

Transnational constitutional values and protection of the person in the age of climatic migrations

Transnarodowe wartości konstytucyjne i ochrona osoby ludzkiej
w okresie zmian klimatycznych

Транснациональные конституционные ценности и защита человеческой личности
в период климатических изменений

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Summary: The study of climatic migration from a legal perspective ought to take into account both the difficulty and the importance of combining different methods and approaches to the essential needs of the migrants. For this reason, to properly make use of legal institutions, especially in the ambit of international law and its implementation, it would seem to be particularly relevant to understand their intrinsic aims and conditions of application. The analysis of the arguments used by the courts, in particular in relation to the Geneva Convention of 1951, shows difficulties in adapting to issues related to climate change, which took shape in different legal circumstances. Therefore, the paper attempts to verify how, and according to which criteria, different legal instruments may be connected within a pluralistic approach to climate migration, which might respond to current needs.

Key words: climate migrations law, legal protection of biosphere, interdisciplinary research in law, transnational constitutional law, international law and constitutional law, comparative jurisprudence

Streszczenie: Prowadzenie badań nad migracjami klimatycznymi w perspektywie prawnej powinno mieć na uwadze zarówno trudności, jak i korzyści łączenia różnych metod i podejść do istotnych potrzeb migrantów. Z tego powodu, aby właściwie wykorzystać instytucje prawne, zwłaszcza w ramach prawa międzynarodowego i jego implementacji, szczególnie ważne wydaje się zrozumienie ich wewnętrznych celów i warunków stosowania. Analiza argumentów podnoszonych przez sądy, w szczególności w odniesieniu do konwencji genewskiej z 1951 r., wskazuje na trudności w adaptacji do kwestii migracji klimatycznych rozwiązań prawnych, które kształtowały się w innej przestrzeni politycznej. W artykule podjęto zatem próbę sprawdzenia, w jaki sposób i według jakich kryteriów można łączyć różne narzędzia prawne w pluralistycznym i odpowiadającym aktualnym potrzebom podejściu do migracji klimatycznych.

Słowa kluczowe: prawo zmian klimatycznych, ochrona prawna biosfery, badania interdyscyplinarne w prawie, prawo konstytucyjne transnarodowe, prawo międzynarodowe i prawo konstytucyjne, prawoznawstwo porównawcze

Резюме: Проводя исследования климатической миграции с правовой точки зрения, следует помнить как о трудностях, так и о преимуществах сочетания различных методов и подходов к соответствующим потребностям мигрантов. По этой причине для правильного использования правовых институтов, в частности в рамках международного права и его имплементации, представляется особенно важным понимать их внутренние цели и условия применения. Анализ аргументов, выдвинутых судами, в частности, в отношении Женевской конвенции от 1951 года, свидетельствует о трудностях адаптации к проблеме климатической миграции правовых решений, которые были сформированы в другом политическом пространстве. Таким образом, в статье предпринята попытка рассмотреть, как и в соответствии с какими критериями различные правовые инструменты могут быть объединены в плюралистическом и отвечающем всем актуальным требованиям подходе к климатической миграции.

Ключевые слова: право климатических изменений, правовая охрана биосферы, междисциплинарные исследования в области права, транснациональное конституционное право, международное право и конституционное право, сравнительное правоведение

Introduction

In this paper, we wish to analyze the legal arguments developed in the field of climate change migrations, mainly within international law. On this basis, we may consider whether and how they may contribute to the development of transnational constitutional principles, addressed to comply with the issue of climatic migrations. Our aim is not only to underline the protection for the displaced that are forced to migrate, due to climate change. Our aim is also to look at how the law may be used to support the prevention of human driven climate changes. We would like to stress that authoritative opinions in the field of natural sciences, show that, under different drivers, the biosphere is changing under the influence of man-made increase in global temperature.¹ This means that, if change does not occur in time, different parts of our planet will not be able to properly host human societies. Because of this, governments will not be able to protect “life, liberty and property”,² and the rule of law may be thus transformed into a rule of exception, where a growing number of people are forced to move from the areas where they had their property and their life was rooted and are genuinely deprived of true legal protection.

1. The legal protection of the biosphere and the law relating to climate change migrations

The efforts of many legal scholars to justify and to advocate legal recognition of people compelled to migrate because of climate change are gradually emerging as a separate branch of migration law. Furthermore, we ought to recognize that studies on migration law have developed – mostly in the last decade – issues of general importance such as the interest in the protection of the rights of foreigners. This

¹ A.D. Barnosky et al., *Approaching a State Shift in Earth's Biosphere*, Nature 2012, no. 486, pp. 52–58.

² J. Locke, *The Two Treatises of Civil Government*, ed. T. Hollis, London 1764, reprinted as an online edition by Online Liberty Library, <http://oll.libertyfund.org/title/222> [access: 10.05.2021].

principle, although widely recognized in international law and in constitutional law after World War II, has been put in jeopardy due to the waves of migration accompanying the process of globalization.

Thus, the studies on the acknowledgement of the rights of migrants, as well as of the ranking of the principle of non-refoulement in international law, appear to be of special importance. In our understanding, such principles pave the way for efforts to deepen understanding of migration due to climate change, which have been leading so far to highlight relevant issues concerning the protection of humans. In this perspective, we first need to study problems related to climate change migration, taking into account the different conditions in which climate change causes migration. From this issue, follow several questions concerning the model of international law protection, which may be suitable to deal with climate migration. In legal research, a significant debate has been conducted as to whether an interpretation of the Geneva Convention can include climate migrants. More generally, there is a growing interest in studying climate migrations together with climate change. We should be aware that the human species, which has managed to inhabit practically the whole Earth, should take appropriate responsibility for it. Furthermore, statehood – the basic form of political organization – was developed following an economic approach in which raw materials often came from far beyond the borders of the state. At the same time, the sale of finished products ranged far beyond national borders. As Carl Schmitt underlines, the conceptions which accompanied the development of the *Ius Publicum Europaeum*, led to every part of the globe being regarded as the territory of Europeans (or equated to it) or as potential colony, which may be occupied.³ In the development of such a law, applied to all the globe, the constant fight to get goods that travelled on the sea, influenced the legal equilibrium between land and sea. Indeed, the domain of law was recognized only on land. On the sea, the concept of law, peace, and property was weakened, if it existed at all.⁴ I had already criticized this concept by saying that the concept of a constitution, which is based on internal conflict (to gain and maintain power), and external conflict (to get hold of resources and of markets), should be improved. A constitution ought to primarily take care of the duties we have towards living entities, persons, communities, and those natural processes, thanks to which we exist.⁵

³ C. Schmitt, *Il Nomos della Terra nel diritto internazionale dello „Jus Publicum Europaeum”*, transl. E. Castrucci, ed. F. Volpi, Milano 1991, pp. 207–214.

⁴ *Ibidem*, p. 207.

⁵ P. Policastro, *Constitution and Conflict. Regulating Regional Interdependences through Society-Based Supranationality as a Path for the European and Mediterranean Transformation*, in: *Costituzione – Economia – Globalizzazione, Liber amicorum in onore di Carlo Amirante*, Napoli 2013, pp. 1467–1493.

The protection of our common home, the biosphere, requires an approach, which may not be the same as the legal approach to the sea, which has been consistently adopted for a long time, as a *res nullius*, and not as a *res omnium*.⁶ Indeed, according to Carl Schmitt, we may not reach the point of considering the sea as a *res omnium*, without a community of States which is organized enough to accomplish this task. As we can see at present, notwithstanding the progress made by law, international organizations have not reached the point to be able to consider not only the sea, but also other fundamental goods, including human life, as something we ought to protect together. This requires taking into due account the protection of the biosphere. For this reason, an approach to the protection of our common home also requires a new and transnational approach to law and to legal duties. The study of climate change refugees may make an important contribution to this aim.

2. On the concept of a refugee under international law: the problem of its application to climate migration

The system of protection of refugees adopted in most countries is based upon a conception, which developed in Europe, in the period between WWI and WWII. The crisis and the fall of the Ottoman Empire, the 1917 Bolshevik revolution in Russia, and the new borders of Europe after WWI created massive flows of migrants. Consequently, several treaties and agreements were concluded to deal with this issue.⁷ Moreover, the creation of new borders, the nationalistic thought behind such processes, the rise of political hatred, and the increase of economic migration, made states pay greater attention to their borders.⁸ We have to remember that, however, in the previous century, natural calamities, such as the Irish famine, had already caused large flows of refugees.⁹

In the second part of the 1920s, it was then agreed that the measures adopted for Russian and Armenia refugees would also be extended to Assyrian, Assyro-Caldean, and other assimilated refugees, as well to other Turkish refugees. Such

⁶ C. Schmitt, *Der Nomos...*, pp. 212–213.

⁷ J.H. Fischel de Andrade, *On the Development of the Concept of 'Persecution' in International Refugee Law*, *Brazilian Yearbook of International Law* 2008, vol. 2, no. 3, pp. 114–136.

⁸ M. Radomska, *The Political Origins of the Social Protection of Polish Migrant Workers in the German Interwar Labor Market*, *Annales de Démographie Historique* 2012, vol. 2, no. 124, pp. 105–140.

⁹ E.D.G. Fraser, *Social Vulnerability and Ecological Fragility: Building Bridges between Social and Natural Sciences Using the Irish Potato Famine as a Case Study*, *Conservation Ecology* 2003, vol. 7, no. 2.

instruments were not legally binding. Besides, the relation between the state of origin and the refugee was described by saying that the latter no longer enjoys the protection of the government of the country of origin. “Lack of protection” was the core element in such agreements, to grant the status of “refugee.”¹⁰ Furthermore, L’Institut de Droit International, in the Brussels session of 1936, considered that a refugee “does not enjoy the diplomatic protection of the State.”

The Convention Concerning the Status of the Refugees Coming from Germany of 1938 puts in evidence, by means of its wording, the character of forced migration.¹¹ Indeed, article 1 of the Convention, concerning definitions, mentions: “1. (a) Persons possessing or having possessed German nationality and not possessing any other nationality who are proved not to enjoy [our underlining], in law or in fact, the protection of the German Government. (b) Stateless persons not covered by previous Conventions or Agreements who have left Germany territory after being established therein and who are proved not to enjoy, in law or in fact, the protection of the German Government.” It adds, however, that: “2. Persons who leave Germany for reasons of purely personal convenience are not included in this definition.” As has been observed, the Convention aimed to condemn the German policies of that time. However, as Hannah Arendt has already underlined, the deprivations of nationality and expulsions created paradoxes, since, after the German expulsions, there were overnight deportations from other States.¹² However, the importance of the Convention lies in the fact that evidence of not enjoying, in law or in fact, of the protection of a state, together with the exclusion of the people that migrate for economic convenience, paves the way for a more stringent notion of refugee.¹³ The fact that the acknowledgement of the status of refugee has been related with a negative connotation of the state they were fleeing from, appears evident from the definition of refugee given by United Nations Relief and Rehabilitation Administration (UNRRA) in its Resolution no. 71. In such a Resolution the definition of persons eligible for help extends to “other persons who have been obliged to leave their country or place of origin or former residence.”¹⁴ The fact that this wording displeased Eastern European Countries shows that the perception of the recognition of refugees as having a negative connotation for the countries

¹⁰ J.H. Fischel de Andrade, *On the Development...*, p. 116–117.

¹¹ League of Nations, Convention concerning the Status of Refugees coming from Germany, Geneva, 10 February 1938, League of Nations, Treaty Series, vol. 192, no. 4461, p. 59.

¹² H. Mahrtdt, *Rethinking our Refugee Crisis with Hannah Arendt*, Estudios Ibero-Americanos 2017, vol. 43, no. 3, pp. 535–547, <https://www.redalyc.org/articulo.oa?id=134653657006> [access: 1.03.2021].

¹³ J.H. Fischel de Andrade, *On the Development...*, p. 118.

¹⁴ *Ibidem*.

they are fleeing from has been confirmed. The International Refugee Organization (IRO)¹⁵ introduced in its Constitution the concept of persecution. The attention of this organization was concentrated on the “victims of the Nazi or Fascist regimes or of regimes which took part on their side in the Second World War,”¹⁶ “Spanish Republicans and other victims of the Falangist regime in Spain,”¹⁷ “persons who were considered refugees before the outbreak of the Second World War, for reasons of race, religion, nationality or political opinion.”¹⁸ The term “refugee” also applies, in the perspective of the Constitution of the International Refugee Organization, to “a person, other than a displaced person, who is outside of his country of nationality or former habitual residence, and who, as a result of events subsequent to the outbreak of the Second World War, is unable or unwilling to avail himself of the protection of the Government of his country of nationality or former nationality.”¹⁹ This also applies to “persons who, having resided in Germany or Austria, and being of Jewish origin or foreigners or stateless persons, were victims of Nazi persecution and were detained in, or were obliged to flee from, and were subsequently returned to, one of those countries as a result of enemy action, or of war circumstances, and have not yet been firmly resettled therein.”²⁰ The term also applies to unaccompanied children who are outside their country of origin and are war orphans or whose parents have disappeared.²¹

The “refugees” defined above, became of concern to the organization if they could be repatriated, or if they expressed, in full freedom and with full knowledge of the facts, valid objections to returning to their countries. The Constitution of the International Refugee Organization considered as valid objections: “(i) persecution, or fear, based on reasonable grounds of persecution because of race, religion, nationality or political opinions [...]”²²; (ii) objections of a political nature judged by the Organization to be “valid”, [...] (iii) [...] compelling family reasons [...] or, compelling reasons of infirmity or illness.”²³

¹⁵ United Nations Organization UNO, Constitution of the International Refugee Organization, New York, 15 December 1946, United Nations, Treaty Series, vol. 18.

¹⁶ “[...] or of the quisling or similar regimes which assisted them against the United Nations, whether enjoying international status as refugees or not.” Ibidem, Annex I, Part I, Section A 1 (a).

¹⁷ Ibidem, Annex I, Part I, Section A 1 (b).

¹⁸ Ibidem, Annex I, Part I, Section A 1 (c).

¹⁹ Ibidem, Annex I, Part I, Section A 2.

²⁰ Ibidem, Annex I, Part I, Section A 3.

²¹ Ibidem, Annex I, Part I, Section A 4.

²² “[...] provided these opinions are not in conflict with the principles of the United Nations, as laid down in the Preambular of the Charter of the United Nations.” Ibidem.

²³ Ibidem, Annex I, Part I, Section C 1.

The United Nations Convention to the Status of Refugee, signed at Geneva on 28th July 1951,²⁴ was based on the concern for the protection of the fundamental rights and freedoms, as well as the suitability to revise, consolidate, and extend the scope of previous international agreements. The Convention justified the need for wider international cooperation, saying that otherwise the grant of asylum may place undue burdens on certain countries, expressing the wish that it may help all states to do everything in their power to prevent refugee issues from becoming a cause of tension between them.²⁵

The structure of the Convention relies upon a definition of the term “refugee”, based on previous documents, including the Convention of 1938 and the Constitution of the International Refugee Organization. Concerning its ambit of application, the Convention recognizes the condition of “refugee” to persons who, “as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”²⁶

Indeed, the Convention was designed to respond to the conditions of displacement, which followed WWII, and took place mainly in Europe. Furthermore, its original ambit of application concerned people who were already displaced in another country. The protocol to the Convention has relieved such limitations and permitted a general application of the Convention itself.²⁷

However, a question remains concerning the boundary of the semiotic space created by the concept of persecutions, which is not defined in the convention itself. Indeed, the cause to have acknowledged the status of migrant is connected with the “fear of being persecuted.” The reasons for such persecution are enumerated in the Convention, and they are: “race, religion, nationality, membership to a particular social group or political opinion.” The condition which must be fulfilled is that the cause of fear prevents the return to the country of nationality or to

²⁴ United Nations Organization UNO, Convention Relating to the Status Of Refugees, Adopted on 28 July 1951, Entry into force on 22 April 1954, in accordance with Article 43, United Nations, Treaty Series, vol. 189, no. 2545, p. 137.

²⁵ Cf. *ibidem*, Preambular.

²⁶ *Ibidem*, Article 1 (2).

²⁷ J.H. Fischel de Andrade, *On the Development...*, see in particular p. 122.

the country of habitual residence. No one of such elements really apply to climate change phenomena including, at a first glance, also natural disasters.

However, we shall consider that the Geneva Convention was not only concerned with the European situation but was related with a political function of the recognition of the refugees, connected with a negative reference to the states from which refugees came. The Protocol relating to the Status of Refugees of 1967,²⁸ started acknowledging that the Convention covers only those persons who became refugees in relation to the events that took place before 1951. It adds that new refugee situations have arisen, and therefore it is desirable that all the persons covered by the definition of the Convention may be protected according to its rules without regard to the deadline set in the original version of the Convention. The Convention obtained a “universal” range thanks to the elimination of few words that limited its application in time.

The Convention, even after the protocol, is grounded on the assumptions of the chain of documents and acts which led to its enactment. They affected: a) the description of the events, according to which the question of refugees was a temporary phenomenon, and the drivers of refugees were the actions carried out by a circumscribed number of states; b) the value given to the events, entailing a negative judgement of the states from which the refugee came, and the evidence that requires the well-founded fear of persecution; c) concerning the impact on reality, the suitability of the model of the Convention was related to the rights of the refugee, including the prohibition of expulsion or return: the “non refoulement”;²⁹ d) for this reason, in terms of the policy of law, the elements mentioned before, led from one side to the generalization of the model of Geneva Convention; from the other, they led to the attempts to recognize the status of refugee to climate migrants, which is happening at present.

We shall take into consideration that the framework of the Convention of 1951 circumscribes an event that may be accepted to grant the status of “refugee.” Not so much later, the Convention of the Organization of African Unity Governing specific aspects of refugee problem in Africa, adopted in Addis Ababa in 1969,³⁰

²⁸ United Nations Organization UNO, Protocol Relating to the Status of Refugees, Adopted on 31 January 1967, United Nations, Treaty Series, vol. 606, no. 8791, p. 267.

²⁹ See Article 33 of the Convention Relating to the Status of Refugees of 1951: prohibition of expulsion or return (“refoulement”).

³⁰ The Convention was adopted by the Assembly of the Heads of State and Government at its Sixth Ordinary Session. Organization of African Unity OAU, Convention Governing the Specific Aspects of Refugee Problems in Africa, Adopted on 10 September 1969 by the Assembly of Heads of State and Government, Entry into force on 20 June 1974, in accordance with Article XI, United Nations, Treaty Series, no. 14691.

has enlarged the principles of the Geneva Convention, including “external aggression, occupation, foreign domination or events seriously disturbing the public order.”³¹ In doing so, however, it maintained the approach of the Geneva Convention, which relates the phenomenon of the refugees as connected, directly or indirectly, with a political condition. The production of the said condition makes it possible to protect the individual refugee, to tolerate him or to exclude the individual from protection. It also permits a limited enlargement of the concept, for example to organized turmoil.

Although the model of the Convention of Geneva of 1951 has practically an universal character, from the analysis developed so far, we observed that it considers an approach to the refugee, which is related to temporary phenomenon, depending on political factors. Climate change does not fulfill such conditions. First, it is not a temporary phenomenon. Secondly, it calls for prolonged efforts. Thirdly, responsibility for climate change may not be circumscribed to one or a few states. Fourthly, climate change effects appear in different ways. They may manifest themselves as desertification, a tendency to droughts, an increase in fires, an increase in floods, a rise in the level of the sea, and so on. They may generate very wide ranges of scenarios in human societies and several kinds of vicious circles. However, the primary cause of climate migration may not involve a negative judgement of states from which the flows of refugees come.

The states from which the climate refugees move, on the contrary, have in many cases not contributed significantly to cause the climate change, if at all. Such states are instead called to unusual costs coming from the events related to climate change. They suffer from the loss of territory, which can be properly inhabited and may be used for agriculture and other economic activities, which may feed the population. The poverty or even the loss of land generate instead movements of people, which are the cause of social and political tensions, as well as disorder.

From an analysis of the approach of the Convention of Geneva of 1951, we can easily see that it neither explicitly refers to climate change migration, nor that it even indirectly encourages an action of all states to eliminate the causes of climatic migrations. Furthermore, the multiplicity of the causes of climate migration has not made possible so far the recognition of climate refugees in the framework of the Geneva Convention. Instead, from the point of view of policy of law, climate change

³¹ See Article 1.2 of the Convention Governing the Specific Aspects of Refugee Problems in Africa: “The term ‘refugee’ shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence to seek refuge in another place outside his country of origin or nationality.”

so far has been the object of calls for a plurality of instruments. Such instruments ought to be analyzed, however, considering that climate change migrations firstly negatively affect the territory of the states from which migrations come and the basic cohesion of their society, which are the basic elements on which legal order rests. Secondly, they affect the receiving countries in different ways.

3. Climate migrations protection between governance and *jus cogens*

The different situations related with migration are presently leading to a gradual acknowledgement of the need to grant adequate status and protection to climate migrants and their rights. Such a process appears justified not only by climate changes, but also by the fact that, together with the development of globalization processes, questions of migration have grown in complexity. Indeed, the development of a “post-Cold-war world”³² has been accompanied by a global increase in geopolitical tensions. Furthermore, the growing increase of the cleavage between poorer and wealthier countries, also with respect to demographic rates, has created ambiguities towards migration flows: from one side, many richer countries have opened to migration. From the other, different states aimed at making use of migration to achieve their political and geopolitical interests in full sovereignty. Furthermore, the development of internationalization and globalization processes has increased conflicts for the control of raw materials. Together with this, we have observed, for more than 30 years, a growing scientific interest concerning climate change as a driver of change at the international level, including migration. Nevertheless, interest in refugee law remained linked to the historical paradigm which influenced its development. Its proposals have been limited to noticing mostly the need for mutual coordination: from the one side, to deal with increasing refugee flows; from the other, to approach the growing restrictions posed by these states.³³

Looking at such a perspective, we see a persistent attitude addressed to separate political issues and geopolitical issues from issues concerning the conditions of our planet. Thus, political and geopolitical issues have priority, whilst the biological, climatic and physical condition of our planet remain subordinated, notwithstanding the growing attention of scholars and of the civil societies. And this has happened

³² Cf. L. Barnett, *Global Governance and the Evolution of the International Refugee Regime*, *International Journal of Refugee Law* 2002, vol. 14, no. 2–3, p. 261.

³³ *Ibidem*, p. 257.

even though reports and scientific studies have also been made within the system of the United Nations. Among the first, we may refer to the “Brundtland report.”³⁴

The above mentioned document pointed out that, during the course of the XX century, “the relationship between the human world and the planet that sustains it has undergone a profound change.” Such changes have been taking place at such a rate and with such a magnitude, that it “is outstripping the ability of scientific disciplines and our current abilities to assess and advise.”³⁵ We have mentioned this, because a proper acknowledgement of each scientific contribution or report demands the complexity of the problem in the legal perspective to be taken into account: indeed, it demands a proper description of the events and consideration for the related priorities. To this regard, we would like to refer once more to the Brundtland report, where it is written: “The Commissioners came from 21 very different nations. In our discussions, we disagreed often on details and priorities,”³⁶ but “We are unanimous in our conviction that the security, well-being, and very survival of the planet depends on such changes, now” (§ 126). Here, the complexity of the issues appears from the fact that only 21 States were members of the Commission chaired by Brundtland himself. However, climate changes and the effects of the anthropic footprint over the biosphere is of concern for everybody. Thus, the order of complexity of the decisions to be taken and the policies to be implemented is much higher. For this reason, it is worth remembering the reflections on complexity and ethics, which are the contribution of Niklas Luhmann to ecological communication. To this aim, Luhmann considered ethics that went beyond all the moral choices that embody in themselves preconceived choices, and that therefore look primarily at themselves.³⁷ For this reason, the contribution of legal sciences, based upon the evolutions of concepts, structures, and procedures, appears a very important system of reference to develop a “semiosphere”³⁸ of the discourse on climate migration within life in our common home, the biosphere. A first step in this process, which appears essential for the proposal of new legal approaches, is to study how the legal discourse has developed its perspectives. Indeed, it is only quite recently that legal scholars have been trying to make more extensive use of

³⁴ United Nations, Report of the World Commission on Environment and Development, *Our Common Future*, The Brundtland Report, 1987.

³⁵ *Ibidem*, § 122.

³⁶ *Ibidem*, § 125.

³⁷ N. Luhmann, *Ecological Communication*, transl. J. Bednarz, Cambridge 1989, pp. 140–142.

³⁸ Ю.М. Лотман, *О Семиосфере*, Труды По Знаковым Системам 1984, vol. 17. Структура диалога как принцип работы семиотического механизма, pp. 5–23; Y.M. Lotman, *Universe of the Mind*, Bloomington 1990.

interdisciplinary perspectives, without refraining from trying to formulate evaluations, concerning, for example, that human action can only be limited to mitigation, since “climate change is unstoppable.”³⁹

A very important feature of the present trends on migration law and on climate migration law, in particular, consists of the specific relations between the concepts used, concerning understanding of the phenomenon, institutions, principles, and systemic evaluation on the perspective of the policy of law. Concerning institutions, an approach which may not be neglected is the one of “global governance.” An interesting proposal on this issue has been the proposal to extend the mandate of United Nations High Commissioner for Refugees (UNHCR) to internally displaced people, under the assumption provided that the definitions characterizing the Refugee Convention of 1951 are no longer relevant. Instead, the function of international institutions should consider the manifold relations concerning refugees, including interstate issues, issues between nations and communities, media, non-governmental organizations, and issues concerning international bodies together with UNHCR. Therefore, it has been proposed that UNHCR goes beyond its traditional approach, centered on the absolute notion of state sovereignty, to permit extending its mandate to internally displaced persons. In this perspective, an approach focused on people who are needing help may appear acceptable, if not suitable.⁴⁰ It is important to consider that such an opinion may be regarded as consistent with our research on the protection of the existential manifestations of the person, beyond what we protect as human rights.⁴¹

Parallel to the line of thought centered on global governance to protect the refugee that we just considered in brief, we also focus on the status of the migrant in international law. Bearing this in mind, we have the recognition of the status of being a migrant as a principle of *jus cogens*, namely, a norm of international law that states or organizations of states, may not override, in any circumstances, unless there emerges a new norm having the same status. Apart from the reflections on the formal legal characteristics of the institute, we find it important to refer to the argument proposed by Allain on this matter. Indeed, the argument assumes

³⁹ P.P. Benedicic, M. Riemer, S. Cassotta, *Climate Change, Forced Migration and International Law in a Cross-Area and Interdisciplinary Approach: A Global Environmental Legal Solution Focusing on Adaptation?*, *Journal of Academic Perspectives* 2012, vol. 17, no. 2, pp. 23–25.

⁴⁰ L. Barnett, *Global Governance...*, p. 259. See also footnote 120 and the opinion of Gervais Appaye mentioned thereby.

⁴¹ P. Policastro, *A New Garment for an Old Question: ‘A Clash between Man’s Rights and Citizens’ Rights in the Enlarged Europe?’*, in: *Nordic and other European Constitutional Traditions*, ed. J. Nergelius, Leiden–Boston 2005, pp. 61–92; P. Policastro *Interdipendenze costituzionali e protezione della persona*, in: *Studi in Onore di Luigi Arcidiacono*, Torino 2011, pp. 2635–2675.

that following the “end of the Cold War”, there has been a rapid development of the issues that the states wished to develop on an international or global scale.⁴² To this aim, states have been reinforcing the number and the ambits of coordinated cooperation, by means of inter-governmental institutions. The consequence is that such intergovernmental institutions have been able to operate without the necessary democratic supervision which is granted within national states. Therefore, states operating together through intergovernmental organizations have often achieved – stresses Alain – what states have not achieved alone. As an example, the author mentions the European Court of Justice, which, as he points out, has been pushing towards economic integration to an extent that the states would have not succeeded acting by themselves.⁴³ He thus affirms that there is a need to ensure that inter-governmental institutions ought to respect their obligations, which, in the case of non-refoulement, are bound to the fact that the states have agreed to recognize to such principles the strength of *jus cogens*. Furthermore, the author makes a very introductory reference to the obligations of the states *erga omnes*, as an element reinforcing the conception of a “system of international law”, which binds the states towards the whole international community, not specifying however, whether the object of the obligation would be to respect the *jus cogens* or whether it would be extended further.

4. The protection of climate migrants vs. international duties, constitutional duties, and geopolitical interests

These arguments on a wider and stronger protection of climate migrants need to be scrutinized with attention. Indeed, from one side, the processes of regional integration started well ahead with respect to the end of the Cold War, and they have been fully endorsed by UNO. For this reason, intergovernmental integration processes have frequently shown some drawbacks, for example, what has been called the “democratic deficit.”⁴⁴ Furthermore, the process of economic integration has been deepened through the influence of the European Court of Justice (now Court

⁴² J. Allain, *The Jus Cogens Nature of Non-Refoulement*, International Journal of Refugee Law 2002, vol. 13, no. 4, p. 541.

⁴³ Ibidem, p. 542, see also footnote 35, and the relative reference to J. Allain, *The European Court of Justice is an International Court*, Nordic Journal of International Law 1999, vol. 68, no. 3, pp. 249–274.

⁴⁴ See e.g., C. Amirante, *Costituzione e governance*, Enciclopedia Treccani, https://www.treccani.it/enciclopedia/costituzione-e-governance_%28altro%29/ [access: 1.05.2021].

of Justice of the EU) much earlier than the beginning of the opening of the world economy to internationalization or globalization. Instead, the tendency of inter-governmental organizations to neglect certain rights may be understood as a way to pursue geopolitical aims, neglecting the tenor of the rights accepted within the international community.

Recently, new arguments have been proposed, which may support this line of thought concerning climate change migration. Indeed, after an introductory observation that poorer countries are more vulnerable to the events related to climate change than richer ones, the author goes further.⁴⁵ In particular, he points out that the Intergovernmental Panel on Climate Change (IPCC), takes into account, with different degrees of probability, whether certain manifestations of climate change are generated by anthropic action, with relation to the different regions of the world.⁴⁶ The author seems to propose the possibility to rely on such analyses to argue in favor of the request of residence permit of the victims of related environmental disasters. His approach appears looking towards a true obligation of the states towards the whole international community, and namely an obligation *erga omnes*, whose object, in this case, ought to be to grant less stringent thresholds towards “climate change related displacement claims.” Indeed, while the author does not refer explicitly to an obligation of the state *erga omnes*, he encourages us to take the challenge to invoke, to resist expulsion, considering “the connection between climate change and the particular natural disaster.” He adds that “scientific understanding of such a connection is increasing.”

The genuine challenges that these opinions show is, however, the threefold complexity concerned with the interaction between international duties, constitutional duties, and geopolitical interests. It has indeed been suggested that, within the ECHR legal order, certain arguments relating to climate change may be worth considering in relation to climate change migrants.⁴⁷ ECHR, with regards to the understanding of the climate change phenomenon, has indeed approached arguments very similar to the ones mentioned by the said doctrine.⁴⁸ However, the “living instrument doctrine” of the European Convention on Human Rights, which

⁴⁵ M. Scott, *Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?*, *International Journal of Refugee Law* 2014, vol. 26, no. 3, p. 407.

⁴⁶ *Ibidem*, p. 410.

⁴⁷ J. Allain, *The Jus Cogens...*

⁴⁸ T. Eicke, *Human Rights and Climate Change: What role for the European Court of Human Rights*, <https://rm.coe.int/human-rights-and-climate-change-judge-eicke-speech/1680a195d4> [access: 10.05.2021].

has been reaffirmed as its capacity to adapt to new challenges, such as climate,⁴⁹ gives the Convention itself a kind of “common law” nature.⁵⁰ This may not be conceived outside the strict relations between the constitutional development of the Member States of the Council of Europe and its conventions. Furthermore, it seems the European Union is not in the center of an intense process of climate change. Indeed, in other places, where climate change challenges appear closer to everyday experience, the legal approach to climate migrants may be different. We can see this in the well commented case of Teitiota, a migrant from the Republic of Kiribati, which is composed of small islands in the Pacific Ocean. Mr Teitiota, who was in New Zealand, wished to continue to live in New Zealand, claiming climate change in his country of origin. However, the courts of New Zealand rejected his demand, which, we repeat, was based on arguments related to climate change. The appeal proposed by Mr. Ioane Teitiota, claimed his acknowledgement of the status as a “climate refugee” on the grounds of the Geneva Refugee Convention of 1951, of its implementation within New Zealand law, the United Nations Convention on the Right of the Child (the birth of some children of Mr. Teitiota took place during his stay in New Zealand), and the International Covenant on Civil and Political Rights. The Supreme Court of New Zealand upheld the findings of the previous degrees of judgment, giving the following arguments: 1) The question in front of the Court does not give rise to questions of law, which may be considered to have “general or public importance”; 2) The eventual return of Mr. Teitiota may not lead him to face “serious harm”; 3) The activity of the government of Kiribati shows no evidence that it is failing to act, within its possibilities, to protect its citizens against the effects of climate change; 4) The Court does not consider that the International Covenant on Civil and Political Rights finds application in the facts of the case; 5) The Court is not convinced that this decision may be related to any miscarriage of justice;⁵¹ 6) However, the Supreme Court emphasized that the court that judged the case in the former degrees of jurisdiction, namely the Tribunal and the High Court, did not mean that environmental degradation may not create the conditions to make use of the Refugee Convention or other legal instruments. The Court simply affirmed that such possibility did not concern the case in question.⁵²

⁴⁹ Ibidem, § 25.

⁵⁰ S.D. Warren, L.D. Brandeis, *The Right to Privacy*, Harvard Law Review 1890, vol. 4, no. 5, pp. 193–220. Concerning the inevitable development of law see p. 195.

⁵¹ New Zealand Supreme Court, NZSC 107, *Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment*, New Zealand: Supreme Court, 20 July 2015, § 12, https://www.refworld.org/cases,NZL_SC,55c8675d4.html [access: 4.05.2021].

⁵² Ibidem, § 13.

The literature which dealt with the case pointed out the difficulty of granting protection on the basis of the rights related to climate change within international law.⁵³ Furthermore, the scientific literature on climate change and migration has pointed out that, almost all around the world, the object of the Refugee Convention does not protect in general the victims of natural disasters, who are searching to improve, by migrating, their living conditions. In general, the courts of Australia and New Zealand dismiss the demands of people wishing to migrate from the islands of Tuvalu and Kiribati, although the courts underline the importance of climate change related phenomena and the suitability to grant international protection to the people which suffer from them.⁵⁴

These statements find their confirmation in the views expressed by the Human Rights Committee within the International Covenant on Civil and Political Rights given on 23 September 2020, on the Teitiota case, related to the substantive issue of the right to life.⁵⁵ Among the different statements, the committee affirmed that: a) the judgment of the national courts in the case Teitiota has not been arbitrary or wrong (§ 9.9), and b) that the State party (New Zealand) authorities, after a thorough examination, found that Kiribati has been taking measures to adapt to climate change and to reduce the existing vulnerabilities. In the other side, the statements of the Committee concerning the possible violation on the right to life have been resting on the statements that: i) although it is presently difficult to grow crops at Kiribati, it was not impossible; ii) the author of the communication did not send information on alternative sources of employment and on the availability of financial assistance in Kiribati to meet basic humanitarian needs (§ 9.9). The committee counterposed to such statements that robust “national and international efforts” may be needed to respect the rights of individuals, which, by reason of climate change, move towards other states. Indeed, Article 6 and Article 7 of the Covenant, namely the right to life and the right not to be subjected to inhuman treatment, require, according to the committee, robust national and international efforts. Otherwise, the same duty of non-refoulement may be in danger (§ 9.11). In this sense,

⁵³ M. Baker-Jones, M. Baker-Jones, *Teitiota v The Chief Executive of Ministry of Business, Innovation and Employment – A Person Displaced*, QUT Law Review 2015, vol. 15, no. 2, p. 107.

⁵⁴ J. McAdam, *Building International Approaches to Climate Change, Disasters, And Displacement*, Windsor Yearbook of Access to Justice 2016, vol. 33, no. 2, pp. 1–14, especially pp. 5–6 and the cases and the documents quoted thereby.

⁵⁵ United Nations Organization UNO, Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2782/2016, http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200107_CCPRC127D27282016-_opinion.pdf [access: 1.05.2021].

the same committee was open to take care of climate change and the issues relating to it, by all possible means, national and international.

This question is very important, since it relates to 1) the fact that international means may not be sufficient; 2) in which way and with which kind of means the states may approach such problems, whatever their wealth and their magnitude of responsibility on the anthropic footprint on biosphere; and 3) which approaches to mutual coordination ought to be undertaken.

5. International, National, Transnational Law and Policies

Human induced climatic changes have their ground in the reasons that have led to the present manifestations of the anthropic footprint on the biosphere. They follow not only the use of the natural resources and on technology, but they are the result of the historical development of the relationship between power and territory, of the approach of the states to geopolitical issues and, in the last resort, of ethical choices made by each of us.

The plurality of causes which lead to climate changes and to climate change migrations, reflect a plurality of differentiated effects. Furthermore, the effects that motivate the decision to move from one place to the other may be seen only as the result of climate change in specific cases. In most cases, the existence in the region of richer countries, the link of former colonial areas with the former metropolis, and the magnitude of the migrations, affect the policies concerning adaptations to climate change. Furthermore, the differentiation of the effects of climate change demands different processes of mutual adaptation, both for those states which suffer climate changes and for the ones where the flows of migrants appear to have increased for climate reasons.

Concerning the issue that international means may not be sufficient, we have two lines of thought that ought to be considered. One that underlines from one side that it is difficult – under the present lines of interpretation of the Geneva Convention of 1951 – to extend its contents to climate change refugees. Furthermore, such an opinion (McAdam) appears skeptical on the adoption of a new Climate Refugee Treaty. The reasons appear very sound: indeed, the effects of the treaties depend on their implementation. This aim requires an adequate political will. Instead, this line of reasoning prefers to underline the importance of enacting legislation and implementing policies supporting the endeavor of people to remain on their land, eventually supporting them in the case that they wish to migrate due to the difficulties

related with climate, and assisting them when they have been displaced.⁵⁶ To this aim, the importance to reflect on an intergovernmental base on the development of services addressed to meet the needs of disaster induced displacement has been highlighted. The Nansen Initiative has developed a wide consensus, including both governments and scholars.⁵⁷ The initiative shows nevertheless the present limitation of the dialogue within the states and in civil society. As Luhmann would say, the level of ecological communication does not involve a large quantity of the potential related subjects. Specifically, we mean the population of those areas potentially impacted by climate risks, as well as the NGOs. The contribution of civil society appears very important to enable greater communication, as well as to permit the development of proper mechanisms of subsidiarity. However, the Nansen Initiative considered important tasks, such as building resilience, facilitating migration with dignity, relocation with respect towards peoples' rights, and addressing the needs of the internally displaced.⁵⁸ In this perspective, the Sendai Declaration, with reference to disaster risks, places emphasis on international, regional, sub regional and transboundary cooperation as a means to support the effort of states. The Sendai Declaration underlines the need to include regional and local authorities, communities, and businesses.⁵⁹ An important aspect of this declaration relates to an inclusive perspective with respect to all relevant social stakeholders,⁶⁰ to paying attention to the different risk drivers,⁶¹ and the participation of all such stakeholders in the design and implementation of policies, plans, and standards.⁶²

⁵⁶ J. McAdam, *Building International Approaches...*, p. 9.

⁵⁷ The Nansen Conference, *Climate Change and Displacement in the 21st Century*, Oslo, Norway, 5–7 June 2011, <https://www.unhcr.org/4ea969729.pdf> [access: 1.05.2021]; The Nansen Initiative, *Global Consultation*, Conference Report, Geneva, 12–13 October 2015, <https://disasterdisplacement.org/wp-content/uploads/2015/02/GLOBAL-CONSULTATION-REPORT.pdf> [access: 1.05.2021].

⁵⁸ The Nansen Initiative, *Global Consultation...*, pp. 44–51.

⁵⁹ United Nations Organization UNO, Resolution adopted by the General Assembly on 3 June 2015 (without reference to a Main Committee [A/69/L.67]) 69/283. Sendai Framework for Disaster Risk Reduction 2015–2030, United Nations, Treaty Series, vol. 189, no. 2545, Sixty-ninth session, Agenda item 19 (c), Annex I – Sendai Declaration, § 6–9.

⁶⁰ “[...] including women, children and youth, persons with disabilities, poor people, migrants, indigenous peoples, volunteers, the community of practitioners and older persons.” Ibidem, § 7.

⁶¹ “[...] such as the consequences of poverty and inequality, climate change and variability, unplanned and rapid urbanization, poor land management and compounding factors such as demographic change, weak institutional arrangements, non-risk-informed policies, lack of regulation and incentives for private disaster risk reduction investment, complex supply chains, limited availability of technology, unsustainable uses of natural resources, declining ecosystems, pandemics and epidemics.” Ibidem, § 6.

⁶² Indeed, “There is a need for the public and private sectors and civil society organizations, as well as academia and scientific and research institutions, to work more closely together and to create

It is also important to consider opinions supporting the creation of a new binding instrument. Indeed, as it has been said, a new instrument, not linked with existing models of governance and of conventional law, for example, The United Nations Framework Convention on Climate Change⁶³ or Geneva Convention of 1951, would have their own scope, not linked to existing approaches.⁶⁴ The implementation of such a new mechanism ought to take place through a coordinating scheme. With respect to such a mechanism, the obligations of the state ought to be differentiated, considering per capita gas emissions, per capita income and other factors. Another important aspect of this proposal is related to the decisions of groups of states with respect to the direct link to climate change, as well with respect to the kind of climate change they are related to. To this end, it would also be worth distinguishing between climate refugees and environmental refugees.⁶⁵

This approach presents several interesting aspects. The first of which is to avoid insisting on the Geneva Convention of 1951, which has been created within the context of refugees and their relations with states, which is not relevant to climate migrations, both from the theoretical point of view and from the point of view of its practical application. A student of refugee law, who does not support the proposal of a new conventional instrument to deal with climate migrations, underlines however, that both legislation and the judgments of courts have limited the range of application of “inhumane treatment” in a way that only exceptionally it may be used to deal with phenomena such as poverty, lack of medical care, and so on.⁶⁶ A second aspect of interest of the proposal is the differentiation between states according to parameters that are relevant both for what concerns the production of the causes, which lead to human generated climate changes, and for the level of difficulty of a state and its communities to deal with such effects.

We can see, then, that both the reflections purporting the approval of a new conventional instrument to deal with climate changes, as well as the ones related to an efficient use of the existing means, converge on the facts that international law alone may not be sufficient to solve the problems related to climate migration.

opportunities for collaboration, and for businesses to integrate disaster risk into their management practices.” Ibidem, § 7.

⁶³ United Nations Organization UNO, United Nations Framework Convention on Climate Change, New York, 9 May 1992, United Nations, Treaty Series, vol. 1771, no. 30822, p. 107.

⁶⁴ M. Ammer, G. Hafner, M. Nowak, L. Stadlmayr, *Rechtsstellung und rechtliche Behandlung von Umweltflüchtlingen*, Dessau-Roßlau 2010, p. 12, <https://www.umweltbundesamt.de/en/publikationen/rechtsstellung-rechtliche-behandlung-von> [access: 1.05.2021].

⁶⁵ Ibidem, pp. 12–13.

⁶⁶ J. McAdam, *Building International Approaches...*, p. 6. See also footnote 24 and the decision quoted thereby.

Furthermore, according to both the considered lines of research, the participation of state subjects and of the different stakeholders is required. Therefore, the question is to see in which legal framework all this may take place.

Conclusion

A final reflection that we may propose is that, while the framework of the Convention of 1951 is of difficult application to the needs of climate refugees, it would be useful not to neglect the potential given by joining international law instruments with constitutional law tools. Indeed, while the national courts have not recognized the needs of climate refugees within the framework of the Geneva Convention, they have nevertheless supported the argument that action of states in favor of climatic migrants is strongly needed. From other cases, however, not related with climate migrations but with the worsening of the conditions of life, due to massive exploitations of natural resources in Amazonia, the Supreme Court of Colombia accepted the collective petition of young persons of the region. It also presented an important point of reflection on the nature of the constitutional state, that the acts that impact negatively on nature diminish the fundamental rights of persons and their surroundings.⁶⁷ However, the Inter-American Court of Human Rights has not accepted the arguments of the Arctic Inuit people, demanding to assess the responsibility of the USA for the destruction of the environment in which they live and express their culture.⁶⁸ However, the International Court of Justice in its Advisory Opinion of 8 July 1996, on the Legality of the Threat or Use of Nuclear Weapons,⁶⁹

⁶⁷ Republica de Colombia, Corte Suprema de Justicia, Sala de Cuidado Civil, Luis Armando Tolosa Vilabona, Magistrado Ponente, STC4360-2018, Radicación n. 1101-22-03-000-2018-319-01, pp. 13–17, <https://cortesuprema.gov.co/corte/wp-content/uploads/2018/04/STC4360-2018-2018-00319-011.pdf> [access: 1.05.2021].

⁶⁸ Inter-American Court of Human Rights, *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*, <http://climatecasechart.com/climate-change-litigation/non-us-case/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/> [access: 4.05.2021]. Concerning the petition of 2013 of Arctic Athabaskan Council vs. Canada, see A. Szpak, *Arctic Athabaskan Council's Petition to the Inter-American Commission on Human Rights and Climate Change – Business as Usual or a Breakthrough?*, *Climatic Change* 2020, vol. 162, pp. 1575–1593, <https://link.springer.com/article/10.1007/s10584-020-02826-y> [access: 4.05.2021].

⁶⁹ International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996, p. 226, <https://www.icj-cij.org/en/case/95> [access: 1.05.2021].

has warned against the danger of catastrophic events for the environment to our planet. In such a perspective, the time seems to be appropriate to develop instruments which combine international law, constitutional duties, and ethical duties.⁷⁰ With regard to the rank of the values involved, an enlarged approach joining the obligations of the States *erga omnes*,⁷¹ the legal schemes of constitutional protection and enquiry,⁷² policy issues – including good administrative practices, as well as good practices stemming from the civil society⁷³ – ought to be the subject of further scientific enquiry.

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⁷⁰ Francis, *Encyclical Letter Laudato Si' of the Holy Father Francis on Care for Our Common Home*, Città del Vaticano 2015, https://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html [access: 1.05.2021].

⁷¹ P. Picone, *Comunità internazionale e obblighi «erga omnes»*, Napoli 2013, pp. 44–45, 47, 48, 51.

⁷² P. Policastro, *Superior Values and the Foundation of Constitutional Comparison: Peace, Symbiosis with the Biosphere and Transnational Citizenship*, in: *Profesor Marek Safjan znany i nieznan. Księga jubileuszowa z okazji siedemdziesiątych urodzin*, ed. K. Szczepanowska-Kozłowska, Warszawa 2020, pp. 359–364.

⁷³ P. Policastro, *Planting Trees to Plant Life. Care of the Common Home and Pedagogy of a Green Heart*, *Educatio Catholica* 2019, vol. 5, no. 2–3, pp. 141–156.

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