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TOWARDS LITIGATING CLIMATE-INDUCED MIGRATION? CURRENT LIMITS AND EMERGING TRENDS FOR THE PROTECTION OF "CLIMATE-INDUCED MIGRANTS" IN INTERNATIONAL LAW**

1. *Introduction*

Over the last decade much has been said by legal scholars about the link between climate change and migration.[1] Though the exact number are disputed,[2] there seems to be a wide consensus that climate change is (actually and significantly) affecting human mobility, whether as a major "push-factor" or as a relevant contributing element.[3] It is also clear that

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[1] See, *inter alia*, also for further bibliographical references: J. MCADAM (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives*, Oxford, 2010; ID, *Climate Change, Forced Migration, and International Law*, Oxford, 2012; W. KÄLIN, N. SCHREPFER, *Protecting People Crossing Borders in The Context of Climate Change: Normative Gaps and Possible Approaches*, UNHCR Legal and Protection Research Series, PPLA/2012/01, 2012, available at https://www.unhcr.org/4f33f1729.pdf; S. BEHRMAN, A. KENT (eds.), *Climate Refugees: Beyond the Legal Impasse*, Abingdon/New York, 2018; among Italian scholars, see F. PERRINI, *Cambiamenti climatici e migrazioni forzate: verso una tutela internazionale dei migranti ambientali*, Napoli, 2018, and G. SCIACCALUGA, *International Law and the Protection of Climate Refugees*, Cham, 2020.

[2] On the difficulty in estimating the numbers in the context of climate-induced migration see for example the work by A. RANDALL, *Climate Refugees: How Many are there? How Many will there be?*, available at http://climatemigration.org.uk/climate-refugees-how-many/

[3] See *e.g.,* D. IONESCO ET AL., *The Atlas of Environmental Migration*, Abingdon/New York, 2018.

the scale of this phenomenon will be significant, as millions will be relocated (*rectius*, will be *forced* to migrate) in one way or another.[4]

International law will have to provide answers to this emerging phenomenon. To date, the relevant international regulatory framework is quite patchy and several important gaps seem to exist within it.[5] Notable gaps include issues such as statehood and finance.[6] It is also not clear *who* is responsible for the damage caused to "climate refugees"[7] (the issue of causality still acting as a significant barrier); and affected communities do *not* have the right to seek refuge in a different country, *nor* are they allowed to stay there legally, at least not on the basis *simply* that the effects of climate change have forced them from their homes.

This short contribution will open with an evaluation of the recent development of the international law of climate-induced migration. It will explain that, despite certain notable efforts, a *regulatory* gap still exists. It will then examine a new strategy, one that over the last few years has been employed by communities and civil society organisations wishing to force progress in the fight against climate change – the use of *litigation*. In this respect it seems that (at least some of) this recent wave of litigation is relevant *also* in the more specific case of climate-induced migration. Therefore, in what follows we will evaluate this new phenomenon and ask particularly: *a)* whether the use of litigation could be – in the short run – the solution to the mentioned longstanding (regulatory) stalemate, and *b)* whether, by the means of litigation, some (first) answers might at least be provided to the plight of "climate refugees".

2. *Recent international regulatory initiatives in the context of climate-induced migration*

The international regulation of climate-induced migration is a relatively new development. Until 2010, the international community was almost silent on this matter. While climate change was at the very heart of public debate, the fact that it could (also) lead to mass migration was left untouched – a sort of "elephant in the room", whose social and economic implications were almost too big to fathom.

In that year, the member States of the United Nations Framework Convention on Climate Change (UNFCCC) admitted, for the first time, that a problem exists. In the, now iconic, par. 14 lett. F of the Conference of the Parties (COP) Decision 1/CP.16, the international community was indeed called on «to enhance on adaptation […], by undertaking, inter alia, […] [m]easures to enhance understanding, coordination and

[4] According to a recent World Bank report, by 2050 the number of climate-induced *internally* displaced persons alone, in only three regions (Sub-Saharan Africa, South Asia and Latin America), will reach 143 million: see K. RIGAUD ET AL., *Groundswell: Preparing for Internal Climate Migration*, The World Bank, 2018. Other estimates can be found in D. IONESCO ET AL., *The Atlas*, cit., pp. 16-17.

[5] As put in evidence by all legal scholars confronted with the issue.

[6] Concerning, respectively: the "endangered statehood" of the insular States whose very survival is threatened by the sea-level rise related to climate change; and the problem of the financial compensations for the damages suffered by the States and communities/individuals affected by such a change. See more on this point in A. KENT and S. BEHRMAN, *Facilitating the Resettlement and Rights of Climate Refugees*, Abingdon/New York, 2018, p. 9 ff.

[7] As well known, the use of the term "climate refugee" is quite controversial in international legal doctrine. On this point, beyond the scope of our study, see *amplius* (also for further bibliographical references) A. KENT, S. BEHRMAN, *Facilitating the Resettlement,* cit., p. 40 ff.

cooperation with regard to *climate change induced displacement, migration and planned relocation*, where appropriate, at the national, regional and international levels».[8]

This (unassumingly vague) paragraph ignited a process that, ten years later, has not yet matured into a *concrete* change in the regulatory framework. Nonetheless there have been several stepping-stones, including declarations such as the *UN New York Declaration for Refugees and Migrants* (2016)[9] and the *UN Global Pact for Safe, Orderly and Regular Migration* (2018)[10], adopted within the United Nations system. These legal instruments, though being non-binding, are important: firstly, they kept the plight of "climate-induced migrants" at the heart of the political debate; secondly, they inspired further action by States and regional frameworks.[11] At the same time, it is important to recognise these declarations for what they are – mere political statements that mostly (though significantly) reconfirmed what many regarded as obvious: climate change is affecting human mobility, and those displaced by climate-related events need (and will increasingly require) protection. In *normative* terms, these declarations simply do *not* add too much to the on-going legal debate on the issue; neither admittedly they could have, given their *non-binding* scope.

Other important developments from the previous decade include the adoption of the *Nansen Protection Agenda* (2015)[12] and the establishment within the UN Framework Convention on Climate Change of a *Task Force on Displacement* (2015)[13], two further steps that may provide actual utility in the future. The *Nansen Protection Agenda* provides States with: *i)* some useful guidelines and principles on the regulation of climate-induced migration, including criteria for the term "cross-border disaster-displaced persons";[14] *ii)* a series of useful practices with respect to individuals' admission and stay in host States;[15] *iii)* further practices concerning the protection of human rights (including on non-return/non-refoulement), and for cases in which long-term stays are required.[16] The Nansen Initiative has also contributed in terms of global governance: it led indeed to the establishment of a *Platform on Disaster Displacement* (PDD), an international institution that positioned itself at the forefront of international efforts to address climate-induced migration.

The *UNFCCC-led Task Force* is, in turn, a cross-institutional body with representatives from a variety of key intergovernmental organisations (IGOs).[17] The Task Force's objective is «to develop recommendations for integrated approaches to avert, minimise and address

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[8] Italics added.

[9] Unanimously adopted by the UN General Assembly (UNGA) on 19 September 2016 (UN Doc. A/RES/71/1).

[10] Adopted on 10 December 2018 at the Intergovernmental Conference of Marrakech and formally endorsed by the UN General Assembly on 19 December 2018 (UN Doc. A/RES/73/195).

[11] See, for example, B. FELIPE PEREZ, *Climate Migration and its Inclusion in Mexican Legal and Political Frameworks*, in S. BEHRMAN, A. KENT (eds.), *Climate Refugees: Global, Local and Critical Approaches*, Cambridge, forthcoming 2022.

[12] The Nansen Initiative, *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change* (*Nansen Agenda*), adopted on 6 October 2015 (text available at https://nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf,The Nansen Initiative).

[13] Established by the UNFCCC COP Decision 1/CP.21 of 30 November 2015 (see para 49 of the Decision).

[14] *Nansen Agenda*, cit., p. 22.

[15] *Nansen Agenda*, cit., p. 26.

[16] *Nansen Agenda*, cit., p. 28-29.

[17] A list of the Task Force's members can be found at https://unfccc.int/process/bodies/constituted-bodies/executive-committee-of-the-warsaw-international-mechanism-for-loss-and-damage-wim-excom/sub-groups/task-force-on-displacement/membership

displacement related to the adverse impacts of climate change».[18] In line with its mandate, in 2018 the Task Force issued a report including useful recommendations for the UNFCCC and for its member States.[19] It addressed relevant issues such as governance structure (notably with respect to inclusivity[20] and coherence/coordination within the UNFCCC, and with other institutions[21]), preparedness (*e.g.* by risk assessment and data-collection)[22], the streaming of migration into other related policies,[23] and, importantly, finance.

Other less central developments have supplemented these efforts over the last decade and contributed to this trend. It is important to mention in this respect the adoption of several non-binding instruments, such as the *Sendai Framework for Disaster Risk Reduction* (2015);[24] the *Guidelines to Protect Migrant in Countries experiencing Conflicts or Natural Disasters* (2016);[25] the *International Law Commission* (ILC) *Draft Articles on the Protection of Persons in the Event of Disasters*[26] (as well as the ILC mandate to examine issues of sea-level rise in relation to international law); and to a lesser extent statements by authoritative bodies such as the International Law Association (ILA) and UN treaty committees.[27]

Considered as a whole, these regulatory developments have all been certainly useful in providing valuable blueprints and guidelines as to the shape of future international negotiations and regulations. To date, however, they have not brought us any closer to a significant change in the *normative* framework, and the gaps identified at this level in the literature remain in fact as they were. The main legal frameworks that are relevant to the phenomenon – notably the 1992 UNFCCC and the 1951 Refugee Convention – have not been adjusted indeed in any significant way in order to address the plight of "climate refugees". None of the many models proposed by authors in the literature have been adopted;[28] and longstanding legal hurdles – for example with respect to liability – have not

[18] UNFCCC COP Decision 1/CP.21, cit., para 49.
[19] *Report of the Task Force in Displacement 2018*, available at https://unfccc.int/sites/default/files/resource/2018_TFD_report_17_Sep.pdf
[20] *E.g.,* para 28 b) of the Task Force Report.
[21] *E.g., ibidem*, paras 29, 28 c).
[22] *E.g.,* para 33 b) and c) of the Task Force Report.
[23] *E.g., ibidem*, para 33 d).
[24] Adopted at the Third UN World Conference on Disaster Risk Reduction in Sendai (Japan) on 18 March 2015 (text available at https://undrr.org/publication/sendai-framework-disaster-risk-reduction-2015-2030).
[25] Adopted within the Migrants in Countries in Crisis (MICIC) Initiative on 13 June 2016 (text available at https://micicinitiative.iom.guidelines).
[26] At its sixty-eighth session, in 2016, the ILC, on second reading, adopted a draft preamble and 18 draft articles (3 June 2016), together with commentaries thereto (2-4 August 2016), on the protection of persons in the event of disasters; the text of the *Draft Articles*, with commentaries, is available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/6_3_2016.pdf.
[27] See, for instance, the ILA Sidney *Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise*, 2018 (available at https://environmentalmigration.iom.int/sydney-declaration-principles-protection-persons-displaced-context-sea-level-rise%C2&A0); and the *Joint Statement on 'Human Rights and Climate Change'*, adopted on 19 September 2019 by the UN Committee on the Elimination of Discrimination against Women, the UN Committee on Economic, Social and Cultural Rights, the UN Committee on the Protection of All Migrant Workers and Members of their Families, the UN Committee on the Rights of Child and the UN Committee on the Protection of the Rights of Persons with Disabilities (available at https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E).
[28] For a review of different proposals see A. KENT, S. BEHRMAN, *Facilitating the Resettlement*, cit., p. 9 ff., besides those provided by the authors mentioned in footnote n. 1 above.

been addressed, allowing States to continue invoking (and hide behind) "excuses" such as the lack of *direct* causality.[29]

In sum, it is clear that the international community has been busy in the last decade or so in terms of adopting initiatives aimed a shedding light on the emerging phenomenon of climate-induced migration. From the perspective of "climate-induced migrants", however, it is questionable whether much has (actually) changed: their legal rights, and States' liabilities towards them, remained unchanged.

3. *Further recent development from the courts and the supervisory bodies of the international human rights treaties*

As a matter of fact, the problem of climate-induced migration sits within a much larger international political standstill – the international efforts to reduce global emissions and address climate change. The international community has been trying for decades to reach an agreement that will instruct (*all*) States to reduce their GHGs emissions to a level that will be regarded as "safe".[30] The highlight of this effort – the 2015 Paris Agreement – is regarded by many as unsatisfactory, due to its soft mechanisms and an overall "lack of ambition".

The result of this political impasse has been a widespread disillusionment, followed by a search for new (and more effective) strategies that will lead to better results. Particularly, many groups have turned to national and international *courts*,[31] hoping that whatever States were unable to agree on in *political* negotiations (in terms of obligations in the field of climate change mitigation and of remedies for the human rights violations related to climatic change) will be delivered through *judicial* evolution (or even activism). These groups have asked for a variety of remedies, ranging from greenhouse emissions reductions to compensation, protection of the human rights affected by climate change, and declaratory statements.

Most of these attempts were however unsuccessful. As well known, courts are reluctant to "develop" the law on matters that are still subject to sensitive political negotiations. Perhaps the most cited (and explicit) rejection on these grounds was made in the US *Juliana* case. While sympathetic to the claimants' demand to phase-out greenhouse emission, the US Court of Appeal of the Ninth Circuit has «reluctantly concluded that the

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[29] States are avoiding in fact responsibility *vis-à-vis* the damage caused to "climate refugees" (and their home/host States) by pointing to the so called "double-causality problem", that is: *a)* the impossibility of establishing a causal link between the emissions of one *specific State* and a *specific* (climate-induced) *damage*, and *b)* the difficulty in establishing a causal link between climatic changes *and* the decision to migrate, which in many cases involves multiple push factors.

[30] The Paris Agreement defines this level as «well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels».

[31] In this regard see, for example, *amplius* A. SAVARESI, J. AUZ, *Climate Change Litigation and Human Rights: Pushing the Boundaries*, in *Climate Law*, 9.2019, n. 3, p. 244 ff.; J. SETZER, R. BYRNES, *Global Trends in Climate Change Litigation: 2019 Snapshot*, Policy Report, July 2019 (available at https://lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf); and C. BAKKER, I. ALOGNA, J. GAUCI (eds.), *Climate Change Litigation: Global Perspectives*, Leiden/Boston, 2021. Among Italian scholars see M. MONTINI, *Verso una giustizia climatica basata sulla tutela dei diritti umani*, in *Ordine internazionale e diritti umani*, 2020, p. 506 ff., and P. PUSTORINO, *Cambiamento climatico e diritti umani: sviluppi nella giurisprudenza nazionale*, in *Ordine internazionale e diritti umani*, 2020, p. 596 ff.

plaintiffs' case must be made *to the political branches or to the electorate at large*».[32] A similar position was taken by other courts, rejecting claims on similar grounds[33] as well as others.[34]

Nevertheless, a few success stories also exist within the jurisdictional trend under examination. Some courts have agreed indeed to adjudicate climate cases despite their clear political implications,[35] and on rare occasions even to issue operative decisions against the State. A rare, notable, example to this respect is the Dutch Supreme Court's ruling in the *Urgenda* case (2019),[36] in which the State was ordered to reduce its emission levels.[37] Another important decision was made by the Human Rights Committee in the *Teitiota* case (2020),[38] which confirmed that the impact of climate change on islanders' right to life could be significant enough to justify protection, and effectively prohibit their deportation to sinking islands.[39] Other "rays of hope" could be found in some fierce dissenting opinions, such as that provided by Judge Staton in the *Juliana* case, who condemned the majority's decision to

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[32] United States Court of Appeal of the Ninth Circuit, *Juliana et al. vs the United Stated of America* Case No. 18-36082, 17 January 2020, p. 5 (emphasis added).

[33] Such as in: United Kingdom High Court (Queen's Bench Division, Administrative Court), *Plan B Earth vs Secretary of State for Business, Energy and Industrial Strategy* Case No. CO/16/2018, 20 July 2018, para 49; Oslo District Court, *Greenpeace vs Government of Norway* Case No. 16-166667TVI-OTIR/06, 4 January 2018 (available at https://climate-laws.org/cclow/geographies/norway/litigation cases/greenpeace-norway-v-government-of-norway); Republic of Ireland High Court, *Friends of the Irish Environment vs Ireland* Case No. [2019] IEHC 747, 19 September 2019 (available at https://climate-laws.org/cclow/geographies/ireland/litigation_cases/friends-of-the-irish-environment-v-ireland); Administrative Court of Berlin, *Family Farmers and Greenpeace vs Germany* Case No. VG 10 K 412.18, 31 October 2019 (available at https://climate-laws.org/cclow/geographies/germany/litigation_cases/family-farmers-and-greenpeace-germany -v-germany).

[34] For example, the lack of legal standing (as in the case: European Union Court of Justice, General Court, *Armando Ferrão Carvalho and others vs The European Parliament and Council*, application of 24 May 2018).

[35] See, for example, Quebec Superior Court, *Environment Jeunesse vs Attorney General of Canada* Case N°.: 500-06-000955-183, 11 July 2019 (available at https://climate-laws.org/cclow/geographies/Canada/litigation_cases/environment-jeunesse-v-canada).

[36] Netherlands' Supreme Court, *Urgenda vs Netherlands* Case N°. 19/00135, 20 December 2019.

[37] The Supreme Court affirmed that, on the base of the European Convention on Human Rights, the Netherlands has a *positive obligation* to take measures for the prevention of climate change and that it *has to reduce* its greenhouse gas emissions with at least 25% by the end of 2020, compared to 1990 levels. The judgement is significant as it demonstrates how a court can determine responsibilities of an *individual* State, in spite of the fact that climate change is caused by a *multiplicity* of other actors who share responsibility for its harmful effects. For a comment see A. NOLLKAEMPER, L. BURGES, *A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case*, in *Eur. Jou. Int. Law: Talk!*, 6 January 2020, available at www.ejiltalk.org; C. BAKKER, *Climate Change Litigation in the Netherlands*, in C. BAKKER, I. ALOGNA, J. GAUCI (eds.), *Climate Change Litigation: Global Perspectives*, cit., p. 199 ff.

[38] United Nations Human Rights Committee (HRC), *Ioane Teitiota v. New Zealand*, adopted on 24 October 2019, CCPR/C/127/D/2728/2016, published on 7 January 2020.

[39] Ivi, para 9.11. See for a comment on the scope of the Committee's decision, *ex multis* J. MCADAM, *Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-refoulement*, in *American Journal of International Law*, 114.2020, p. 708 ff.; S. BEHRMAN, A. KENT, *Prospects for Protection in the Light of Human Rights Committee's Decision in Teitiota v. New Zealand*, in *Polish Migration Review*, 8.2021, pp. 1-14, ID., *The Teitiota Case and Limitations of the Human Rights Framework*, in *Quest. Int. Law*, *Zoom-in 75*, 2020, p. 25 ff., available at www.qil-qdi.org.; J. HAMZAH SENDUT, *Climate Change as a Trigger of Non-Refoulement Obligations Under International Human Rights Law*, in *Eur. Jou. Int. Law: Talk!*, 6 February 2020, available at www.ejiltalk.org; F. MALETTO, *Non-refoulement e cambiamento climatico: il caso Teitiota c. Nuova Zelanda*, in *SIDIBlog*, 23 March 2020, available at www.sidiblog.org; A. MANEGGIA, Non-refoulement *of Climate Change Migrants: Individual Human Rights Protection or 'Responsibility to Protect?' The* Teitiota *Case Before the Human Rights Committee*, in *Dir. um. dir. int.*, 2, 2020, p. 635 ff.; G. REEH, *Climate Change in the Human Rights Committee*, in *Eur. Jou. Int. Law: Talk!*, 18 February 2020, available at www.ejiltalk.org; E. SOMMARIO, *When Climate Change and Human Rights Meet: A Brief Comment on the UN Human Rights Committee's* Teitiota *Decision*, in *Quest. Int. Law*, *Zoom-in 77*, 2021, p. 51 ff.

leave this decision to the political branch («The majority laments that it cannot step into the shoes of the political branches, […], but appears ready to yield even if those branches walk the Nation over a cliff»).[40]

Finally and remarkably, some first positive signals - in terms of confirmation of the innovative trend inaugurated by the Dutch Supreme Court decision in *Urgenda* - seems to emerge from the national case-law of several other (European and non-European) countries. Significant decisions have been indeed recently adopted (*e.g.*, in Ireland,[41] France,[42] Belgium,[43] Germany,[44] Canada[45] and Australia[46], just to mention a few), aimed at "inducing" the

[40] *Juliana et al. vs the United States of America* Case, cit., p. 49.

[41] Supreme Court of Ireland, *Friends of the Irish Environment vs Ireland*, 31 July 2021, where the Supreme court significantly *reversed* the (aforementioned, see footnote 33) lower court decision (rejecting Friends of the Irish Environment's claim that the 2017 National Mitigation Plan was invalid for failing to achieve substantial short-term emissions reductions) and unanimously determined instead that the National Mitigation Plan falls short of the sort of specificity that the act requires. The court determined, however, that the applicant NGO (FIE) lacks standing to bring its claims under the Irish Constitution or the European Convention on Human Rights; and it also concluded that FIE had not made a compelling enough case for identifying an unenumerated right to a healthy environment (separate from the rights expressly conferred by the Irish Constitution), while *not ruling out* «the possibility that constitutional rights and obligations may well be engaged in the environmental field in an appropriate case».

[42] Administrative Court of Paris, *Notre Affaire à Tous and Others vs France*, 3 February 2021, a decision *recognising* that France's inaction has caused ecological damage from climate change and *awarding* the plaintiffs the requested one euro for moral prejudice caused by this inaction. The Court deferred the decision on whether to issue an injunction to order the French government to take stronger climate measures and *ordered* the 14 October 2021, the Administrative Court of Paris *ordered* the State to take immediate and concrete actions to comply with its commitments on cutting carbon emissions and repair the damages caused by its inaction by December 31, 2022. In particular, the court determined that France emitted 62 million extra tonnes of emissions from 2015-2018, though it lowered the amount to 15 million tonnes, taking into account the drop in emissions in 2020. The court thus called on France to subtract the emissions caused in excess of its legislative commitments, adding these to the reduction of emissions planned between 2021 and 2022. Moreover, as France has committed to a reduction in greenhouse gas emissions of 40 percent by 2030, compared to 1990 levels, and to reaching carbon neutrality by 2050, the court affirmed that any future slippage of emissions beyond the legislative commitments must also be compensated. The court finally rejected a request to have France to pay 78 million euros per semester of delay in meeting the emissions goals, and said it is up to the Prime minister and the government to come up with the measures to fix the problem.

[43] Brussel Court of First Instance, *VZW Klimaatzaak vs Kingdom of Belgium et al.*, 17 June 2021, helding that the Belgium government *breached* its duty of care by failing to take necessary measures to prevent the harmful effects of climate change, though (as in the US *Juliana* case) *declining* to set (the) specific reduction targets (requested by the plaintiffs) on separation of powers grounds.

[44] German Federal Constitutional Court, *Neubauer et al. vs Germany*, 26 April 2021. In this important decision, *reversing* the (aforementioned, see footnote 33) ruling of the Administrative Court of Berlin, the *Bundesverfassungsgericht* joined other courts around the world in their criticism of governments for failing to take efficient measures against climate change. It ruled in particular that the 2019 Germany's Climate Protection Act (GCPA) was *partially not sufficient* to meet Germany's obligation under international climate change law and consequently *requested* more efficient and faster climate change protection initiatives from the legislator (by the means of a redesign of the 2019 GCPA within the end of 2022).

[45] Supreme Court of Canada, *Greenhouse Gas Pollution Pricing Act*, 25 March 2021, confirming that climate change is a matter of national concern and setting a precedent for the federal government to define nation-wide minimum standards as to climate action.

[46] Australia Federal Court, *Anjali Sharma et others vs Minister for the Environment (Commonwealth) and Vickery Coal Pty Ltd*, 27 May 2021. See above all para 293, as to: *i)* the recognition by the court of the severe intergenerational consequences arising from the government's inaction or from its inadequate measures against the effects of climate change (raised by the extension of a coal mine project under examination by the Minister), and *ii)* the consequent recognition of a specific "duty of care" for the Australian government towards present and future generations in this respect. The court declined to issue the injunction (requested by the applicants) to force the

respective governments to reduce the causes of the climate change caused by human activities.[47]

With a substantial number of cases still pending at the time of writing,[48] it could be that the "more activist" approach will find further support in coming future, at least in some courts.

4. *Towards litigating climate-induced negotiations? Emerging trends…*

What can this barrage of cases on the climate change-human rights nexus mean for the more specific legal gap, in the context of climate-induced migration?

To begin with, many of the remedies requested in the cases mentioned above are relevant to the case of climate-induced migration. For example, requests for emissions cuts will, if successful, mitigate the "push-factors" that are leading to climate-induced migration. Moreover, remedies that are addressing human rights violations are also of direct importance for "climate migrants", whose protection was signalled on many occasions as a key objective. Even more specifically, in some cases communities have asked for financial remedies in the shape of adaptation funds, which will allow communities to address climate change and avoid displacement.[49] In one very high-profile case, the claimant asked for a remedy that will *de facto* prevent his deportation to his sinking island nation.[50]

It is therefore not surprising to find that the issue of climate-induced migration was *explicitly* mentioned in many of these petitions/claims, including those submitted in the

Minister to block the coal mine project extension, founding that the plaintiffs had not established that it is probable that the Minister would breach the duty of care in making the approval decision, and had not established that they will have no further opportunity to apply for an injunction.

[47] In these rulings governments are recognized by courts as being *individually* responsible for omissive/inadequate behaviors in the adoption of measures necessary for the progressive reduction of greenhouse gases of anthropogenic origin (as required by both *international* treaties on combating climate change and the *internal* rules on their implementation) and/or for the protection of the applicants' right to life and right to private and family life (as established by international and regional treaties on human rights). On this recent trend see, also for bibliographical references, J. BÄUMLER, *Sustainable Development made Justiciable: The German Constitutional Court's Climate Ruling on Intra- and Inter-Generational Equity*, in *Eur. Jou. Int. Law: Talk!*, 8 June 2021, available at www.ejiltalk.org.

[48] See a list of pending climate-related cases at https://climate-laws.org/cclow/litigation_cases. Among them, the suit filed against Italy by the environmental Italian NGO *A Sud* and more than 200 plaintiffs alleging that the Italian government, by failing to take actions necessary to meet Paris Agreement temperature targets, is violating fundamental rights, including the right to a stable and safe climate. On this suit, through which the plaintiffs are seeking a declaration that the government's inaction is contributing to the climate emergency and a court order to reduce emissions 92% by 2030 compared to 1990 levels, see R. LUPORINI, *The 'Last Judgment': Early reflections on upcoming climate litigation in Italy*, in *Quest. Int. Law*, *Zoom-in 77*, 2021, p. 27 ff.

[49] *E.g.*: *Petition to the Inter American Commission on Human Rights seeking Relief from Violations resulting from Global Warming Caused by Acts and Omissions of the United States*, 7 December 2005; or *Petition of Torres Strait Islanders to the United Nations Human Rights Committee Alleging Violations Stemming from Australia's Inaction on Climate Change*, 13 May 2019.

[50] *V. Ioane Teitiota v. New Zealand*, cit.

national courts of Peru,[51] Canada,[52] Pakistan[53], India[54] and the United States.[55] On the international level, climate-induced migration was mentioned in petitions submitted to the European Court of Justice,[56] the Inter-American Commission on Human Rights,[57] the UN Human Rights Committee (HRC),[58] and the UN Committee on the Rights of the Child.[59]

As many of these cases are still pending, it is difficult to know how (and if) their resolution will develop the law on climate-induced migration. Early indications, however, seem to suggest that they will, even if only in a limited way.

Importantly, the HRC's *Teitiota* case was described by many as a «landmark», «a ground-breaking asylum case»[60] and a decision that «opens [the] door to climate change asylum cases».[61] There is no doubt that this decision indeed developed the law in an important manner: it confirmed that, in extreme cases, the impact of climate change could impose a significant threat to one's right to life.[62] This confirmation is important, as it creates the possibility that "climate refugees" will enjoy the protection provided by the *non-refoulement* rule, effectively prohibiting their deportation to their home countries. On the face of it, this is an important development that addresses what is perhaps the most significant gap in the international regulatory framework: the right to enter another State and remain there legally.

To this regard, it is also worth mentioning that the principle (of *non-refoulement*) affirmed by the HRC's *Teitiota* decision (in relation to "climate-induced migrants") has already found

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[51] Superior Court of Lima, *Álvarez et al. vs Peru*, complaint of 16 December 2019, available at https://climate-laws.org/cclow/geographies/peru/litigation_cases/alvarez-et-al-v-peru, p. 10.

[52] Federal Court of Vancouver, *La Rose vs Her Majesty the Queen*, complaint of 25 October 2019, available at http://climate-laws.org/cclow/geographies/canada/litigation_cases/la-rose-v-her-majesty-the-queen, paras 75-77, 232 e).

[53] Supreme Court of Pakistan, *Ali vs Federation of Pakistan*, petition of April 2016, available at https://climate-laws.org/cclow/geographies/pakistan/litigation_cases/ali-v-federation-of-pakistan-supreme-court-of-pakistan-2016

[54] National Green Tribunal of India, *Pandey vs India*, petition of March 2017, available at https://climate-laws.org/cclow/geographies/india/litigation_cases/pandey-v-india, p. 29.

[55] United States District Court of Oregon, *Juliana et al. vs the United States of America* (First Amended Complaint for Declaratory and Injunctive Relief of 10 September 2016) Case 6:15-cv-01517-TC paras 66, 70, and to a certain extent 239-240.

[56] *Armando Ferrão Carvalho and others vs The European Parliament and Council*, application 2018, cit., paras 78-82, 410 h).

[57] *Request for a Hearing on the Impacts of Climate Change on Human Rights*, 11 July 2019, available at http:// climate-laws.org/cclow/geographies/pakistan/litigation_cases/hearing-on-climate-change-before-the-inter-american-commission-on-human-rights, p. 9; *Petition to the Inter-American Commission on Human Rights seeking Relief from Violations resulting from Global Warming Caused by Acts and Omissions of the United States*, 2005, cit.

[58] *Ioane Teitiota v. New Zealand*, cit.; *Petition of Torres Strait Islanders to the United Nations Human Rights Committee*, cit.

[59] *Communication to the Committee on the Rights of the Child, in the case of Chiara Sacchi et al.*, 23 September 2019, available at https://childrenvsclimatecrisis.org/wp-content/uploads/2019/09/2019.09.23-CRC-communication-Sacchi-et-al-v.-Argentina-et-al.pdf, p. 2, 6, 21, and 43.

[60] Amnesty International, *UN Landmark case for people displaced by climate change*, 20 January 2020 (available at https://www.amnesty.org/en/latest/news/2020/01/un-landmark-case-for-people-displaced-by-climate-change/).

[61] OHCHR, *Historic UN Human Rights case opens the door to climate change asylum claims*, 21 January 2020 (available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25482&LangID=E).

[62] The right to life in this case was based on Article 6 of the 1966 International Covenant on Civil and Political Rights (ICCPR) of 16 December 1966, text in *UN Treaty Series* vol. 999, p. 171.

quick application in certain recent national jurisdictional practice (concerning asylum or temporary protection requests before German,[63] Italian[64] and French[65] judges).[66]

Nevertheless, despite the interesting perspectives opened by the *Teitiota* decision (both *per sé* and in terms of its capacity of "inspiring" further rulings at the national level), it should be recognised that certain limitations exist under the Committee reasoning on the possibility for "climate-induced migrants" to enter another State and enjoy adequate protection there. Notably, claimants will need to overcome some "barriers", including establishing that the risk is personal in nature[67] (which is rarely the case with climate change) and that the risk is imminent (which will be difficult to establish at least in slow-onset climate-related events). These limitations seem to water-down the importance of this decision.[68]

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[63] In a significant decision concerning an Afghan national, on 17 December 2020 a German Higher Administrative Court (the *Verwaltungsgerichtshof* of Baden Württemberg) declared a ban on deportation (*non-refoulement*), based on German immigration law (Section 60(5) of the German Residence Act) in conjunction international human rights, under the main argument that the humanitarian conditions in Afghanistan had seriously deteriorated due to the Covid-19 pandemic and thereby *explicitly mentioning* «environmental conditions, such as the *climate* and natural disasters» as relevant factors for determining the severe humanitarian situation in the country (VGH Baden-Württemberg, judgement of 17 December 2020, A11S 2042/20, para 25, emphasis added). In considering *also* environmental factors among the reasons for considering the applicant's repatriation illegitimate, the German Administrative Court therefore proposed an interesting *extensive* interpretation of the concept of "vulnerability", recognizing the impact that these factors have on the fundamental rights of the person.

[64] Italian *Corte Suprema di Cassazione (Sez. II civile)*, *I.L. v Ministry of the Interior and Attorney General at the Court of Appeal of Ancona*, *No. 5022*, 24 February 2021. In this recent decision the Italian Supreme Court, by extensively referring to the decision relating to the *Teitiota* case, stated that, when assessing the application for temporary protection for humanitarian reasons, the assessment of the danger existing in the applicant's country of origin must be conducted «con specifico riferimento al peculiare rischio per il diritto alla vita e all'esistenza dignitosa *derivante dal degrado ambientale, dal cambiamento climatico o dallo sviluppo insostenibile dell'area*» (emphasis added). Thereby, the court unequivocally established that the existence of a situation of environmental degradation in the country of origin of an international protection seeker which entails grave human rights violations justifies the recognition of the humanitarian protection status, potentially paving the way for a wave of (human rights-based) climate lawsuits before Italian civil courts. See for a comment of the decision F. PERRINI, *Il riconoscimento della protezione umanitaria in caso di disastri ambientali nel recente orientamento della Corte di Cassazione*, in *Ordine internazionale e diritti umani*, 2021, p. 349 ff.; F. VONA, *Disasters and Humanitarian Protection: A Fertile Ground for Litigating Climate Change and Human Rights*, in *Italian Review of International and Comparative Law*, 2021, p. 146 ss.; and A. DEL GUERCIO, *Migrazioni connesse con disastri naturali, degrado ambientale e cambiamento climatico: sull'ordinanza n. 5022/2020 della Cassazione italiana*, in *Diritti umani e diritto internazionale*, 2021, p. 521 ff.

[65] With a decision filed on 20 December 2020, the second section of the Court of Appeal of Bordeaux (*CAA de Bordeaux*) established the issue of a temporary residence permit for medical treatment for an asylum seeker from Bangladesh who, given the health and environmental conditions of that country, could not have access to the essential health treatments he needed for his (respiratory) disease. In particular the court, noting the inadequacy of the country's health system and mentioning the fact that it represents *one of the most polluted in the world*, consequently ordered the issue of a residence permit for medical treatment in (specific) consideration of the serious *environmental* and health conditions of the country of origin.

[66] The three aforementioned national rulings are particularly interesting for the purposes of our analysis, as they seem to help lay the foundations for a relevant emerging trend to the recognition of forms of national protection for environmental migration causes. This result has been achieved through an (interesting and dynamic) evolutionary interpretation of the rules on human rights in the light of the effects of climatic and environmental disasters and of atmospheric pollution that has been made by the judges of these countries.

[67] It should be noted that the HRC confirmed that, in extreme cases, claims can be made based on *general* conditions, rather than *purely personal* ones, although there is a "high threshold" in establishing such a claim. See *Ioane Teitiota v. New Zealand*, cit., para 9.3.

[68] As correctly pointed out also by S. BEHRMAN, A. KENT, *Prospects for Protection in the Light of Human Rights Committee's Decision in Teitiota v. New Zealand*, cit.

5. … *and a possible development related to causality*

Another important development of the law is related to causality. *Per sé*, the "double causality problem" forms a barrier for any claim regarding States' liability in the context of climate-induced migration. First, it is difficult to establish a *direct link* between *specific emissions* polluted in/by any given State and the *environmental damage* that pushed a certain individual to leave their home. This difficulty forms an easy way out for any country wishing to evade responsibility.[69] Secondly, it can also be difficult to isolate climate change as the *sole/leading reason* that led to one's migration. Often enough, the decision to migrate is made due to a *combination* of push-factors, rather than just due to climate change.

However, the second causal link is not completely insurmountable,[70] especially in cases that involve a rise in sea-levels (*e.g.,* disappearing island nations). In these cases, indeed, climate change could be easily identified as a major (if not *the only*) reason for migration. Other economic and social difficulties often arise out of environmental damage and cannot be distinguished from it.

As to the first causal link, it is on the contrary more difficult to address with *existing* legal tools. Here, the emerging jurisprudence has been therefore very useful. Some authors proposed in particular that the "do not harm" principle can be relied on in this context, and that the causal link can be established in the following manner: «[W]hile the exact causal link is hard to come by, it is not impossible to find a 'close enough' causal link. We know, for example, the percentage of GHGs emitted by each State: it could be decided that the funding of efforts to deal with the problem of climate-induced migration could be allocated based on these data».[71]

More recently, the already mentioned Dutch Supreme Court has made a very similar point by referring to the "no harm rule" as the source for attributing responsibility: «Countries can be called to account for the duty arising from this principle. Applied to greenhouse gas emissions this means that they can be called upon to make their contribution to reducing greenhouse gas emissions. This approach justifies partial responsibility: *each country is responsible for its part and can therefore be called to account in that respect*».[72]

This "quantified partial responsibility" could be clearly very useful in litigation also beyond the context of the *Urgenda* case, notably as a liability mechanism that will justify compensation. This possibility will naturally concern major polluters, hopefully enough to push them back to the negotiating table, or simply to pledge additional funds - as Australia recently did following a complaint submitted against it to the HRC.[73]

Other courts have addressed this barrier of causality as well. The US Court of Appeal of the Ninth Circuit has rejected in the *Juliana* case the State's claim regarding the lack of causality, stating that «there is at least a genuine factual dispute as to whether those policies were a 'substantial factor' in causing the plaintiffs' injuries». The Court explicitly accepted

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[69] See, for example the position of Brazil, Germany and France in the *Case of Chiara Sacchi et al.*, cit., as described in the reply to these countries' submissions (the submissions are currently still unavailable): https://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200504_Not-available-reply.pdf

[70] On this point see, in the same sense, S. BEHRMAN, A. KENT, *Prospects for Protection*, cit.

[71] A. KENT, S. BEHRMAN, *Facilitating the Resettlement*, cit., p. 91.

[72] *Urgenda*, cit., para 5.7.5 (italics added).

[73] Client Earth, *Torres Strait Islanders win Key Ask after Climate Complaint*, 19 February 2020, (available at https://clientearth.org/torres-straight-islanders-win-key-ask.after-climate-complaint).

that the claimants' injuries are *the result of* carbon emissions, and that «[a] *significant portion* of those emissions *occurring in this country*».[74] As discussed above, the Court eventually rejected the claimants' petition *before* making a ruling on this very matter; but it seems clear that it was determined *not* to allow the causality element to form a barrier.

6. *Conclusions*

While the international community is (still) reluctant or in fact unable to close the longstanding legal gap on the issue of climate-induced migration, it is possible that the current wave of climate litigation will bring about at least some useful answers to the issue of the protection of "climate-induced migrants". The many pending cases clearly indicate indeed that scholars and States alike should – on the one hand – pay closer attention to this space; and, hopefully, await even further developments on the other.

The power of courts is not necessarily in their binding decisions; many of the decisions mentioned above (as well as those *in fieri*) are indeed not binding in nature, or at least limited to a unique jurisdiction. These decisions could, however, provide a relevant contribution, particularly by *a)* inspiring the understanding of specific issues (*e.g.,* that crucial of causality) or *b)* instructing States on the application of *older* rules (such as the "do not harm" principle), in the context of a *new* phenomenon – climate-induced migration.

The current political stalemate on (the protection of) "climate-induced migrants" may (possibly) change in the future and the blocked negotiations may (eventually) result in new, binding regimes. Until they do, the work of tribunals seems to be a very lively place where legal scholars' focus should be.

[74] *Juliana*, cit., p. 20, italics added.