or under the Covenant of Civil and Political Rights, gives a strict reading of their scope of application by limiting them to classical situations of violation likely to exclude environmental migration.

On September 2015, Mr Teitiota decided to file a communication with the UN Human Rights Committee (hereinafter: the Committee), alleging that New Zealand had violated his right to life under the 1966 International Covenant on Economic, Social and Political Rights. The Committee is a body of independent experts established by the Optional

(Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly Resolution 39/46 of 10 December 1984) or the Covenant of Civil and Political Rights apply. However, section 131 explicitly sets that «a person must be recognised as a protected person under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand». Moreover, it is also stressed that the recognition is not possible «if he or she is able to access meaningful domestic protection in his or her country or countries of nationality or former habitual residence». See, New Zealand Immigration Act, 2009, sections 129-131. For an overview on the domestic proceedings, see K. Buchanan, *New Zealand: 'Climate Change Refugee' Case Overview*, www.loc.gov.

57. See, New Zealand Immigration and Protection Tribunal, AF (Kiribati) [2013] NZIPT 800413, 25 June 2013.

58. See, Teitiota v Chief Executive of the Ministry of Business Innovation and Employment [2013] NZHC 3125, 26 November 2013.

59. See, Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment [2014] NZCA 173, 8 May 2014.

60. See, New Zealand Supreme Court, Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment, [2015] NZSC 107, 20 July 2015.

61. *Ivi*, point 13.

Protocol to the Covenant for monitoring its implementation by States Parties. Moreover, it is a non-judicial body having the competence to consider inter-States and individual complaints with regard to alleged violations of the Covenant perpetrated by States that are Parties to the Protocol. Since New Zealand ratified the Optional Protocol in 1989 and, *ex* Article 2 thereof, all available domestic remedies were exhausted, Mr Teitiota had the opportunity to invoke the intervention of the Committee by claiming the violation of the right to life enshrined in Article 6 of the Covenant.

b. The decision of the Human Rights Committee

The question brought before the Committee was whether, upon deportation, the applicant faced a real risk of irreparable harm to his right to life due to the effects of sea level rise in Kiribati. Indeed, he argued that (i) the latter had created scarcity of habitable space, resulting in violent land disputes, and that (ii) environmental degradation had resulted in unsafe and unhealthy concerns, including saltwater contamination of the freshwater supply.

The reasoning of the Committee started by recalling that the invocation of Article 6 of the Covenant is possible where the risk of irreparable harm is personal, i.e., it cannot derive merely from the general conditions in the receiving States, and if there are substantial grounds for believing that a real risk exists. In this case, according to Article 2 of the Covenant, States Parties have the obligation not to extradite, deport, expel, or otherwise remove a person from their territory either in the country to which removal is to be made or in any country to which the person may subsequently be removed.

Given these premises, the Committee made a very brief but accurate analysis for verifying whether the single claims made by the author could amount to serious risks for his life. In the first instance, the members of the Committee argued that a general situation of violence is *per se* sufficient to create a real risk of irreparable harm when the individual is exposed to such a violence. However, in that specific case, it was observed that only sporadic incidents and significant land disputes can be registered in Kiribati. Moreover, Mr Teitiota had never been personally exposed to these acts of violence[62]. Secondly, as for environmental degradation, potable water is at present guaranteed by rationed supplies provided by the public utilities board and alternative means of subsistence are available. Furthermore, while accepting Teitiota's claim that sea level rise is likely to render Kiribati uninhabitable, the Committee explained that, given the 10-15–year timeframe, there is sufficient time for Kiribati's government to intervene to protect its citizens. Indeed, to

62. See, UN Human Rights Committee, Views adopted by the Committee under Article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016, 07 January 2020, point 9.7.

invoke the right to life, the threat must be imminent and actual. As a result, the Committee concluded that there was no evidence proving clear arbitrariness or error in the New Zealand authorities' assessment. Hence, it was unreasonable to conclude that removing the claimer to his country would expose him to an irreparable harm[63].

At the end of its evaluation, the Committee dismissed the communication on the merits by concluding that, on the basis of the information received by Mr Teitiota and of the facts before it, the decision of New Zealand to remove him to the Republic of Kiribati did not violate his rights under Article 6 (1) of the Covenant[64]. It deserves attention, however, that, interestingly, two Committee members dissented. Ms Vasilka Sancin attacked the majority's finding on the lack of evidence that Teitiota's family lacked potable water, explaining that «potable» does not equate to «safe drinking water»[65]. Moreover, despite the Government of Kiribati had taken programmatic steps to address the effects of climate change, specific policies and strategies have yet to be implemented. The second dissenting opinion by Laki Muhumuza[66] argued that the Committee had placed an excessive burden of proof on the claimer to establish a real risk of danger of arbitrary deprivation of life. In addition, according to the Committee member, the author of the claim had presented all the necessary evidence to demonstrate the difficulty to address basic needs and to lead a life consistently with the standards of dignity required under the Covenant.

3.2. Spotlights on the Human Rights Committee's decision

Despite the unfavourable conclusions reached in this specific case, both the reasoning underpinning the Committee's decision and the content of the dissenting opinions have underlined some needs and interpreted well-established principles concerning the human rights of environmental migrants that will be certainly further evaluated in the near future.

In the first place, the Committee's reconstruction made clear that, in an ever-changing international context, environmental migration represents a fast-growing phenomenon that needs special attention also at a supranational level. Besides this factual acknowledgement, the Committee has deeply evaluated the interplay between the human rights dimension and environmental migration. It argued that the scope of the right to life *ex* Article 6 of the Covenant cannot be interpreted in a restrictive way, since, as already reported in the General comment n. 36, it «includes the right of individuals to enjoy a life with dignity and

63. *Ivi*, point 9.9.
64. *Ivi*, point 10.
65. See, Individual opinion of Vasilka Sancin (dissenting), point. 3.
66. See, Individual opinion of Duncan Laki Muhumuza (dissenting).

to be free from acts or omissions that would cause their unnatural or premature death»[67]. Moreover, the Committee further recalled that the respect of the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life[68]. By applying this interpretation to the concrete case, the Committee recognised that, in a long-term perspective, environmental degradation, climate change and unsustainable development may constitute serious threats to the ability of present and future generations to enjoy the right to life[69]. It thus found that «given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to live with dignity before the risk is realized»[70]. The Human Rights Committee itself, in the landmark *Portillo Cáceres v Paraguay* case[71], had already recognised the existence of a connection between environmental protection and the right to life with dignity[72]. Actually, this conclusion is in line with the positions taken by regional human rights tribunals in other cases of climate litigation that, whilst focusing on the effects of sudden-onset disasters, have repeatedly established a link between environmental concerns and the invocation of the right to life. In particular, it deserves to be mentioned that the European Court of Human Rights (hereinafter: ECtHR) has stressed that «the positive obligations under Article 2 [of the ECHR] include a duty to do everything within the authorities' power in the sphere of disaster relief for the protection of the right to life»[73]. And, in its 2017 *Advisory Opinion*

67. See, UN Human Rights Committee, General comment No. 36, Article 6 (Right to Life), 03 September 2019, CCPR/C/GC/35, point 3. For insights on the General comment, see S. Joseph, *Extending the Right to Life Under the International Covenant on Civil and Political Rights: General Comment 36*, in *Human Rights Law Review*, 2019, p. 347 ff. The linkage between climate change and right to life was already stressed by some scholars, see C. Bakker, *Climate Change and the Right to Life: Potentialities and Limits of the International Human Rights System*, in O. Quirico, M. Boumghar (eds), *Climate Change and Human Rights: An International Law Perspective*, London, Routledge, 2016, p. 71 ff.

68. See, UN Human Rights Committee, Views, cit., point 9.4.

69. *Ibidem*.

70. See, UN Human Rights Committee, General comment no. 36, point 62.

71. See, UN Human Rights Committee, *Portillo Cáceres v Paraguay*, 9 August 2019, Comm No. 2751/2016 CCPR/C/126/D/2751/2016. For a comment, see G. Le Moli, *The Human Rights Committee, Environmental Protection and the Right to Life*, in *International and Comparative Law Quarterly*, 2020, p. 735 ff.

72. *Ivi*, point 7.3.

73. ECtHR, *Hadzhiyska v Bulgaria*, n. 20701/09, 15 May 2012. The connection has been proposed in a number of judgments: *Öneryildiz v Turkey*, n. 48939/99, 30 November 2004; *Budayeva et al. v. Turkey*, n. 15339/02, 20 March 2008; *Kolyadenko et al. v Russia*, n. 17423/05, 28 February 2012. For general insights, see: R. Pisillo Mazzeschi, *Responsabilité de l'État pour violation des obligations positives relatives aux droits de l'homme*, in *Recueil Des Cours*, 2008, p.175 ff.; B. Nicoletti, *The Prevention of Natural and Man-Made Disasters: What Duties for States?*, in A. De Guttry, M. Gestri, G. Venturini (eds), *International Disaster Response Law*, Cham, Springer, 2012, p. 177 ff.; W. Kalin, *The Human Rights Dimension of Natural or Human-Made Disasters*, in *German Yearbook of International Law*, 2012, p. 119 ff.; M. Sossai, *States' Failure to Take Preventive Action and to Reduce Exposure to Disasters as a Human Rights Issue*, in F. Zorzi Giustiniani, F. Casolari, G. Bartolini, E. Sommario (eds.), *Routledge Handbook of Human Rights and Disasters*, London, Routledge, 2018, p. 119 ff.

on Human Rights and the Environment, the Inter American Court of Human Rights recognised «the existence of an undeniable relationship between the protection of the environment and the realization of other human rights, in that environmental degradation and the adverse effects of climate change affect the effective enjoyment of human rights»[74]. However, if read exclusively in this way, one could argue that the right to life would result just in the obligation of the affected States to protect their citizens against sudden catastrophes or reasonably foreseeable threats and life-threatening situations occurring within their territory.

The Human Rights Committee made instead a step forward by broadening the legal responsibility of States Parties, which now have an unprecedented obligation to ensure that people live life with dignity[75]. Indeed, whenever an individual suffered from an insufficient level of protection by the country of origin, the other States Parties have to comply with their undertakings under the Covenant by adopting all the necessary measures to ensure the respect and observance of fundamental rights. And it is here that the Committee has created the most interesting legal input. Notably, it gave a new interpretation of the relationship between the right to life and the principle of *non-refoulement*[76] with regard to environmental degradation and climate change under the Covenant. Indeed, according to the Committee, the obligation not to extradite, deport or otherwise transfer «may be broader than the scope of the principle under international refugee law, since it may also require the protection of aliens not entitled to refugee *status*»[77]. As proof of this, the Committee also recalled[78] the General comment No. 31 on the nature of the general legal obligation imposed on States Parties to the Covenant in which it refers to the obligation of States Parties not to extradite, deport, expel, or otherwise remove a person from their territory when there are substantial grounds for believing that there is a real risk of irreparable harm under Article 6 of the Covenant[79]. Therefore, whenever environmental degradation and climate

74. See, Inter American Court of Human Rights, *Advisory Opinion requested by the Republic of Colombia: Environment and Human Rights (State obligations in relation to the environment within the framework of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4.1 and 5.1 in relation with Articles 1.1 and 2 of the American Convention on Human Rights)*, OC-23/17, Opinion of 15 November 2017, Serie A No. 23, point 108.

75. See, UN Human Rights Committee, Views, cit., points 9.12, 9.13.

76. For a general overview on the principle of non-refoulement, see B. Nascimbene, *Le Non-Refoulement comme Principe du Droit International et le Rôle des Tribunaux dans Sa Mise en Œuvre*, Ouverture de l'Année judiciaire, 27 January 2017.

77. See, UN Human Rights Committee, Views, cit., point 9.3.

78. *Ibidem*.

79. See, UN Human Rights Committee, General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13.

change effects constitute serious and real threats to the ability to enjoy the right to life[80], States must be ready to apply the principle of *non-refoulement* also to those who can be affected by environmental hazards and not only to asylum seekers.

The real innovation brought by the *Teitiota* case is encapsulated in the Committee's stance that the effects of climate change *per se* can lead to a violation of individuals' right to life such as to require protection from refoulement. Moreover, the conclusions reached by the Committee seem to give substance to the intentions enshrined in the Migration Compact that explicitly upholds the prohibition of forcible return of migrants in cases of a foreseeable risk of any irreparable individual harm[81]. Following this, the potential application of the right to life combined with the principle of *non-refoulement* is subordinated to the accomplishment of three-fold conditions. In the first place, the Committee's decision confirms that a special protection *status* because of environmental factors can be granted just against *actual* threats existing at the moment when the right to life is invoked. Thus, States cannot be imposed to guarantee protection when the consequences of environmental changes can be solely presumed and not proven by objective figures allowing to verify the existence of a threat for the individual.

Secondly, in order to apply the principle of *non-refoulement*, it should be possible to identify the country of origin as unwilling or uncapable of implementing positive measures to ensure the right to life against environmental hazards. As long as the State is committed to adopt managing and adaptation measures, it seems unlikely that an individual may claim protection from third countries.

Finally, the third condition concerns the reasons behind the forced decision to leave the country of origin. The claimant has indeed the burden to demonstrate not only the real risk of being deprived of life, but also that the resultant individual necessity to leave the country of origin solely (or primarily) depends on environmental factors making livelihood impossible in that territory. If, on the other hand, the environmental issues match with a plethora of other factors (including economic ones) and subjective considerations prevail, then the content of the right to life and the principle of *non-refoulement* may not find application. Considering, however, that one of the highlighted difficulties of identifying a workable legal category for environmental migration is also linked to its complex multicausal nature, the application of the extensive reading of Article 6 of the Covenant to

80. See, General Comment n. 36, point 62. The UN Committee recalls that the same orientation has been adopted also by some regional tribunals. See, Inter-American Court of Human Rights, *Advisory opinion OC-23/17 of 15 November 2017 on the environment and human rights*, series A, No. 23, point 47; Inter-American Court of Human Rights, *Kawas Fernández v. Honduras*, judgment of 3 April 2009, series C, No. 196, point 148; African Commission on Human and People's Rights, General comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), point 3; ECtHR, application Nos. 54414/13 and 54264/15, *Cordella and Others v. Italy*, judgment of 24 January 2019, point 157.

81. The Committee explicitly mentioned the Global Compact on Migration in point 9.11.

those forced to migrate because of environmental hazards can only be made on a case-by-case basis. Accordingly, the Human Rights Committee's decision reflects a carrot and stick approach, consolidating the interaction between the right to life and environmental degradation, by also extending the application of the principle of *non-refoulement*, while setting that the elaboration of self-standing instruments for the protection of environmental migrants beyond national borders remains problematic.

3.3. Environmental migration before domestic courts

Alongside the ruling proposed by the Human Rights Committee, progress in upholding the rights of individuals migrating because of environmental degradation and the effects of climate change have been recently made, even though with some variation, also at a domestic level, as revealed by some significant and illustrative rulings adopted by national courts in Italy and Germany.

In December 2019, the Italian Supreme Court of Cassation upheld the action brought by a Bangladeshi applicant against the decision of the Territorial Commission to reject his application for international protection and to exclude the subsistence of the foundations for granting humanitarian protection[82]. In this case, the applicant had lost his house because of massive floods. Here the Court set that the evaluation on the opportunity to grant a residence permit for humanitarian reasons must be based on a comparative assessment of the individual's subjective and objective situation with reference to the country of origin. In particular, one must take into account the applicant's vulnerabilities and the risk of living conditions that are contrary to the minimum core of fundamental rights and personal

82. Cass., sez. I, ordinanza n. 2563, 4 December 2019. In the Italian legislation (Legislative Decree n. 286/1998, Article 5, para. 6), besides the classical instruments of international protection, there is the humanitarian protection that may be granted as residual form legal arrangement if the applicant is not entitled to international protection but declares and proves to have particular needs recognized as fundamental for the individual. In addition, it must be mentioned that Article 20 *bis* of the Testo Unico sull'Immigrazione (Text on Immigration) establishes a residence permit for catastrophes when the country of origin of the applicant is in a situation of such severity that it does not allow a safe re-entry and stay. The Italian version reads as follow: «Fermo quanto previsto dall'articolo 20, quando il Paese verso il quale lo straniero dovrebbe fare ritorno versa in una situazione di grave calamità che non consente il rientro e la permanenza in condizioni di sicurezza, il questore rilascia un permesso di soggiorno per calamità. 2. Il permesso di soggiorno rilasciato a norma del presente articolo ha la durata di sei mesi, ed è rinnovabile se permangono le condizioni di grave calamità di cui al comma 1; il permesso è valido solo nel territorio nazionale e consente di svolgere attività lavorativa». For insights, see P. Bonetti, *Profili generali e costituzionali del diritto d'asilo nell'ordinamento italiano*, in B. Nascimbene (a cura di), *Diritto degli stranieri*, Padova, Cedam, 2004, p. 1136 ff.; A. Brambilla, *Migrazioni indotte da cause ambientali: quale tutela nell'ambito dell'ordinamento giuridico europeo e nazionale?*, in questa *Rivista*, 2.2017, p. 1 ff.; N. Zorzella, *La protezione umanitaria nel sistema giuridico italiano*, in questa *Rivista*, 1.2018, p. 1 ff.; M. Benvenuti, *Il dito e la luna. La protezione delle esigenze di carattere umanitario degli stranieri prima e dopo il decreto Salvini*, in questa *Rivista*, 1.2019, p. 1 ff.; C. Scissa, *La protezione per calamità: una breve ricostruzione dal 1996 ad oggi*, in *Forum di Quaderni Costituzionali*, 2021, p. 136 ff.

dignity[83]. Once the comparative assessment confirmed not only the overwhelming disparity between the two different contexts in the enjoyment of human rights, but also the specific correlation between the triggering event and the personal condition of the individual, the serious reasons of humanitarian character could be identified[84]. In light of these considerations, the Court decided that the local court should re-examine the case and the applicant's request of protection by also taking into consideration the specific instrument of protection for calamities enshrined in Italian law. One year later, the Supreme Court of Cassation ruled[85] about the decision of rejecting the application of a citizen from the Niger Delta for subsidiary protection or, alternatively, humanitarian protection under Italian law. The plaintiff claimed that the local judge had not taken into account the serious environmental situation of his country of origin due to the indiscriminate exploitation of the natural resources, especially from oil companies and paramilitary forces exercising their control over the territory and contributing to the political instability in the area. Moving from the *Teitiota* case and the broad interpretation given to the right to life, the judges of the Italian Supreme Court supported the idea that the risk to undermine the right to life for the individual and his or her relatives should be recognised not only in case of armed conflict that remains the most striking example of threat to life. Indeed, also those situations of social and environmental degradation or of unsustainable exploitation of natural resources are suitable to undermine the opportunity to live with dignity. In more detail, where there is a serious environmental situation due to sudden-onset disasters or to the effects of climate change such that broad sections of population cannot have access to essential natural resources such as potable water or fertile soil, a proper evaluation on the potential impairment of the fundamental rights, including that to a decent life, has to be carried out. Accordingly, the Court concluded that the occurrence of an environmental disaster threatening the right to life justifies the grant of humanitarian protection under Italian law. Again, in compliance with the Human Rights Committee, the wording used by the Supreme Court of Cassation confirms the case-by-case approach of the scrutiny that shall be done with reference to the peculiar risk to the individual right to life occurring in the concerned territorial area.

In Germany, the Higher Administrative Court of Baden-Wuerttemberg took its landmark decision[86] concerning the request of protection coming from an Afghan national by stressing the application of the non-refoulement principle based on German immigration

83. Cass., ordinanza 2563/2019, cit., point 5.4.
84. Cass., ordinanza 2563/2019, cit., point 5.4.
85. Cass., sez. II, ordinanza n. 5022, 24 February 2021.
86. VGH Baden-Wuerttemberg, judgement of 17 December 2020 – A 11 S 2042/20.

law in conjunction with international human rights. In particular, by extensively interpreting national legislation[87], the Court considered the following relevant factors for determining the humanitarian conditions in Afghanistan under Article 3 ECHR: the general economic situation, the food, housing and health care situation, the volatile security situation, the recent COVID-19 situation, as well as the environmental conditions, such as the climate and natural disasters[88]. Indeed, it was acknowledged that the poor food, housing and health care situation was negatively influenced by the prevailing environmental conditions, in particular, the difficult climate conditions and natural disasters. Citing a report of the European Asylum Support Office, the Court mentioned that out of the approximately 4.2 million internally displaced people in Afghanistan in 2019, around 1.2 million had fled because of natural disasters, especially drought and floods[89]. In this general context of humanitarian crisis further exacerbated by the Covid-19 pandemic, the Court thus found that the applicant was in a condition of vulnerability and that Germany is bound by a non-refoulment obligation.

The illustrated domestic decisions have not been solved through the same legal arguments. Indeed, they originated from different issues: on the one hand, the request of international protection and, on the other, a decision of deportation. Accordingly, the Italian judges have confirmed an extensive reading of the right to life when treating the evaluation on the granting of international protection; instead, the German ones have relied on the prohibition of inhuman or degrading treatment – rather than on the right to life as in the *Teitiota* case – when dealing with deportation. To support the position taken by the German judges, that is seemingly closer to the grounds for granting a subsidiary protection, it must be recalled that the ECtHR has recently opened the door to a broader interpretation of the effects of environmental degradation due to climate change over the individuals in light of Article 3 ECHR in the *Duarte Agostinho and Others v. Portugal and Others* case[90]. Such

87. As for the German legislation, also in this case the refugee and subsidiary protection are completed with another legal arrangement set in the Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory regulating, *inter alia*, the ban on deportation. Indeed, according to Section 60 (5) a foreigner may not be deported if deportation is inadmissible under the terms of the ECHR. The German version of Section 60, par. 5, reads as follows: «Ein Ausländer darf nicht abgeschoben werden, soweit sich aus der Anwendung der Konvention vom 4. November 1950 zum Schutze der Menschenrechte und Grundfreiheiten (BGBl. 1952 II S. 685) ergibt, dass die Abschiebung unzulässig ist». For comments, see J. Grote, M. Vollmer, *Opportunities to change the residence title and the purpose of stay in Germany*, Working Paper 67, Federal Office for Migration and Refugees, 2016, available at www.bamf.de.

88. VGH Baden-Wuerttemberg, cit., point 30.

89. *Ivi*, points 65-68.

90. ECtHR, Case n. 39371/20 [Pending]. The proceeding has been promoted in November 2020 against 33 States accused of contributing to greenhouse gas emissions. In their application form, the applicants here invoke the positive obligations of the States under Articles 2 and 8 of the ECHR (right to life and respect for private and family life, respectively), read in the context of the Paris Agreement, considering that there may be discrimination against future generations who will be most affected by climate change. However, when the case was communicated, the judges of the

reference is quite noteworthy because, even though the Court had already relied on Article 3 ECHR, this provision is not commonly invoked specifically with respect to climate change. Hence, even though *Duarte Agostinho* is not an expulsion case, if confirmed, the ECtHR's reading could also be very relevant in terms of evolutionary interpretation of the combination between Article 3 ECHR and environmental migration.

Ultimately, besides laying the foundation for future cases of climate litigation in the field of environmental migration, all these cases confirm the elaboration of a parallel instrument of protection based on human rights arguments that is alternative to the international protection. The idea is, indeed, that the latter cannot be the only one capable of guaranteeing protection to individuals and that the principle of non-refoulement should be deemed as the real benchmark for accomplishing the needs of individuals in condition of special vulnerability.

4. Conclusive remarks

The notion of human displacement occurring as a result of environmental issues is a relatively recent conceptualisation compared to the more traditional ideas associated with human mobility. Nevertheless, the last developments at a supranational level in the field of environmental migration are demonstrating the progressive, even though still weak, attention to tackle this phenomenon in a more comprehensive and coordinated way.

The main element that emerges from the different strategies and soft law documents adopted by most States, including the Global Compact on Migration and that on Refugees, as well as from the decision taken by the Human Rights Committee, is the tendency to focus on a general human rights-based approach, rather than to call for the application of the 1951 Refugee Convention. In broader terms, the interpretation proposed by the Committee has brought to light a fundamental concept. On the one hand, it has acknowledged that environmental migrants cannot always be categorised as individuals that freely decide to migrate because of an unfavourable environment. They can be forced to leave their countries of origin thus seeking protection in other States. Thus, even though they cannot be considered refugees under the Geneva Convention, they may claim their right to life under the Covenant, ultimately limiting the discretion of the receiving States by invoking the application of the principle of *non-refoulement*. There is no doubt that this principle is well-established under international law, but it has to be stressed that a firm and wider affirmation of the principle is missing in the Migration Compact. Due to some States' opposition, this shortcoming might downgrade the centrality of States' *non-refoulement*

ECtHR suggested the applicants also to comment and propose evidence of the alleged violations of Article 3 ECHR. For a preliminary comment, C. Heri, *The ECtHR's Pending Climate Change Case: What's Ill-Treatment Got To Do With It?*, in *EJIL:Talk!*, 22 December 2020, www.ejiltalk.org.

obligations in managing international migration and can be seen as an attempt to progressively reduce their scope of application.

Against this background, the UN body has indirectly reinforced the necessity to promote the elaboration of special and separated instruments of protection for this category of migrants who, even though for different reasons in comparison to asylum seekers, can be forced to leave their country of origin not because of a human persecution but because of an irreparable environmental context. By considering, however, the difficulty in applying the principle of *non-refoulement* to environmental migrants, the Committee did not refrain from recalling that the affected States are supposed to bear the primary responsibility in protecting people from environmental hazards. Indeed, the reasoning behind the decision to rule out Mr Teitiota's claim is based on the fact that the principle of *non-refoulement* following the recognition of a potential threat to the right to life should be triggered in *extrema ratio* and according to the individual circumstances. In other words, as long as the measures taken by the affected State suffice to reduce existing vulnerabilities and build resilience to climate change-related harms, thereby protecting the inhabitants' right to life, individuals cannot be considered as exposed to a violation of their rights under Article 6 of the Covenant such as to trigger the *non-refoulement* obligations of sending States. Hence, the real risk threshold is very high and seeking for external protection can be acceptable just in case of an irreparable and intolerable condition that deprives the individual of objective alternatives. However, as demonstrated by the illustrated cases brought before some domestic courts, the national margin of appreciation remains, and States may apply a broader interpretation where it is deemed appropriate.

The illustrated picture reflects the trend to fill out the current protection gap by safeguarding environmental migrants by means of the already existing instruments intended to guarantee the respect of fundamental human rights such as the right to life. If pursued, it would be the occasion to take charge of that category of people that evaluates the actual gravity of the situation in the country of origin and the causal link between that and the necessity to migrate. Definitely, some crucial steps need to be taken in terms of States' positive obligations as well as of the role of the international community in strengthening the efforts for reducing the impact of climate change as demonstrated by the increasing examples of climate litigation. Hence, when a serious natural disaster occurs or the effects of climate change are evident, each State should guarantee the first level of legal protection. Indeed, States' sovereignty does imply responsibility to guarantee protection to their citizens. At the same time, the other States should take into account the developments in international human rights law and collaborate in order to ensure protection to those who decide to abandon their country by effectively applying the principle of *non-refoulement*. In this way, States could align in respecting the whole content of the right to life, which

includes the right of individuals to enjoy a life with dignity and to be free from acts or omissions that would cause their unnatural or premature death caused, *inter alia*, by serious environmental degradation.