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MIGRATION AND ASYLUM POLICIES SYSTEMS' NATIONAL AND SUPRANATIONAL REGIMES

The General Framework and the Way Forward

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RECENT DEVELOPMENTS IN THE PROTECTION OF ENVIRONMENTAL MIGRANTS: THE CASE OF ITALY

ANNA FAZZINI*

1. Introduction

The issue of the so-called 'environmental migrants'[1] is an increasingly crucial one, in light of the growing awareness, by the international community, of the effects of environmental degradation and climate change on human rights, as well as on mobility associated with these phenomena. According to the UN High Commissioner for Human Rights, climate change and environmental degradation pose a "rapidly growing and global threat to human rights".[2] It is therefore common knowledge that without adequate measures and effective climate change mitigation and adaptation strategies, there will be an increase in natural disasters and environmental degradation, due to the combined effects of fast-onset events (such as hurricanes and floods) and slow-onset events (such as rising sea levels, desertification, erosion and loss of soil fertility and so on).[3] It is clear that these events, because they will contribute to the increase in poverty, resource scarcity and related conflicts, diseases, pandemics and so on, will also result in the impairment of human rights, such as the right to life, the right to health and the right to a healthy environment.[4] Therefore, if, on the one hand, it is clear that a first level of

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[1] In this contribution, we will use the term 'environmental migrants' to refer to people who migrate for reasons related to the effects of climate change and environmental disasters. However, there is not unanimous agreement on which definition to use in this regard, as will be detailed below.

[2] See *Global update at the 42nd session of the Human Rights Council, Opening statement by UN High Commissioner for Human Rights Michelle Bachelet*, 9.09.2019.

[3] See United Nations, *Slow onset events. Technical Paper*, FCCC/TP/2012/7, 26.11.2012.

[4] As enshrined in a United Nations General Assembly resolution: Human Rights Council, *The human right to a safe, clean, healthy and sustainable environment,* UN-Doc. A/HRC/48/L.23/Rev.1, 5.10 2021; On the impact of climate change on human rights see, *inter alia*, United Nations Environment Programme (UNEP), *Climate Change and Human Rights*, UNON Publishing Services Section, Nairobi, 2015 and the several reports published by the UN Human Rights High Commissioner (OHCHR) on the mat-

action can only concern the implementation of effective measures to fight climate change, on the other hand the question arises of how to protect people who are forced to leave their home countries or the region where they live for reasons related to these phenomena.

Firstly, it is essential to provide support and relocation options to displaced people, who do not cross the borders of their own country and who constitute the majority of the so-called environmental migrants. Actually, according to data by the Internal Displacement Monitoring Centre (IDMC) relating to 2021, environmental disasters were the leading cause of internal displacement of people worldwide (23.7 million), surpassing the figure caused by wars and conflicts (14.4 million).[5] Secondly, the question arises of the cross-borders migrants, and therefore of the system of protection they can access in the destination countries.

This contribution focuses on this second aspect. Specifically, considering the lack of an international legal framework protecting environmental migrants, this article aims at identifying the main developments emerging at the jurisprudential level, both supranational and national, on the matter. In fact, starting from the guidance taken by the UN Human Rights Committee in the famous *Teitiota* decision,[6] where for the first time they affirmed the applicability of the prohibition of *refoulement* in cases related to the adverse effects of climate change and natural disasters, several pronouncements by European domestic courts show that a consensus is emerging around the need to also offer some kind of protection to environmental migrants. Among them, the Italian case will be the focus of this contribution, considering, in particular, the orientation taken by the Supreme Court of Cassation, in the Ordinance no. 5022/2021.[7]

ter, https://www.ohchr.org/en/climate-change/reports-human-rights-and-climate-change (09/22).

[5] See the IDMC website: https://www.internal-displacement.org/database/displacement-data (09/22).

[6] Committee of Human Rights, *Ioane Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016, January, 7, 2020.

[7] Court of Cassation, Second Civil Section, Ordinance of 12 November 2020, no. 5022.

2. Protecting environmental migrants: a general overview.

Despite the abundance of studies on the phenomenon of migration related to environmental and climate change,[8] the current international legal framework on the subject is decidedly inadequate.[9] With regard to the soft-law, we can mention several documents, which contain references to environmental migration. These include for example the 2016 *New York Declaration for Refugees and Migrants* that recognises how human mobility is also linked to "the adverse effects of climate change, natural disasters (some of which may be linked to climate change), or other environmental factors".[10] Then, it is in particular the 2018 *Global*

[8] See, *ex multis*, N. Myers, "Environmental Refugees: in a Globally Warmed World", in *BioScience*, Vol. 43 No. 11, 1993, p. 752; J. McAdam, "Swimming Against The Tide: Why A Climate Change Displacement Treaty Is Not The Answer", in *International Journal of Refugee Law*, 2011, p. 1; J. McAdam*, Climate Change, Forced Migration, and International Law*, 2012; J. Morrissey, "Rethinking the 'Debate on Environmental Refugees': From 'Maximalists and Minimalists' to 'Proponents and Critics'", in *Journal of Political Ecology*, 19, 2012, p. 36; E. Piguet and F. Laczko, *People on the Move in a Changing Climate. The Regional Impact of Environmental Change on Migration*, 2014; B. Mayer and F. Crépeau (eds), *Research Handbook on Climate Change, Migration and the Law*, Edward Elgan Publishing, Cheltenham, Northampton, 2017; D. Manou et al. (eds.), *Climate Change, Migration and Human Rights Law and Policy Perspectives*, 2017; G.C. Bruno et al. (eds.), *Migration and the Environment. Some Reflections on Current Legal Issues and Possibile Ways Forward*, 2017; S. Atapattu, *'Climate Refugees' and the Role of International Law*, 2018; S. Behrman e A. Kent (eds.), *'Climate Refugees'. Beyond the Legal Impasse?*, 2018; M. Scott, *Climate Change, Disasters, and the Refugee Convention*, Cambridge University Press, 2020; and more recently G.D.R. Laut, *Humans on the move : integrating an adaptive approach with a rights-based approach to climate change mobility*, , 2022; E. Fornalé, "Collective action, common concern and climate-induced migration", in Simon Behrman and Avidan Kent (eds.), *Climate Refugees: Global, Local and Critical Approaches. Earth System Governance*, 2022; A. Del Guercio, "Una Governance integrata della mobilità umana nel contesto del cambiamento climatico. spunti di riflessione a partire dalla decisione Teitiota del comitato per i diritti umani", in *Diritto Pubblico Europeo Rassegna Online*, 1/2022, p. 334.

[9] However, although the protection regime is lacking for the so-called environmental migrants at an international level, there is no shortage of interesting initiatives worth mentioning, including the *Nansen Initiative*, launched by the Norwegian and Swiss governments, which led to the adoption of the *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change* in 2015, https://www.nanseninitiative.org/ (09/22).

[10] UN General Assembly, *New York Declaration for Refugees and Migrants: resolution / adopted by the General Assembly*, 3 October 2016, A/RES/71/1, Introduction.

Compact for Safe, Orderly and Regular Migration, that, by recognising climate change and natural disasters among the causes of migration, states the need to cooperate in order to find solutions for migrants compelled to leave their countries of origin due to slow-onset natural disasters, the adverse effects of climate change, and environmental degradation (among the mentioned solutions there are "planned relocation and visa options, in cases where adaptation in or return to their country of origin is not possible").[11] In any case, despite the urgency of adequate responses, there is no binding instrument on the subject, nor is there the recognition of a legal status for the so-called 'environmental migrants'. Actually, there is not even an agreed definition shared by the international community of people forced to move for environmental and climatic reasons. While in this contribution we will use the term 'environmental migrants', as proposed by the International Organisation for Migration (IOM),[12] it must be said that there is an ongoing debate on the matter. Indeed, different expressions are currently used, such as 'environmental or climate refugees', which presents some critical issues[13], 'eco-refugees', 'environmentally induced migration',[14] etc. Some authors also suggest expressions that may provide a more comprehensive understanding of the phenomenon, such as 'migration *linked* to environmental and climatic phenomena'.[15] The last proposal might actually better convey the *complexity*[16] of the phenomenon of 'environmental

[11] UN General Assembly, *The Global Compact for Safe, Orderly and Regular Migration*, 19 December 2018, A/RES/73/195, art. 21; see also art. 18.

[12] See the appropriate section on the IOM website: https://environmentalmigration.iom.int/#home (09/22).

[13] As discussed below, environmental migrants cannot be considered refugees due to the difficulty in meeting the eligibility criteria under the 1951 Geneva Convention Relating to the Status of Refugees. See on this point the comments of the United Nations High Commissioner for Refugees (UNHCR), *Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective*, 2009, f. 8; *Key Concepts on Climate Change and Disaster Displacement*, 2017, p. 3.

[14] As used by the European Commission, see the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The Global Approach to Migration and Mobility,* COM(2011) 743 final, Brussels, 18.11.2011, p. 7.

[15] See A. Del Guercio, *Una Governance integrata della mobilità umana*, cit.

[16] In particular, it must be considered that in most cases there is not a direct causal relationship between the climate change/natural disasters' effects and migration. Rather, the migration is determined by a combination of economic, social and political factors to which environmental and climatic phenomena are also increasingly connected. These

migrants', which indeed requires multiple protection regimes, ranging from climate change mitigation and adaptation interventions to recollection solutions for internally displaced persons (for which specific instruments have been adopted[17]), to the forms of protection for the so-called cross-border migrants in the countries of destination.

Concerning this last aspect, therefore, noting the absence of an *ad hoc* convention which provides a specific protection discipline for environmental migrants, it is important to question the possibility of extending existing protections, such as the refugee status, or complementary protection mechanisms, for people who move for climatic and environmental reasons. This possibility is not without issues. In particular, the recognition of the refugee status[18] presents several problematic aspects, although the 1951 Geneva Convention has been subject to evolutionary interpretations which have gone to include categories of persons not expressly provided for in the definition of refugee. This has been possible thanks to the extensive interpretation of the concept of persecution due to belonging to a 'particular social group', which has gradually gone to include, for example, persecutions on the basis of gender, sexual orientation and gender identity.[19] In any case, even if in some ways such an

phenomena act as "existing *vulnerability* amplifiers" (A. Del Guercio, *Una Governance integrata della mobilità umana*, cit., p. 336; on the notion of vulnerability related to climate and environmental phenomena see M. Scott, *Climate Change,* cit.). On the causal relationship between climate change/environmental disasters' effects and migration, see W. Kälin and N. Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches*, Legal and Protection Policy Research Series, UNHCR Division of International Protection, Ginevra, 2012, p. 4 ff.

[17] Important instruments on the subject include: UN Office for the Coordination of Humanitarian Affairs (OCHA), *Guiding Principles on Internal Displacement*, 2004; UNHCR, *Guidance Package for UNHCR's Engagement in Situations of Internal Displacement*, 2019, African Union, *Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention),* adopted in 2009, entered into force in 2012.

[18] Please note that the eligibility criteria for the recognition of refugee status under the 1951 Geneva Convention are 1) the presence of a well-founded fear of persecution (on the basis of race, nationality, religion, political opinion, belonging to a particular social group); 2) removal from the country of origin; 3) the lack of protection from the country of origin; see extensively A. Del Guercio, *La protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016.

[19] UNHCR, *Guidelines on International Protection no. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2)*

interpretative development could also cover the category of environmental migrants,[20] there is no doubt that it would be complex to bring the need for protection on environmental and climatic grounds back into the general framework offered by the Geneva Convention.[21] This is particularly due to the notion of 'persecution' required and the link between the victim in question and the agent of persecution.[22] In fact, in its strictest interpretation, persecution requires the presence of a discriminatory motive and, therefore, the commission of persecutory acts by state or non-state agents, induced by particular characteristics of the victim. Persecutory conduct thus suggests the existence of a specific intention of an agent of persecution to cause the harm to another person or group of persons.[23] At the same time, it is the agent of persecution itself that is difficult to identify in these cases, due to the absence of a direct causal

of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/12/09, 2012.

[20] On this point see for example A. Ciervo, 'I rifugiati invisibili. Brevi note sul riconoscimento giuridico di una nuova categoria di richiedenti asilo', in Salvatore Altiero e Maria Marano (eds), *Crisi ambientale e migrazioni forzate. L'ondata silenziosa oltre la fortezza Europa*, Associazione A Sud- CDCA, 2016, p. 261.

[21] See, *inter alia*, J. McAdam, 'The Relevance of the International Refugee Law', in Jane McAdam (ed.) *Climate Change, Forced Migration, and International Law*, cit., pp. 39-51; G. SCIACCALUGA, '(Non) rifugiati climatici dal 1995 al 2015: perché il diritto internazionale dei rifugiati non può applicarsi al fenomeno delle migrazioni causate (anche) dai cambiamenti climatici', in *Rivista giuridica dell'ambiente*, 3, 2015, p. 469. In light of these considerations, some authors have also proposed to revise the Geneva Convention Relating to the Status of Refugees in order to expressly add the ground of persecution on environmental grounds (see J.B. Cooper, 'Environmental Refugees: Meeting the Requirements of the Refugee Definition', in *New York University Environmental Law Journal*, 6, 1998, p. 480; G. Kibreab, 'Climate Change and Human Migration: A Tenuous Relationship?' in *Fordham Environmental Law Review*, 20, 2010, p. 357). However, this hypothesis seems rather unlikely: even the UNHCR has taken a negative stance on the issue, fearing that, given the current political circumstances, reopening the negotiations might actually lead to a narrowing of the scope of the Convention rather than to its expansion (see A. Guterres, *Climate Change, Natural Disasters and Human Displacement: a UNHCR perspective*, UNHCR, 2008, p. 7; on this point see also C. Cournil, 'The inadequacy of international refugee law in response to environmental migration', in Benoît Mayer and François Crépeau (eds), *Research Handbook on Climate Change, Migration and the Law*, cit., pp. 100-101).

[22] G. Sciaccaluga, *(Non) rifugiati climatici dal 1995 al 2015*, cit., p. 471

[23] *Ibidem*; see also C. Cournil, *The inadequacy of international refugee law*, cit., p. 98 ff.

relationship between the wrongful conduct and the caused harm.[24] However, even considering such a framework, this does not mean that environmental migrants are not, under any circumstances, entitled to access the highest form of recognised protection. Indeed, in a recent document,[25] UNHCR stated that environmental migrants may have valid grounds for refugee status. The effects of climate change and natural disasters, as we have seen, can result in the undermining of the fundamental rights of already vulnerable and marginalised people, leading to territorial conflicts and discriminatory access to resources essential for survival. Therefore, if the criteria for eligibility are met, and the discriminatory treatment is sufficiently severe, persecution cannot but occur. *A fortiori*, if the stringent requirements of refugee status are not met, consideration should be given to granting complementary or humanitarian forms of protection, provided at regional and national level (such as subsidiary protection within the European Union).

In light of these considerations, it is important to analyse the orientation that is emerging at a jurisprudential level on the matter. A starting point is certainly the famous decision *Teitiota v. New Zealand* by the UN Human Rights Committee of January 2020, where, for the first time, they affirmed that the prohibition of refoulement can also apply in cases where the right to life is compromised by the effects of climate change and environmental disasters.[26]

[24] G. Sciaccaluga, *(Non) rifugiati climatici dal 1995 al 2015*, cit., p. 471 ff.

[25] UNHCR, *Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters*, 2020.

[26] On the case see, *ex multis*, J. H. Sendut, "Climate Change as a Trigger of Non-Refoulement Obligations Under International Human Rights Law, in *EJIL:Talk!*", 6 February 2020; G. Reeh, "Climate Change in the Human Rights Committee", in *EJIL:Talk*!, 18 February 2020; F. Maletto, "Non-refoulement e cambiamento climatico: il caso Teitiota c. Nuova Zelanda", in *SidiBlog*, 23 March 2020; G. Citroni, "Human Rights Committee's decision on the case Ieoane Teitiota v New Zealand: Landmark or will-o'-the-wisp for climate refugees?, in *QIL-Questions of International Law*, 75, 2020, p. 1; V. Rive, "Is an Enhanced Non-refoulement Regime under the ICCPR the Answer to Climate Change related Human Mobility Challenges in the Pacific? Reflections on Teitiota v New Zealand in the Human Rights Committee", in *QIL- Questions of International Law*, 75, 2020, p. 7; S. Behrman and A. Kent, "The Teitiota Case and the Limitations of the Human Rights Framework", in *QIL-Questions of International Law*, 75, 2020, p. 25; A. Brambilla and M. Castiglione, "Migranti ambientali e divieto di respingimento", in *Questione Giustizia*, February 2020; M.Courtoy, "An Historic Decision for 'Climate Refugees'? Putting It into Perspective", in *Cahiers de l'EDEM*, March 2020; L. Imbert, "Premiers éclaircissements sur la protection internationale des «mi-

3. *Teitiota v. New Zealand*: the findings of the Human Rights Committee

The facts of the case concern Mr. Teitiota, a citizen of the Republic of Kiribati, who had applied for the refugee status from New Zealand because of the unlivable conditions in his home country due to the effects of climate change.[27] After being denied the refugee status,[28] Mr. Teitiota appealed to the UN Committee, alleging the violation of art. 6 of the U.N. Covenant on Civil and Political Rights. Specifically, he argues that, by turning him back to Kiribati, New Zealand had violated his right to life under the Covenant, since "sea level rise in Kiribati has resulted in: (a) the scarcity of habitable space, which has in turn caused violent land disputes that endanger the author's life; and (b) environmental degradation, including saltwater contamination of the freshwater supply".[29]

Entering into the merits of the case, first of all, it should be recalled that the Committee does not find a violation in the present case (the point will be discussed shortly), as, in its view, the applicant did not demonstrate that the conduct of the judicial proceedings was arbitrary or

grants climatiques»", in *La Revue des droits de l'homme*, 2020; 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 *Diritti umani e diritto internazionale*, 2020, p. 63; 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, vol. 3, pp. 827 ff.; M. Ferrara, "Looking Behind Teitiota V. New Zealand Case: Further Alternatives of Safeguard For "Climate Change Refugees" Under the ICCPR and the ECHR?", in G. Cataldi, A. Del Guercio, A. Liguori (eds), *Migration And Asylum Policies Systems Challenges And Perspectives*, 2020, p. 291.

[27] Specifically, Mr. Teitiota comes from the island of Tarawa, where, as he argued, climate change and rising sea levels had led to coastal erosion, frequent floods, salinisation of freshwater wells, reduction of arable land and thus a shortage of habitable space (also due to overcrowding on the island), as well as worsening health conditions, instability and conflict in the population. The Republic of Kiribati is among the so-called "disappearing states", destined to be submerged by 2050, due to rising sea levels. See on the matter M. Oppenheimer et al., "Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities", in H.O. Portner (eds.), *IPCC Special Report on the Ocean and Cryospherein a Changing Climate*, Cambridge University Press, UK and New York, NY, USA, pp. 321-445.

[28] For more on the case history see S. Behrman and A. Kent, The Teitiota Case, cit.

[29] *Teitiota v. New Zealand*, para. 3.

amounted to a manifest error or denial of justice, or that the New Zealand courts otherwise had violated their obligation of independence and impartiality.[30] However, it recognizes that hypothetically the principle of *non-refoulement* may also apply in cases related to environmental degradation and climate change issues. Specifically, the Committee comes to the conclusion that

> *without robust national and international efforts*, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the *non-refoulement* obligations of sending States. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible *with the right to life with dignity before the risk is realized.*[31]

Such a conclusion is decidedly innovative, as it reflects an expansive interpretation of the right to life in several respects. In particular, in light of the *General Comment No. 36*,[32] the Committee affirms that "the right to life also includes the right to enjoy a *life with dignity* and to be free from acts or omissions that would cause their unnatural or premature death", adding also that the obligation of the States to respect and protect "extends to *reasonably foreseeable threats* and life-threatening situations that can result in loss of life".[33] In doing so, the Committee's traditional position on the matter, that the threat to life under art. 6 of the Covenant, must be *real, personal and imminent*, is partly superseded.[34] In the current view, in fact, injury to the right under art. 6 may occur even *before* the risk to life is realized or becomes 'imminent',[35] if the

[30] Ivi, para 9.13.

[31] Ivi, para. 9.11.

[32] Human Rights Committee, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, CCPR/C/GC/36, 2018.

[33] *Teitiota v. New Zealand*, para 9.4.

[34] See A. Brambilla and M. Castiglione, *Migranti ambientali e divieto di respingimento*, cit.

[35] On the notion of 'imminence' in the practice of human rights monitoring bodies, see A. Anderson, M. Foster, H. Lambert, J. McAdam, "Imminence In Refugee and Hu-

threat is incompatible with the possibility of living a dignified life. The Committee specifies that these threats include phenomena such as "environmental degradation, climate change and unsustainable development",[36] thus both the effects of fast-onset events and slow-onset events, which do not have an immediate impact.[37] As argued,[38] moreover, the innovative concept of 'dignified life' also marks the international recognition of the so-called *human rights integrated approach* whereby the impairment of social rights (such as the right to water and food) can result in the violation of civil rights such as the right to life and the prohibition of inhuman or degrading treatment.

Finally, great prominence is given to positive obligations under art. 6 of the Covenant, which, in light of the evolving reading of the provision, implies that the State shall implement all appropriate measures to prevent threats to the right to life, including those that are reasonably foreseeable.[39] There is no doubt, therefore, that States are called upon to prevent and protect people against the effects of environmental degradation and climate change on the right to life (and in particular, it should be recalled, to live a *dignified life*). In a significant opening, echoing the *General Comment No. 36*, the Committee states that "environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life".[40] This aspect of the decision is decidedly important,[41] since the Kiribati government's fulfillment of its positive obligations under the Committee's assessment[42] is found to be an appropriate element to exclude

man Rights Law: A Misplaced Notion for International Protection", in *International and Comparative Law Quarterly*, 68, 2019, pp. 111 ff.

[36] *Teitiota v. New Zealand*, para 9.4.

[37] Ivi, para 9.11.

[38] A. Brambilla and M. Castiglione, *Migranti ambientali e divieto di respingimento*, cit.

[39] *Ibidem.*

[40] *Teitiota v. New Zealand*, para 9.4, which echoes the General Comment No. 36 at para 62.

[41] In fact, some authors believe that the *Teitiota* decision does not strictly express a position on migration related to environmental and climatic causes, but rather should be read from the perspective of fighting climate change, due to its emphasis on positive obligations on States in this regard, see A. Del Guercio, *Una Governance integrata della mobilità umana*, cit.

[42] In this regard, in fact, it is recalled that the Committee considers the measures put in place by the Government of Kiribati to be sufficient (among them the 2007 National

a violation of art. 6 in this case. Indeed, it is worth pointing out that the Committee's conclusions state that *without robust national and international efforts*, the effects of climate change may trigger non-refoulement obligations under articles 6 and 7 of the Covenant.[43] Therefore, it seems appropriate to state that in these cases, according to the Committee, the violation of the right to life can be established in presence of a reasonably foreseeable risk *together with* the inability of the States to fulfil their due diligence obligations to protect.[44]

In any case, if these are the most innovative aspects of the decision, there is no shortage of criticism, particularly with regard to the Committee's reasoning that led to rule out the violation of art. 6, as also emphasised by the dissenting opinions of judges Sancin and Muhumuza. In the Committee's view, in fact, the applicant had failed to prove that he would run "a *real*, *personal* and *reasonably foreseeable risk* of a threat to his right to life".[45] In particular, with regard to the risk to life resulting from overcrowding or private land disputes, the Committee notes that the appellant had not been involved in such conflicts, which, by the way, were sporadic, nor had he been able to demonstrate that he was running a greater risk than other inhabitants. In this regard, the Committee recalls that only in the most extreme cases does a *general situation* of violence come into play in the assessment of a real risk of irreparable harm under articles 6 or 7 of the Covenant, i.e. "where there is a real risk of harm simply by virtue of an individual being exposed to such violence or where the individual in question is in a particularly vulnerable situation".[46] Similarly, in the opinion of the Committee, the applicant has failed to provide sufficient evidence indicating a lack or insufficiency of drinking water supply such as to result in a reasonably foreseeable threat of a health risk that "would impair his right to enjoy a life with dignity".[47]

Adaptation Program of Action, the 2008-2011 National Development Plan, the 2008 National Water Resources Policy, and the 2010 National Sanitation Policy's priorities are also recalled), but it also points out that, within 10 to 15 years, the state, with the assistance of the international community, could adopt effective strategies to protect and relocate the population elsewhere (para. 9.12).

[43] *Teitiota v. New Zealand*, para 9.11.

[44] A. Brambilla and M. Castiglione, *Migranti ambientali e divieto di respingimento*, cit.

[45] *Teitiota v. New Zealand*, para 9.7.

[46] Ivi, para 9.7.

[47] Ivi, para 9.8.

In this regard, the two dissenting judges highlight the 'disproportionate' burden of proof that was on the applicant. In fact, as argued by the judge Sancin, in light of the positive obligation under art. 6, it should be the State that provides evidence of access to safe drinking water, considering also that the applicant has limited means, compared to the government, to access all the necessary information in this regard.[48] Moreover, as observed by the judge Muhumuza, "whereas the risk to a person expelled or otherwise removed, must be personal – not deriving from general conditions, except in extreme cases, the *threshold should not be too high and unreasonable*".[49] On the other hand – he continues – "it would indeed be counterintuitive to the protection of life, to wait for deaths to be very frequent and considerable in order to consider the threshold of risk as met".[50] Indeed, the need to prove the *personal nature* of the risk is difficult to reconcile with the effects of climate change, which generally affect all or a large part of the population and this is indeed one of the main problems in assessing cases of this type.[51]

The issue of the 'high threshold' required with respect to the assessment of the personal nature of the risk will also come to the fore in the examination of the Italian Supreme Court's Ordinance no. 5022/2021, where a more flexible criterion seems to have been adopted.

[48] Dissenting opinion of Committee member Vasilka Sancin, para 5.

[49] Dissenting opinion of Committee member Duncan Laki Muhumuza, para 3 dissenting opinion.

[50] Ivi, para 5.

[51] On this point see *inter alia* S. Behrman and A. Kent, *The Teitiota Case*, cit.; In this regard, it is argued in doctrine that it would be more appropriate to require a lower risk threshold when a number of rights are affected, as in the *Teitiota* case, since the protection of the right to life should not be delayed in order to be effective. Therefore it should not be necessary to wait for high mortality rates or generalised violence to trigger the *non-refoulement* obligation (G. Cataldi, "Human Rights of People Living in States Threatened by Climate Change", in *QIL-Questions of International Law,* 91, 2022, p. 51); in this matter, it should also be noted that the UN Committee's interpretative practice has not affirmed an attenuation of the personal nature of the risk where the phenomenon depends not only on a general condition, but predominantly on the actions or omissions of the State, as was the case in the jurisprudence of the Strasbourg Court, see ECtHR, judgment of 28 June 2011*,* ric. no. 8319/07 and 11449/07*, Sufi and Elmi v. United Kingdom* (on the matter A. Del Guercio, *La protezione dei richiedenti asilo,* cit., pp. 160 ff.).

4. Recent developments in the case-law at national level: the case of Italy

In the aftermath of the *Teitiota* case, there have been several interesting rulings at a domestic level in Europe, such as in Germany[52] or France,[53] which demonstrate the tendency of national courts to evolving interpretations that can guarantee some kind of protection for environmental migrants. This contribution focuses on the Italian case, which is particularly interesting in many respects.

In the first place, the Italian legal system is currently considered as one of the most advanced on the subject, since it expressly provides multiple forms of protection for so-called environmental migrants.[54] These include, for example, the possibility of granting temporary protection measures, as regulated by the art. 20 of the Consolidated Immigration Act (TUI),[55] "for significant humanitarian needs, during conflicts, *natural disasters* or other particularly serious events". Further-

[52] See for example VGH Baden-Wuerttemberg, judgement of 17th December 2020 – A 11 S 2042/20, regarding the annulment of a return decision issued against an Afghan citizen due to environmental and climatic conditions in his country of origin. What is relevant in this case is the fact that environmental factors are not assessed as determinant per se, but 'support' the prohibition of refoulement under art. 3 ECHR (whereas the jurisprudence of the German Supreme Court is based on a restrictive application of art. 3 ECHR, which, in these cases, comes into play when the harm is caused by a humanitarian crisis due to a major disaster of completely 'natural' origin), see C. Schloss, "Climate migrants – How German courts take the environment into account when considering non-refoulement", *Völkerrechtsblog*, 3 March 2021; C. Scissa, "Migrazioni ambientali tra immobilismo normativo e dinamismo giurisprudenziale: un'analisi di tre recenti pronounce", in *Questione Giustizia*, 2021, p. 1.

[53] See CAA de Bordeaux, 2ème chambre, 18/12/2020, 20BX02193, 20BX02195, regarding the issue of a temporary residence permit for medical treatment to an asylum seeker from Bangladesh who could not have had access to the essential medical treatment he needed in his country of origin, because of the health and environmental conditions, see C. Scissa, *Migrazioni ambientali tra immobilismo normative*, cit.

[54] In Europe, only Sweden and Finland explicitly listed environmental disasters as valid grounds for subsidiary (in the case of Sweden) and temporary protection (in the case of Finland, with the Finnish Aliens Act 301/2004). However, both statuses were suspended after the so-called refugee crisis of 2015; see C. Scissa, "Estrema povertà dettata da alluvioni: condizione (in)sufficiente per gli standard nazionali di protezione?", in *Questione Giustizia*, 2022, p. 1

[55] Legislative Decree 25.7.1998, No. 286 on "Consolidated Act of Provisions concerning immigration and the condition of third country nationals".

more, the art. 20bis provides for the possibility of issuing a residence permit "to foreigners unable to return to a country experiencing a *serious calamity* situation", as recently modified by the Lamorgese Decree,[56] which emended the controversial 'Security (or Salvini) Decrees'.[57] In this regard, it is worth noting that the Salvini Decree provided for the issuance of the said residence permit in case of "situation of *contingent and exceptional calamity*".[58] Therefore, as it was noted,[59] the current rule (as amended by the Lamorgese decree) suggests a less restrictive interpretation of the notion of calamity, which could therefore include more cases, which do not qualify as 'contingent' and 'exceptional'.

Anyway, it must be said that art. 20 TUI has never found application in reference to natural disasters. Actually, cases of vulnerability connected to environmental and climatic reasons have been included in the scope of application of the humanitarian protection (now, following the Lamorgese decree, 'special protection'), regulated by art. 5 (6) TUI, which does not allow the refusal or revocation of a residence permit if there are "serious reasons of a humanitarian nature or resulting from constitutional or international obligations of the Italian State".[60] This orientation was expressed by the Ministry of the Interior in 2015, as reflected in the Circular of the National Commission for the Right to Asylum, which, in providing guidance to the Territorial Commissions on the requirements for the recognition of humanitarian protection, clarified

[56] Named after the Minister of the Interior responsible for that, see Law Decree no. 130/2020, converted with amendments by Law no. 173/2020; on the changes brought about by the so-called Lamorgese decree in Italian legislation see in this volume A. Liguori, *Some Observations on Italian Asylum and Immigration Policies*.

[57] Law Decree no. 132/2018 and 53/2019, converted with amendments respectively by Law no. 113/2018 and 77/2019; on the 'Salvini Decrees' see G. Cataldi, "Search and Rescue of Migrants at Sea in Recent Italian Law and Practice" and A. Del Guercio, "The Right to Asylum in Italy", in G. Cataldi, A. Del Guercio, A. Liguori (eds), *Migration and Asylum Policies Systems Challenges and Perspectives,* Editoriale Scientifica, Napoli, 2020.

[58] See Law Decree no. 130/2020, p. 2.

[59] 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,* 2, 2021, p. 527.

[60] On the matter A. Brambilla, "Migrazioni indotte da cause ambientali: quale tutela nell'ambito dell'ordinamento giuridico europeo e nazionale?", in *Diritto Immigrazione e Cittadinanza*, 2, 2017, pp. 15 ff.

that it also included "serious natural disasters or other serious local factors hindering repatriation in dignity and safety".[61] Therefore, humanitarian protection has gradually found greater application in cases related to natural disasters and climate change.[62]

4.1. The Ordinance no. 5022/2021 of the Supreme Court of Cassation

The ordinance no. 5022 of February 2021 comes after several decisions of the Italian Supreme Court, testifying to a trend of openness to the recognition of environmental and climatic factors as elements to be taken into account in the assessment for granting humanitarian protection.[63] In this regard, special mention should be made of the judgment no. 4555/2018, where the Supreme Court affirmed that, for the purposes of recognition of humanitarian protection, the lack of minimum conditions for leading a dignified life could also be found in "a very serious political-economic situation with *radical impoverishment effects concerning the lack of basic necessities*, of a nature that is also not strictly contingent, or even [...] a geo-political situation that offers no guarantee of life within the country of origin (*drought, famine, situations of unendurable poverty*)".[64] Subsequently, in the Ordinance no. 7832/2019, the Court makes explicit reference also to the "*disastrous climatic situation*

[61] Ministry of the Interior, National Commission for the Right to Asylum, Circular prot. 00003716 of 30.7.2015.

[62] See again A. Brambilla, *Migrazioni indotte da cause ambientali*, cit.

[63] See on the ordinance, *inter alia*, A. Ciervo, "Verso il riconoscimento dei 'rifugiati ambientali'? Note a prima lettura ad una recente ordinanza della Corte di Cassazione", in *ADiM Blog*, Osservatorio della Giurisprudenza, 2021, http://www.adimblog.com/2021/05/31/verso-il-riconoscimento-dei-rifugiati-ambientali-note-a-prima-lettura-ad-una-recente-ordinanza-della-corte-di-cassazione/ (09/22); A. Del Guercio, *Migrazioni connesse con disastri naturali*, cit.; F. Vona, "Environmental Disasters and Humanitarian Protection: A Fertile Ground for Litigating Climate Change and Human Rights in Italy? Some Remarks on the Ordinance No. 5022/2021 of the Italian Corte Suprema di Cassazione", in *The Italian Review of International and Comparative Law*, 1. 2021, p. 146; 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.

[64] Court of Cassation, First Civil Section, judgment of 23 February 2018, no. 4455, p. 9.

in the country of origin".[65] Not least, in the Ordinance no. 2563/2020,[66] the Court recognizes environmental disasters, such as floods, as suitable grounds for granting the humanitarian protection.

This is the background under which the findings of the ordinance currently under analysis have matured.

Firstly, it should be pointed out that the ruling refers to the case of a citizen from the Niger Delta, who unsuccessfully brought an appeal before the Court of First Instance, since his application for international or humanitarian protection had been rejected. The applicant complains of violation of art. 360, no. 5 of the Code of Civil Procedure (failure to examine a decisive fact), because the Court of First Instance had not considered the situation of environmental disaster existing in the Niger Delta, as well as the violation of art. 5 TUI for the non-recognition of the humanitarian protection. Actually, the lower Court had not failed to establish the existence of a serious environmental degradation in the applicant's area of origin. In fact, Niger Delta is notoriously recognised as an area marked by severe environmental degradation, due to the exploitation and pollution caused by oil companies. The judges also noted the existence of polluted areas due to crude oil spills caused by breakdowns and sabotage by paramilitary groups, as well as the depletion of the area and the existence of ethnic and political conflicts for the control of resources.[67] Anyway, they did not consider this situation to constitute a 'serious harm' in order to grant the subsidiary protection under art. 15 (c) of Qualification Directive,[68] nor they considered the possibility of granting humanitarian protection at all.

The Supreme Court, on the other hand, takes a different view and

[65] Court of Cassation, First Civil Section, ordinance of 17 December 2019, no. 7832, p. 3.

[66] Court of Cassation, First Civil Section, ordinance of 4 February 2020, no. 2563.

[67] The area is indeed subject to widely reported environmental degradation, starting with the 2011 UNEP report that illustrated the disastrous consequences of oil extraction activities on the territory, see UNEP, *Environmental Assessment of Ogoniland*, 2011, https://wedocs.unep.org/bitstream/handle/20.500.11822/25282/ogoniland_chapter1_UNEP_OEA.pdf?sequence=1&isAllowed=y (09/22).

[68] Please note that, under the art. 15 (c) of Qualification Directive, a serious harm consists of: (a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict (see A. Del Guercio, *La protezione dei richiedenti asilo*, cit.).

does not miss the opportunity to align itself with the *Teitiota* case findings. Indeed, in line with the notion of a *life with dignity*, offered by the UN Committee, the Court explicitly affirmed that:

> The assessment of the condition of widespread danger existing in the country of origin of the applicant, for the purposes of recognition of humanitarian protection, *must be conducted with specific reference to the peculiar risk for the right to life and for the right to a dignified existence resulting from environmental degradation, climate change or unsustainable development of the area.*[69]

In order to reach this conclusion, the Court provides an evolutionary interpretation of the notion of 'ineliminable core constituting the foundation of personal dignity', that, in the jurisprudence of the Court, represents the parameter to which the judge must refer in order to assess the *individual vulnerability* that justifies the granting of humanitarian protection.[70] In this regard, the Court affirmed:

> For the purpose of recognizing, or denying, humanitarian protection […], the concept of 'ineliminable core constituting the foundation of personal dignity' identified by the jurisprudence of this Court […] is *the minimum essential limit* below which the right to life and the right to a dignified existence of an individual are not guaranteed. That limit must be appreciated by the trial judge […] in relation to any context that is, in practice, able to put the fundamental rights to life, liberty and self-determination of the individual at risk of zeroing or reduction below the aforementioned minimum threshold, *therein specifically including – if their existence in a given geographical area is concretely established – situations of environmental disaster, […] climate change, and unsustainable exploitation of natural resources*.[71]

Therefore, in the Supreme Court's view, the lower court failed to correctly assess the risk of compromising the minimum threshold of human rights, since it considered only the condition of *generalised dan-*

[69] Ordinance no. 5022/2020, pp. 5-6.
[70] As specified in the aforementioned judgment no. 4555/2018, see below.
[71] Ordinance no. 5022/2020, pp. 8-9.

ger resulting from armed conflict, and not also from environmental disaster, both for the purposes of granting subsidiary protection and humanitarian protection.[72] As stated elsewhere,[73] this passage of the ordinance seems to suppose that the compromission of the minimum threshold of human rights due to environmental or climatic reasons might be suitable for granting even the subsidiary protection, not only the humanitarian one. In any case, this formulation is not maintained subsequently, when the Supreme Court indicates the principle of law which the Tribunal of different composition must abide by, referring only to humanitarian protection. In this regard, it is therefore reasonable to wonder whether the Supreme Court has missed the opportunity to conclude a reasoning that could have led to the recognition of broader forms of protection, such as that provided for by subsidiary protection, if not the refugee status.[74] In the present case, in fact, the Supreme Court could have gone so far as to recognize the existence of a 'serious harm', constituted, in fact, by the situation of generalized violence deriving from the resources conflicts between armed groups, in turn determined by the situation of environmental disaster.[75]

That being said, the importance of this ordinance in the framework of the protection of environmental migrants is undisputed. In particular, an innovative element seems to emerge from the Court's reasoning, even compared to the Teitiota decision. In fact, in the ordinance, the Supreme Court seems to highlight the *objective* situation of environmental degradation in the applicant's country of origin and the possible consequences on human rights in case of return.[76] Likewise, the burden of proof of the applicant is mitigated, not having to prove an *individualised risk* to his life resulting from the environmental disaster. Therefore, there is not any specific focus on the personal and individual condition

[72] Ordinance no. 5022/2020, p. 8.

[73] A. Del Guercio, *Migrazioni connesse con disastri naturali*, cit., pp. 530 ff.

[74] *Ibidem*.

[75] It should be noted that in 2019, the Naples Court of Appeal granted subsidiary protection to an asylum seeker coming precisely from the Niger Delta because of the risk of suffering inhuman and degrading treatment, in the event of repatriation, due to the environmental, economic and social damage resulting from oil extraction by multinationals, associated with conflicts between ethnic groups and situations of police violence to quell riots (Court of Appeal of Naples, judgment of 8 May 2019, no. 2798).

[76] On this point see F. Vona, *Environmental Disasters and Humanitarian Protection*, cit.

of the applicant that specifically caused the migration, which the Court previously had indicated as a fundamental criterion to grant the humanitarian protection. Specifically, in the aforementioned judgment no. 4555/2018, the Court clarified that the applicant's vulnerability must be determined throughout "an *individual* case-by-case assessment of the applicant's private life in Italy *compared* with his personal situation experienced before the departure and the situation to which he would be exposed in case of return".[77] In the ordinance, such an individual and comparative assessment seems to be absent. Actually, this element can be a key point that could open up a more expansive interpretation of the prohibition of *refoulement* and in relation to the granting of forms of protection, because it should establish an effective (*but more general*) risk to the enjoyment of the applicant's human rights. Consequently, this could have implications also for the burden of proof upon the applicant, that can be reduced (in this regard, the judgment seems to be a step forward even with respect to the *Teitiota* case).

5. Conclusion

In this contribution, it was pointed out that environmental migration is a complex phenomenon that requires multiple tools and interventions to be managed by the international community. Indeed, mitigation and adaptation actions to respond to the threat of climate change are indispensable, as well as support and resettlement solutions for displaced people. Likewise, it is necessary to provide forms of protection for cross-border environmental migrants in the destination countries. With respect to this issue, the absence of an effective international legal framework has been highlighted, since, at the moment, the status of 'environmental migrant' is not effectively recognized, nor protected. However, there are interesting developments at the jurisprudential level, both at supranational and national levels, which are clearly aimed at broadening the scope of beneficiaries of currently existing forms of protection to include the so-called environmental migrants, through the use of an *integrated human-rights based approach*. In fact, starting from the *Teitiota* decision, where for the first time the applicability of the prohibition of refoulement was recognized in these contexts, several European do-

[77] Judgment no. 4455/2018, p. 10.

mestic courts have proved to be inclined to evolutionary interpretations in this regard. Significant in this sense is the Ordinance 5022/2021 of the Italian Court of Cassation, which expressly recognized the applicability of humanitarian protection in cases where the effects of climate change and environmental degradation compromise the *ineliminable core constituting the foundation of personal dignity*, as essential limit established by the jurisprudence of the Court, below which the right to life is not guaranteed. Furthermore, noteworthy is the fact that the Supreme Court's ruling seems to overcome some critical issues of the *Teitiota* decision, since, for the purpose of recognizing humanitarian protection in the present case, they give prominence to the *objective* situation of environmental degradation in the applicant's country of origin and the possible consequences on human rights in case of return, not to the *personal* threat to the applicant's life. Consequently, also the burden of proof upon the applicant seems to be reduced, not having the latter to prove an *individualised risk* to his life resulting from environmental degradation. This kind of development could actually open up to a more expansive interpretation of the prohibition of *refoulement*, as well as of the requirements for granting forms of protection to environmental migrants. In any case, it is desirable that courts do not 'settle' on the recognition of residual forms of protection in these cases, but that, depending on the circumstances, they do consider the possibility of granting higher protection statuses, such as the subsidiary protection, if not even the refugee status.