

STRATEGIC CLIMATE LITIGATION AND ITS IMPACT ON THE GOVERNANCE OF CLIMATE MIGRATION

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RESUMEN: El marco jurídico que rige el fenómeno de la migración climática se ha definido como un "vacío legal enorme". Años de negociaciones internacionales han dado como resultado muy poco, principalmente vagas declaraciones o recomendaciones no vinculantes. Este artículo argumenta que, si bien las negociaciones internacionales sobre la migración climática han sido en gran parte ineficaces, se han logrado avances significativos a través de litigios climáticos estratégicos y se ha reducido, al menos en cierta medida, el "vacío legal enorme". Este artículo revisa varios casos clave y explica su relevancia e importancia para el desarrollo de la regulación de la migración climática.

RESUM: El marc jurídic que regeix el fenomen de la migració climàtica s'ha definit com un "buit legal enorme". Anys de negociacions internacionals han donat com a resultat molt poc, principalment declaracions o recomanacions no

vinculants i vagues. Aquest article argumenta que, tot i que les negociacions internacionals sobre la migració climàtica han estat en gran part ineficaces, s'han aconseguit avenços significatius mitjançant litigis climàtics estratègics i s'ha reduït, almenys en certa mesura, el "buit legal enorme". Aquest article revisa diversos casos clau i explica la seva rellevància i importància per al desenvolupament de la regulació de la migració climàtica.

ABSTRACT: The legal framework governing the climate migration phenomenon has been defined as a “gaping legal hole”. Years of international negotiations have resulted in very little, mainly non-binding and vague statements or recommendations. This paper argues that while international negotiations on climate migration have been largely ineffective, some significant developments have been achieved through strategic climate litigation and the “gaping legal hole” has been narrowed, at least to a certain extent. This paper reviews several key cases and explains their relevance to, and importance for, the development of the regulation of climate migration.

PALABRAS CLAVE: Migración Climática - Litigación Climática - Derecho Internacional - Derecho de los Derechos Humanos - Comité de Derechos Humanos - Opiniones Consultivas

PARAULES CLAU: Migració Climàtica - Litigació Climàtica - Dret Internacional - Dret dels Drets Humans - Comitè de Drets Humans - Opinions Consultives

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I. INTRODUCTION

International climate negotiations have had very limited success in delivering legal answers to prevent significant global warming. In response, many individuals and groups have attempted to use strategic litigation to overcome this failure and compel states to act. This article will zoom in on this wave of strategic climate litigation and evaluate its impact on the more distinct topic of climate migration.

The legal framework governing the climate migration phenomenon has been defined as a ‘gaping legal hole’.¹ Years of international negotiations have resulted in very little, mainly non-binding and vague statements or recommendations. We argue that while international negotiations on climate migration have been largely ineffective, some significant developments have been achieved through strategic climate litigation and the ‘gaping legal hole’ has been narrowed, at least to a certain extent.

We begin with an overview of the legal framework governing climate migration. It will identify the legal gaps that currently exist, which international negotiations were unable to overcome. We evaluate several key cases that, in our view, have provided (or are expected to provide) further clarifications and developments on the legal framework for climate migration. We identify unique legal difficulties, notably with respect to causality, which is a complex barrier to overcome in the context of climate litigation, and even more so in the unique case of climate migration.

With the exception of one case (the HRC decision in *Teitiota v New Zealand*), authors and policy makers have not addressed climate litigation as a significant source for the development of the law on climate migration. This paper will contribute to existing literature and policy efforts by shedding light on this angle: it will evaluate the usefulness of litigation, and the limits of its advancements.

¹ Sumudu Atapattu, ‘A new category of refugees? ‘Climate refugees’ and a gaping hole in international law’ in Simon Behrman & Avidan Kent (eds) *‘Climate Refugees’: Beyond the legal impasse?* (Routledge 2018).

II. CLIMATE LITIGATION AND CLIMATE MIGRATION

Recent years have seen a wave of cases against states and other entities, addressing the impacts of climate change.² Claimants in these cases have mostly been communities or groups of individuals, organised by non-governmental organisations (NGOs). In other cases, NGOs sued on behalf of the general public, aiming to represent the public's interest. The fact that these cases are driven by NGOs is important. Civil society organisations have been attempting to address climate change in a variety of fronts, including lobbying and campaigning, and their utilisation of the litigation front can be seen as a part of their overall strategy to combat climate change and save the planet.

The use of courts strategically, as an instrument for promoting the public good, is far from being a recent phenomenon. The literature on 'strategic litigation' is well-established, addressing issues such as human rights,³ public health,⁴ and more recently also climate change.⁵ The fact that litigation is regarded as part of a wider effort to bring about change allows for a more 'adventurous' approach. Unlike 'normal' cases, which will be launched only if the chances to win justify the cost, in strategic climate litigation, the fact that a case is heard by the court – with all the media's attention that accompanies such a case – is a win on its own. Indeed, despite several, well celebrated success stories, most strategic

² As Setzer & Vanhala write 'There are as many understandings of what counts as "climate change litigation" as there are authors writing about the phenomenon' (Joana Setzer & Lisa Vanhala, 'Climate change litigation: A review of research on courts and litigants in climate governance' (2019) WIREs Climate Change 3. A review of the debate over the definition(s) for this term is beyond the scope of this paper, but for the purpose of this paper we will rely on Setzer & Higham's definition (relied on in the influential annual Grantham Institute climate litigation report): 'Climate litigation broadly defined includes lawsuits brought before administrative, judicial and other investigatory bodies, in domestic and international courts and organisations, that raise issues of law or fact regarding the science of climate change and climate change mitigation and adaptation efforts'. Joana Setzer & Catherine Hingham, 'Global trends in climate change litigation: 2021 snapshots (Grantham Research Institute on Climate Change and the Environment 2021).

³ See for example Veronica Michel, 'Judicial reform and legal opportunity structure: The emergence of strategic litigation against femicide in Mexico' (2020) 82 *Studies in Law, Politics and Society* 27.

⁴ See for example Tamar Ezer and Priti Patel, 'Strategic litigation to advance public health' (2018) 20(2) *Health and Human Rights Journal* 149.

⁵ Jacqueline Peel and Rebekkah Merkey-Towler 'Recipe for success? Lessons for strategic climate litigation from the Sharma Neubauer, and Shell cases' (2021) 22(8) *German Law Review* 1484; Alessandra Lehman, 'Advancing strategic climate litigation in Brazil' (2021) 22(8) *German Law Review* 1471; Elizabeth Donger 'Children and youth in strategic climate litigation: advancing rights through legal argument and legal mobilization' (2022) 11(2) *Transnational Environmental Law* 263.

climate litigation has so far resulted in the court's rejection, or at the least, with very few gains.

This is not to say that the climate litigation strategy is futile; the opposite is true. As stated above, the publicity surrounding these cases is significant on its own terms. Furthermore, in some recent cases (e.g. *Sacchi*,⁶ or *Teitiota*⁷) we have seen what could be regarded as a process of 'foundations placing': the case is rejected, but important comments are nevertheless made by tribunals, comments that may facilitate the success of future cases. This may be a conscious strategic choice by courts concerned that in challenging government policies on climate change they are transgressing too far into the political sphere, and as a consequence jeopardising public legitimacy of what might be considered a form of legal activism. At the national level, climate policies are clearly political in nature; they are set on the basis of the political agendas of the government of the day; courts deciding against the 'will of the people' could be seen as transgressing into the realm of legislators and/or the executive branch.⁸ On the international level, climate action is designed and decided on by a highly sensitive process of negotiations between states. This process is shaped by longstanding tensions between North and South, and is guided, above all, by the leading notions of consensus-making and states' sovereignty. The reluctance of courts to intervene directly in these processes is therefore

⁶ Committee on the Rights of the Child, *Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 104/2019* (2021).

⁷ UN Human Rights Committee (HRC), *Ioane Teitiota v New Zealand* UN Doc CCPR/C/127/D/2728/2016 (7 January 2020).

⁸ See in *Juliana et al v the United States of America* Case: 18-36082, (01/17/2020); See also other examples such as the decision of the Stuttgart Regional Court in *Deutsche Umwelthilfe (DUH) v. Mercedes-Benz AG* (2022) (under appeal), <http://climatecasechart.com/non-us-case/deutsche-umwelthilfe-duh-v-mercedes-benz-ag/>; the Swiss Supreme Court in *Verein KlimaSeniorinnen Schweiz et al. v. Federal Department of the Environment, Transport, Energy and Communications (DETEC)* (2020) unofficial English translation http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200505_No.-A-29922017_judgment.pdf. The Australian Federal Court, in *Minister for the Environment (Australia) v Sharma*) [2022] FCAFC 65; In the UK, the court accepted cases based on issues such as lack of sufficient information presented to the legislator, but stressed that it 'is not responsible for making political, social, or economic choices. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies. The choices may be matters of legitimate public debate, but they are not matters for the court to determine'. See the Divisional Court in *R (Rights: Community: Action) v Secretary of State for Housing Communities and Local Government* [2021], and the High Court ruling in *R (oao Friends of the Earth) v. Secretary of State for Business Energy and Industrial Strategy* (July 18 2022).

understandable. So, by making bold statements on the one hand, while rejecting the claims on the other, tribunals may be sensitively and gradually preparing their audiences (be they governments or the general public) by sending a message: there are legal difficulties with the lack of climate action, and a future court decision against it is a genuine possibility.

The recent wave of climate litigation⁹ is of relevance to the more discrete issue of climate migration,¹⁰ whether directly or indirectly. Indirectly, it could be argued that any litigation that calls for states or other polluters to mitigate climate change by reducing emissions is relevant for reducing push factors of migration. If climate change is averted, its impact on migration will also be eased. Equally, legal claims for financial remedies, *inter alia* in the shape of investment that will support communities' adaptation effort, are relevant for climate migration. This type of financial support will ease communities' life conditions in their current location, allowing them to adapt and avoid having to migrate.

More directly, in some climate litigation cases, claimants have explicitly addressed climate migration; the legal rights that will be breached because of it, and the possible damage that it may cause them. In these cases, claimants have raised a variety of impacts, including loss of life, culture, identity, and traditional ways of life.

⁹ The impact and relevance of climate litigation vis-a-vis climate migration was predicted already in 2017 in a UNEP report, which accurately stated/predicted back then: 'A handful of cases in Australia and New Zealand offer a partial preview of how "climate refugees" will feature in climate change litigation. But the discussion in those cases of whether climate change impacts provide legally sufficient cause to authorize immigration does not presage the full scope of what we can expect to see as climate change-related pressures drive rates of intra- and international migration higher in the coming years and decades. "Climate refugee" litigation is also likely to arise over internal disaster recovery and resettlement efforts, international efforts to facilitate or directly support resettlement within or outside a country of origin, and access to resources within and across national borders amid shifting populations and changing climates'. UNEP, *The Status of Climate Change Litigation – A Global Review* (UNEP 2017), 25.

¹⁰ The term 'climate migration' was defined by the IOM as 'the movement of a person or groups of persons who, predominantly for reasons of sudden or progressive change in the environment due to climate change, are obliged to leave their habitual place of residence, or choose to do so, either temporarily or permanently, within a State or across an international border' (IOM, *International Migration Law: Glossary on Migration* (IOM 2019) 31. The authors are aware of the variety of terms and heated debates surrounding the terminology in this area (e.g. 'climate displacement', 'climate mobilities', 'environmental displacement', 'climate refugees' and more). We have addressed this debate in our previous work, among others in Kent & Behrman (n 17) chapter 2).

III. THE ROLE OF CLIMATE LITIGATION IN SHAPING THE INTERNATIONAL LAW ON CLIMATE-INDUCED MIGRATION

1. Current international law and its deficiencies

Before addressing key issues that are related to climate litigation in the context of climate migration, it is important to stress the potential space that this type of litigation could fill in the international legal framework governing climate migration. International law on climate migration has been defined as a 'legal hole'.¹¹ In a nutshell, the two main legal frameworks that one *would expect* to address this phenomenon – the 1951 Refugee Convention and the UNFCCC - do not provide clear and unequivocal legal solutions.

The 1951 Refugee Convention's¹² approach to 'climate refugees' is clear. According to the provisions of this convention, those who have to leave their homes and seek protection due to the impacts of climate change are not 'refugees' and therefore will not enjoy the protection and rights granted by this Convention. The Convention only recognises as 'refugees' those who are 'unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.'¹³ On the basis solely of climate change impacts it is very difficult to see how individuals could fall under this definition. As such they will not enjoy the rights granted to Convention refugees: notably the right to enter other states, and enjoy all the subsidiary social and economic rights contained in the Convention. However, it should be noted that it is widely recognised that the impacts of climate change *in conjunction with* forms of persecution might result in a successful claim for refugee status.¹⁴

The very precise delineation of the term 'refugee' was determined within a specific post-World War II context. Naturally, more recent phenomena such as

¹¹ Simon Behrman & Avidan Kent (eds) '*Climate Refugees: Beyond the legal impasse?*' (Routledge 2018).

¹² Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189.

¹³ *Ibid.* Article 1A(2).

¹⁴ E.g. UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, February 2019, HCR/1P/4/ENG/REV. 4, para. 39; *Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107, para. 13

climate change were not considered at the time. The Convention has evolved in response to certain changes over time. For example, the 1967 Protocol expanded the scope of the Convention beyond the initial context of events in Europe prior to 1951.¹⁵ This was a recognition that new refugee-producing situations were occurring throughout the world. Also, jurisprudence has developed the category of persecution on grounds of 'membership of a social group' to encompass categories not mentioned in the Convention such as LGBT people and women.¹⁶ However, given the current and widespread hostility towards refugees in general, and the likely rapid expansion in the numbers of people who could access refugee status if the definition were to be expanded to cover people solely on the basis of the impacts of climate change, we believe that further developments and expansions are not likely to happen for the foreseeable future.¹⁷

More flexibility regarding the right to cross borders is found in fairly uncommon and specific regional or bilateral agreements. For example, the Compacts of Free Association between the United States and Micronesia, the Marshall Islands and Palau allow the citizens of these island nations to live and work at the US.¹⁸ Another interesting example is the IGAD Protocol on Free Movement of Persons in the IGAD Region, which allows the free movement of persons in the case of disasters within this block of eastern African countries.¹⁹ These examples however, are rare and unrepresentative.

The approach towards climate migration under the United Nations Framework Convention of Climate Change (UNFCCC) is slightly more dynamic. The

¹⁵ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267

¹⁶ E.g. *Shah and Islam v Secretary of State for the Home Department* [1999] 2 AC 629; *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31.

¹⁷ This is not to argue that the term 'refugee' itself is static and pre-determined, and that there is no case for it to include the concept of 'climate refugees'. There are, in fact, wider definitions for the term 'refugee' which *might* cover environmental grounds, such as those found in the the Organization of African Unity Refugee Convention of 1969 and the Cartagena Declaration of 1984. We explored all these issues elsewhere, see Avidan Kent & Simon Behrman, *Facilitating the resettlement and rights of climate refugees* (Routledge 2018), chapter 2.

¹⁸ For an overview of these compacts see Congressional Research Service, 'The Compacts of Free Associations' (August 15, 2022) <https://crsreports.congress.gov/product/pdf/IF/IF12194/1#:~:text=In%201986%2C%20Palau%20and%20the,U.S.%20assistance%20beginning%20in%201995>.

¹⁹ IGAD Protocol on Free Movement of Persons in the IGAD Region (2020), Article 16.

UNFCCC did not address climate migration until the 2011 Cancun Agreements, in which COP Decision 1/CP.16 briefly recognised the need ‘to enhance action on adaptation[...] by undertaking, inter alia[...] [m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels’.²⁰ On its own, this paragraph did not add much in terms of legal obligations. This unassuming paragraph is nevertheless one of the main, and most referred to legal provisions in the context of the international law on climate migration. To begin with, it initiated a series of declarations and legal provisions to address climate migration, within the UNFCCC framework and beyond. Also, importantly, the recognition of climate migration in a COP decision solved a longstanding problem: the lack of an institutional home. Until this decision, it was not clear at all under which international framework states would address the phenomenon of climate migration.²¹ While COP Decision 1/CP.16 did not explicitly instruct the UNFCCC’s mandate to be expanded to cover climate migration (in fact, it instructed very little), from this moment on this topic has found its way into this framework.

Since 2011, the UNFCCC process has issued a number of references with respect to climate migration, most notably under Decision 1/CP.21 (‘Adoption of the Paris Agreement’) in which a cross-institutional Task Force on Displacement was established (this time under the title of ‘loss and damage’), with a mandate ‘to develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change’.²² The most recent reference (at the time of writing) to climate migration under the UNFCCC framework was made in the 2022 COP 27 Cover Decision (Sharm el-Sheikh Implementation Plan). Again, under the title of ‘loss and damage’ it was stated that the Parties:

‘Notes with grave concern, according to information in the contributions of Working Groups II and III to the Sixth Assessment Report of the

²⁰ UNFCCC, Decision 1/CP.16, para 14(f).

²¹ See review of institutional developments in this respect in our previous work, Kent & Behrman (n 17) chapter 4.

²² UNFCCC, Decision 1/CP.21, para 49.

Intergovernmental Panel on Climate Change, the growing gravity, scope and frequency in all regions of loss and damage associated with the adverse effects of climate change, resulting in devastating economic and non-economic losses, including forced displacement and impacts on cultural heritage, human mobility and the lives and livelihoods of local communities, and underlines the importance of an adequate and effective response to loss and damage;'

On the one hand, this reference demonstrates the main problem with the UNFCCC's approach towards climate-induced migration: Since the first 2011 reference in the Cancun Agreements, the parties have never been able to rise above mere declarative and non-legally binding language. The legal hole, in this respect, did not get any smaller, despite years of increased attention and discussions.

At the same time, the reference to climate migration within the Sharm el-Sheikh Implementation Plan shows some promise. As stated, this reference was made in paragraph 22 of the decision, under the title of 'loss and damage'. The following paragraphs of this decision provide some context: paragraph 23 expresses 'deep concern regarding the significant financial costs associated with loss and damage for developing countries, resulting in a growing debt burden and impairing the realization of the Sustainable Development Goals', and paragraph 24 goes on by welcoming 'the consideration, for the first time, of matters relating to funding arrangements responding to loss and damage associated with the adverse effects of climate change'. Indeed COP 27's main achievement was the decision to establish a loss and damage fund, and the clear linking of climate migration to this fund in the Implementation Plan is promising.

The details of the new loss and damage fund's operation have not been set at the time of writing, and as established below, certain difficulties (notably regarding establishing a causal link between climate change and the act of migration) are yet to be resolved. It also remains to be seen how ambitious states' contributions will be – a question that will determine its impact - and whether the framing of 'loss and damage' will be useful for host states requiring funds to protect migrants' rights once migration has occurred (i.e. adaptation,

rather than loss and damage). Nevertheless, as we have identified in the past, finance is one of the main missing parts in the regulation of climate migration,²³ and so there is no question that this development should be seen as a positive step forward.

Beyond international climate change and refugee laws, the phenomenon of climate migration has been mentioned, to varying degrees, under other international law regimes. Most prominently, non-binding legal instruments such as the Nansen Protection Agenda (2015), the New York Declaration for Refugees and Migrants (2016) and the Global Compact for Safe, Orderly and Regular Migration (GCM, 2018) have all recognised the need to legally address climate induced migration.²⁴

While the Nansen Protection Agenda could be regarded as a ‘best practices’ document, and the New York Declaration as entirely declaratory, the GCM shows some promise in becoming a game-changer. The GCM itself is a declaratory and non-binding instrument and, as such, it did not add any legal rights or obligations in the context of climate migration. The GCM’s main contribution so far has been that it created a process – the International Migration Review Forum (IMRF) – which requires the world’s nations to meet every four years and discuss and report their progress in implementing the GCM, and submit their voluntary submissions. On the face of it, encouraging states to devise plans and actively think about ensuring that the GCM is implemented sounds promising. The importance of this development is clear when one remembers that only a decade ago (i.e. prior to the Cancun Agreements) *no major institution* was willing to act as a forum to address the climate migration phenomenon. We are, however, in the early days of the IMRF process (the first meeting took place in 2022). The question of what impact this ‘infrastructural’ development will have, and whether it will indeed facilitate useful legal provisions, will become clearer in the years to come.

²³ Kent & Behrman (n 17) chapter 1.

²⁴ Other relevant developments that we did not discuss due to limited space and scope include the Sendai Framework for Disaster Risk Reduction; the Migrants in Countries in Crisis (MICIC) Guidelines; the International Law Commission (ILC) Draft Articles on the Protection of Persons in the Events of Disasters (as well as the ILC mandate to examine issues of sea-level rise in relation to international law); the Global Compact on Refugees, and to a lesser extent statements by bodies such as the International Law Association (ILA).

Finally, any discussion of the regulatory landscape of climate induced migration must include human rights law.²⁵ In the context of human rights, the impact of climate migration is varied and depends on each situation. Relevant examples include basic rights that displaced communities often require, such as the right to shelter, health, education, protection from discrimination and more.²⁶ In other cases, as discussed below, affected communities fear the loss of their culture and traditional ways of life. In the most extreme cases, as discussed in the *Teitiota* case, affected individuals will require protection of their right to life. The effectiveness of these rights and their suitability for the situation of climate migration is also very much case-dependant. *Teitiota* demonstrated that some rights – while relevant – will be difficult to apply.²⁷ Notably, the nature of human rights protection is ‘individualised’ and in response to immediate harms, i.e. it is not designed to address wider groups, or slow onset events (as is often the case with the impacts of climate change). While some steps to ‘update’ the law and adjust it to the realities of climate change have been taken (see discussion below), these issues have not yet been entirely resolved.

A second important question mark in this context is related to the enforcement of human rights law. This issue can be addressed in two parts: first, it is of no surprise that many states do not respect human rights laws and do not prioritise their enforcement. Second, there is also the above-discussed issue of resources and finance. As recognised throughout the United Nations Guiding Principles on Internal Displacement, displaced persons require the provision of shelter, health, education services and more. The protection of these rights requires the allocation of significant resources, which are beyond the reach of

²⁵ The link between climate migration and human rights law was recognised inter alia in UN Human Rights Council Resolution (2017) UN Doc A/HRC/RES/35/20; UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, Ian Fry, ‘Providing legal options to protect the human rights of persons displaced across international borders due to climate change’ (2023) UN Doc A/HRC/53/34.

²⁶ The list of protected rights found in the UN Guiding Principles on Internal Migration is indicative in this respect. *United Nations Guiding Principles on Internal Displacement* (1998) UN Doc E/CN.4/1998/53/Add.2.

²⁷ See our review of the case, and our criticism of the Human Rights Committee’s analysis of the relevance of the right to life in the context of Kiribati’s residents, in Simon Behrman & Avidan Kent ‘The Teitiota case and the limitations of the human rights framework’ (2020) 75 *Questions of International Law* 25.

many host states, particularly in the Global South, where most displacement occurs.

The discussion thus far is only a partial and limited review²⁸ of the international legal landscape relevant to the regulation of climate-induced migration. This shows that while it provides some limited protection, the current legal frameworks have yet to be updated in order to address the specific situation of people displaced by the impacts of climate change. As a result, there remain significant gaps in the legal framework: notably, there is no widely recognised right under international law to enter other states and stay there legally (where such a right is required).²⁹ Another notable gap involves the lack of adequate finance, which in fact reflects a wider issue of global justice and responsibility: climate migration takes place mostly in Global South states, whose contribution to global GHG emissions has been negligible. The responsibility of major polluters, therefore, cannot remain unaddressed. Finally, the human rights framework presents challenges in its concrete application to the context of climate-induced migration, as well as in terms of effective enforcement. We now turn to ask whether developments in climate litigation have addressed these legal gaps, and to what extent they have done so.

2. Climate litigation and the missing pieces

As stated in the introduction, the wave of climate litigation aims to develop the law in order to adjust it to the realities of climate change. These cases could, potentially, change the legal landscape covering climate-induced migration and fill in some of the gaps identified above. These cases can be divided into two groups:

First, there are 'general' climate litigation cases that demand remedies such as emissions abatement, but do not specifically address climate migration. These cases are of clear relevance to climate migration as they address the root of the issue - the push factors that lead to climate migration. However, for reasons of space and scope, we will not address these cases here.

²⁸ A more comprehensive review can be found in our previous work, see Kent & Behrman, *Facilitating the resettlement and rights of climate refugees* (n 17) chapter 1.

²⁹ Some rare examples were mentioned above, e.g. the Compacts of Free Association between the United States and Micronesia, Marshall Islands and Palau, and the IGAD Protocol (n 19).

Second, there are cases that have addressed climate migration directly. In what follows we will evaluate a representative and non-comprehensive list of key cases, and will ask whether and how this emerging jurisprudence has developed the legal situation of climate migrants. Due to limitations of space, we will only address international law, and references to domestic cases will be made only in passing.

The most discussed case in the context of climate migration is *Teitiota v New Zealand*, which was decided by the UN Human Rights Committee (HRC).³⁰ This case and its implications have been widely discussed³¹ – including by us³² – and therefore we will address it only briefly here. This case concerned *inter alia* the question of whether conditions of life in Kiribati – a Pacific Island Nation suffering from the dramatic impacts of climate change – are so difficult as to threaten the petitioner’s right to life with dignity, under the International Covenant on Civil and Political Rights (ICCPR). Kiribati’s islands are low lying (the majority of its territory is less than 4 meters above sea level), over-crowded (a population density ‘similar to Tokyo or Hong Kong’³³), and narrow. As such, they are highly exposed to impacts such as rising sea levels, salinisation, storms, flooding and more. The claimant in this case described severe health issues and violence that resulting from these conditions.³⁴

Despite rejecting the case, the HRC’s decision has been celebrated for developing the human rights framework vis-à-vis climate migration. HRC member Duncan Muhumuza Laki has summarised the importance of this decision:³⁵

‘The decision affirms that treaty bodies and human rights judicial institutions more broadly, can be effective avenues for litigation on climate change

³⁰ UN Human Rights Committee (HRC), *Ioane Teitiota v New Zealand*) UN Doc CCPR/C/127/D/2728/2016 (7 January 2020).

³¹ Jane McAdam, ‘Protecting people displaced by the impacts of climate change: The UN Human Rights Committee and the principle of *non-refoulement*’ (2020) *American Journal of International Law* 114:4 p718-719; Duncan Muhumuza Laki ‘The case of Ioane Teitiota v New Zealand at the Human Rights Committee: A common sense approach?’ (2021) 115 ASIL Proceeding of the 116th Annual Meeting 161.

³² Behrman & Kent (n 27).

³³ Julian Siddle, ‘Kiribati: Tiny island’s struggle with overpopulation’ (BBC Science Radio Unit, 2014) <https://www.bbc.co.uk/news/science-environment-26017336>.

³⁴ *Teitiota* (n 30) para 2.3-2.6.

³⁵ Duncan Muhumuza Laki (n 31).

issues and environmental matters. With an expansive approach to the protection of life—the focus on a life with dignity, the Committee presents the possibility that climate change may lead to the displacement of individuals and trigger the obligation of *non-refoulement*, even where the anticipated extreme risk (like the risk of an entire country becoming submerged under water) has not yet been realized.’

Indeed, the HRC has placed some important foundations. It recognised that, potentially, future claims by those affected by climate change, in which the threat to life will be more imminent than it was in the current case, could be accepted. Importantly, the HRC focus on the right to life *with dignity* (a lower threshold than life threatening situations) will facilitate similar future claims as it does not require claimants to wait until their islands are entirely submerged. The HRC also recognised that while the risk to life must be *personal* (a condition that on its own bars almost *any* climate-related claim), it will accept that ‘in the most extreme cases’ this condition could be discarded, opening a window (albeit a narrow one) for future claims.

At the same time, the limits of this development are also clear. To begin with, the threshold of the ‘most extreme conditions’ exception that will allow a non-individualised claim, is still very difficult to meet. As stated by HRC member Muhumuza Laki in his dissenting opinion (and later on also elsewhere³⁶), the HRC’s understanding of the type of conditions that will be regarded as extreme enough was too strict: ‘in the *Teitiota* case, the considerable difficulty in accessing fresh water because of the environmental conditions should have been sufficient to reach the threshold of risk, without needing to reach the point of a complete lack of fresh water supply.’³⁷

Furthermore, the HRC decided that the threat posed to those living in Kiribati was not ‘imminent’ enough to meet the threshold of Article 6 ICCPR.³⁸ While accepting the evidence of harm caused to Mr Teitiota’s family, the HRC stated that ‘there was no evidence establishing that this situation in the Republic of Kiribati would be so precarious that his or his family’s life would be in danger.’³⁹

³⁶ Duncan Muhumuza Laki (n 31).

³⁷ Duncan Muhumuza Laki (n 31).

³⁸ *Teitiota* (n 30) para 2.9.

³⁹ *Teitiota* (n 30) para 2.9.

This decision demonstrates that even the situation of Pacific Small Island States – ‘the canaries in the climate change coal mine’, and possibly the most extreme example of those experiencing the threats of climate change – is not imminent enough to meet this condition.

In short, while widely celebrated for its recognition that human rights law *should in principle* apply to the situation of climate migration, it is hard to see which cases, in practice, will benefit from such a recognition, at least in the context of the right to life.

The HRC has even more recently dealt with a second case addressing climate migration, brought by communities from the Torres Strait Islands (*Daniel Billy et al*).⁴⁰ In this case, the petitioners claimed that the impact of climate change on their homes - the low-lying island communities of Boigu, Masig, Warraber and Poruma - will be severe. Notably, they fear that climate change will lead to their forced displacement,⁴¹ causing ‘themselves, their families and their communities to be uprooted, and their ancient culture, deeply and inextricably linked to the islands and the local environment, to risk extinction.’⁴² Unlike the *Teitiota* case, this petition addressed mostly these indigenous communities’ loss of culture, tradition and way of life. As one of the petitioners, Kabay Tamu, stated:⁴³

‘You disconnect the people from their land and they don’t practise their traditions anymore. They don’t speak their language. Once we are disconnected from the land, we are disconnected from our culture, language and traditions. We will be climate change refugees in our own country. You take us away from our home and you stop us from practising our culture. I fear especially for my son’s future.’

The claimants made several legal claims. In the context of human rights law, they argued that the threat of displacement could lead to the breaching of the

⁴⁰ UN Human Rights Committee (HRC), *Daniel Billy et al v Australia* UN Doc CCPR/C/135/D/3624/2019 (22 September 2022).

⁴¹ Daniel Billy et al. *Communication under the Optional Protocol to the International Covenant on Civil and Political Rights* (13 May 2019), para 29.

⁴² Daniel Billy et al. *Communication under the Optional Protocol to the International Covenant on Civil and Political Rights*, para 30.

⁴³ Daniel Billy et al. *Communication under the Optional Protocol to the International Covenant on Civil and Political Rights*, para 34.

ICCPR, notably Articles 6 (right to life), 27 (right to culture),⁴⁴ and Article 17 (protection against unlawful interference with privacy, family and home).⁴⁵ The claimants asked for full reparation ('including restitution, compensation, rehabilitation and measures of satisfaction'⁴⁶), as well as adaptation measures (including measures that will secure the safe existence of the communities)⁴⁷ and mitigation measures (*inter alia* cutting Australia's emissions by at least 65% by 2030) in order to prevent their displacement.

With respect to the right to life (Article 6), the HRC continued the line drawn in *Teitiota*, explicitly noting that while the impacts of climate change *could* result in a breach of the right to life,⁴⁸ in the case at hand the petitioners did not establish that they are facing adverse impacts that could threaten their right to life with dignity.⁴⁹ In this respect the HRC mentioned adaptation measures taken by Australia including the Torres Strait Seawalls Program and the millions of dollars invested in these efforts that, hopefully, will mitigate the danger faced by the petitioners and prevent future dire predictions.⁵⁰ The HRC's comments therefore did not develop the law in any meaningful way in relation to the right to life. It did, however, provide an indication for states according to which investment in preventive adaptation measures could be used as a defence against arguments regarding the right to life.

Interestingly from the perspective of climate migration, the HRC explicitly noted that the possible internal relocation of the petitioners into mainland Australia (the petitioners are Australian citizens) before the islands will become inhabitable, is supportive of the fact that their lives are not under direct threat.⁵¹ Displacement, so it seems, and rather perversely, is not only a 'harm' but also a possible legal defence against claims made by those who are displaced.⁵²

⁴⁴ Ibid, page 41.

⁴⁵ Ibid, page 44.

⁴⁶ Ibid, para 211.

⁴⁷ Ibid, page 48.

⁴⁸ *Daniel Billy et al.* (n 40) para 8.3, 8.5.

⁴⁹ *Daniel Billy et al.* (n 40) para 8.6.

⁵⁰ *Daniel Billy et al.* (n 40) para 8.7.

⁵¹ *Daniel Billy et al.* (n 40) para 8.7.

⁵² Indeed the view of migration as adaptation, rather than a mere harm, is gaining traction

Regarding the protection against unlawful interference with privacy, family and home (Article 17), here also the HRC mentioned the variety of programs and steps taken by the Australian government for the purpose of alleviating the harms caused by climate change.⁵³ On this claim, however, the HRC accepted the evidence brought by the petitioners, notably concerning environmental impacts on their ancestral lands and environment, which are closely linked with their culture and tradition: the petitioners enjoy a ‘special relationship with their territory’,⁵⁴ where ‘their most important cultural ceremonies are only meaningful if performed on native community lands’.⁵⁵ Combined with the ‘intensity or duration and the physical or mental harm that they cause’,⁵⁶ the HRC determined that this evidence was sufficient to establish that Australia had failed to protect them against interference with their privacy, family and home.

Next, the HRC approached the petitioners right to culture (Article 27 UCCPR). The HRC commenced by stressing the unique case of indigenous communities: ‘in the case of indigenous peoples, the enjoyment of culture may relate to a way of life which is closely associated with territory and the use of its resources, including such traditional activities as fishing or hunting’.⁵⁷ The Committee continued with an important clarification regarding the individualised nature of human rights, which as discussed above, poses a barrier in the context of climate migration:⁵⁸

‘Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion.’

The HRC added that Australia did not refute the claim presented by the petitioners, according to which the link between the petitioners land, environment and culture is crucial for the maintenance of their culture and traditional way of life, and that this link will be broken should they be relocated

⁵³ *Daniel Billy et al.* (n 40) para 8.11.

⁵⁴ *Daniel Billy et al.* (n 40) para 8.10.

⁵⁵ *Daniel Billy et al.* (n 40) para 8.12.

⁵⁶ *Daniel Billy et al.* (n 40) para 8.12.

⁵⁷ *Daniel Billy et al.* (n 40) para 8.13.

⁵⁸ *Ibid.*

to mainland Australia.⁵⁹ Regarding the seawalls project that was mentioned in the analysis of Article 6 (right to life) and should, in theory, protect the petitioners ability to maintain their way of life, the HRC noted that the delays in this project render it 'an inadequate response' to the threats at hand. The HRC concludes from all of the above:⁶⁰

'the State party's failure to adopt timely adequate adaptation measures to protect the authors' collective ability to maintain their traditional way of life, to transmit to their children and future generations their culture and traditions and use of land and sea resources discloses a violation of the State party's positive obligation to protect the authors' right to enjoy their minority culture.'

One may wonder why the inadequacy of the preventive measures taken by Australia was *relied on* in the HRC's analysis of Article 27 (right to culture), but at the same time, the prospect and availability of the same preventive measures were used *as a reason to reject* a violation of Article 6 (right to life). Here it is important to note the different thresholds: a land could be so degraded so as to eliminate the ability to maintain *a traditional way of life*, but not life itself. The HRC suggested as much by noting 'that the authors' claims under article 6 of the Covenant are indeed mainly related to their ability to maintain their culture, which falls under the scope of article 27 of the Covenant.'⁶¹ In other words, Article 27 is where their situation belongs, rather than Article 6.

Another case that is relevant for climate migration concerns a petition by a group of children and young adults from a number of states (*Sacchi et al*) against the governments of Argentina, Germany, Brazil, France and Turkey, under the UN Convention on the Rights of the Child.⁶² In their communication, the petitioners made numerous references to climate migration and displacement, mentioning it as a key adverse impacts experienced communities, and more specifically by children, due to climate change. Beyond general references concerning the impact of climate change on migration, the

⁵⁹ Ibid.

⁶⁰ *Daniel Billy et al.* (n 40) para 8.14.

⁶¹ *Daniel Billy et al.* (n 40) para 8.6.

⁶² Communication to the Committee on the Rights of the Child, in the Case of Chiara Sacchi et al (2019) <http://climatecasechart.com/non-us-case/sacchi-et-al-v-argentina-et-al/>.

petitioners also addressed this link when describing their own personal stories. For example:

'David's family wonders if they will have to move away from their home, something that worries David, who wants to live in the Marshall Islands when he grows up. He does not want to be separated from his community, his homeland, and his culture.'⁶³

'Litokne now "knows" his home and his island "are not here forever... they will disappear, unexpectedly." Despite the fact that Ebeye is noticeably shrinking, when Litokne grows up he says, "I want to live here. It is my home, there is no place other like Ebeye."⁶⁴

'Ranton worries about losing his home and culture. He thinks about climate change all the time, and "sometimes in my mind I just see Ebeye sinking and a lot of people drowning."⁶⁵

In short, also in this case, climate migration had a central place. The petition itself was rejected by the Rights of the Child Committee on technical grounds, notably the petitioners' failure to exhaust local remedies.⁶⁶ Interestingly, however, the Rights of the Child Committee did make several useful comments. The Committee made the important point that '[t]he present communication raises novel jurisdictional issues of transboundary harm related to climate change'⁶⁷, implying the need to develop existing frameworks. In this respect, relying on the Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights,⁶⁸ the Committee accepted that states owe

⁶³ Communication to the Committee on the Rights of the Child, in the Case of Chiara Sacchi et al (n 62), 156.

⁶⁴ Communication to the Committee on the Rights of the Child, in the Case of Chiara Sacchi et al (n 62), 157.

⁶⁵ Communication to the Committee on the Rights of the Child, in the Case of Chiara Sacchi et al (n 62), 158.

⁶⁶ Committee on the Rights of the Child, *Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 104/2019* (2021).

⁶⁷ Committee on the Rights of the Child (Argentina) (n 66), para 9.4.

⁶⁸ Advisory Opinion OC-23/17 of the Inter-American Court of Human Rights on the Environment and Human Rights. This Advisory Opinion as well provided certain references to climate migration, including mentioning the right not to be forcibly displaced as 'particularly vulnerable to environmental impact' (para 66)

responsibilities not only to their own nationals, but also towards children in other states, due to the foreseeability of the harm caused by their emissions.⁶⁹

The implications of these decisions for climate migration are clear: climate migration is taking place mostly in the Global South, far away from the traditional jurisdictional limits of those who are responsible for climate change. Expanding the responsibility owed by states to people displaced at a global level may bridge this gap. At the same time, this expansion of the jurisdictional limits provides only half the answer, as claimants will still need to demonstrate a causal link between the wrongdoers' action and the victims. Establishing a causal link in this context is an extremely challenging task, one that deserves further attention. We therefore turn now to address this specific question, and its complexity in the unique context of climate migration.

3. The question of causal link

The causal link issue broadly addresses the question of whether the illegal act or omission has caused the alleged harm. In the context of climate migration, the question of the causal link is double-headed: first, one has to demonstrate that a *specific* state's emissions are responsible for a *specific* damage. Climate change is a result of diffuse pollution and indeed it is hard to attribute emissions from a specific state as the cause of a specific damage. This difficulty has often been invoked by states as a defence in climate cases. For example, the Australian government argued in *Daniel Billy et al.*⁷⁰

'As a legal matter, it is not possible to trace causal links between the State party's contribution to climate change, its efforts to address climate change, and the alleged effects of climate change on the enjoyment of the authors' rights.'

Similar claims have been made elsewhere, for example by the defendants in *Sacchi et al.* For example, Argentina claimed that '[b]eyond general statements about the contribution of States to the climate change phenomenon, the causal link between actions or omissions that could be attributable to the State party and the extreme heat in France, a fire in Tunisia or the sea level rise in the

⁶⁹ Committee on the Rights of the Child (Germany) (n 66), para 9.12.

⁷⁰ *Daniel Billy et al.* (n 40) para 4.3.

Marshall Islands, is not established.’⁷¹ The other four states who were defendants in this case made similar claims.⁷²

This part of the causal link has been addressed in some international and national tribunals who were willing to adopt creative explanations in order to avoid what seems to be an unjust way out for emitters from responsibility. For example, the Dutch Supreme Court accepted that responsibility will be partial and proportional to the state’s emissions:

‘Countries can be called to account for the duty arising from this principle. Applied to greenhouse gas emissions, this means that they can be called upon to make their contribution to reducing greenhouse gas emissions. This approach justifies partial responsibility: each country is responsible for its part and can therefore be called to account in that respect.’⁷³

In *Sharma*,⁷⁴ the Australian Federal Court accepted that while the emissions at stake in this particular case were marginal in comparison to total global emissions, they were nevertheless meaningful in the context of a ‘tipping cascade’, which ‘will be triggered even by a fractional increase in temperature’⁷⁵ and will lead to far worse results, possibly a 4 degrees scenario. The Court accepted that:

‘the emission of 100 Mt of CO₂ from the Extension Project increases the risk of the Children being exposed to harm and particularly so in the realm of the risk profile which plausibly arises should the ‘tipping cascade’ be triggered and engage a 4°C Future World trajectory.’⁷⁶

While the question at hand at the *Sharma* was one of ‘foreseeability’ rather than ‘causation’, the ‘tipping cascade’ explanation could be used for the latter as well. Without the added, albeit negligible on their own, emissions, the tipping cascade would not have been triggered and the damage is therefore less likely to be created. This decision was later overturned, albeit the ‘tipping cascade’

⁷¹ Committee on the Rights of the Child (Argentina) (n 66), para 4.3.

⁷² Committee on the Rights of the Child (Brazil) (n 66), para 7.3; Committee on the Rights of the Child (Germany) (n 66), para 7.4; Committee on the Rights of the Child (France) (n 66), para 8.4; Committee on the Rights of the Child (Turkey) (n 66), para 7.6.

⁷³ *Urgenda Foundation v. The Netherlands*, ECLI:NL:HR (2019), para. 5.7.5.

⁷⁴ *Sharma v Minister for the Environment (Australia)* [2021] FCA 560, 84.

⁷⁵ *Sharma* (n 74) 88.

⁷⁶ *Sharma* (74) 249.

explanation was not discussed in the appeal.⁷⁷ This reasoning was also echoed by the Dutch District Court in the *Shell* case in order to justify the link between Shell's emissions and the specific impacts felt in the Netherlands, and even more specifically in the Dutch Wadden region:⁷⁸

'An important characteristic of the environmental damage and imminent environmental damage in the Netherlands and the Wadden region, as raised in this case, is that every emission CO2 and other greenhouse gases, anywhere in the world and caused in whatever manner, contributes to this damage and its increase'

Finally, the Rights of the Child Committee has stated in *Sacchi et al* that 'the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location.'⁷⁹ While mentioning the need to demonstrate a causal link, the Committee stated that it would be satisfied if the harm to children *beyond its territory was foreseeable* by the emitting state.⁸⁰

Importantly, in the context of certain human rights the causal link problem is less significant. For example, in *Daniel Billy et al*, the HRC commented regarding Article 17 ICCPR (right to privacy, family and home) that the obligation on the state is to protect the victims from unlawful interference with their right to privacy, family and home, regardless of whether the state is responsible for such interference or not.⁸¹ Australia's direct responsibility for phenomena, such as rising sea levels, is therefore less important.

Finally, it could be that, eventually, science will (and perhaps already has) come to the rescue. The promise of attribution sciences in addressing the causal link problem has often been mentioned in the literature, including by us.⁸² Stuart-

⁷⁷ *Minister for the Environment v Sharma (No 2)* [2022] FCAFC 65.

⁷⁸ As noted by Peel & Merkey-Towler (n 5); *Milieudefensie v Shell* (District Court) (26/05/2021) 4.3.5.

⁷⁹ Committee on the Rights of the Child (Germany) (n 66), para 9.10.

⁸⁰ Committee on the Rights of the Child (Germany) (n 66), para 9.10.

⁸¹ *Daniel Billy et al.* (n 40) para 8.9.

⁸² Avidan Kent & Simon Behrman, 'An alternative introduction: An interview with the editors, which never took place' in Simon Behrman & Avidan Kent (Eds) *Climate Refugees: Global, local and critical approaches* (CUP 2022).

Smith et al have suggested that claimants have simply not presented the most 'state of the art' scientific evidence, notably in respect to attribution sciences.⁸³ They claim that existing scientific methodologies already exist, and that better understanding of climate attribution sciences will improve the success rates of climate litigation. Indeed, if this is the case, one should expect more productive collaborations between lawyers and scientists, and, perhaps, a bridge across this barrier. However, as further discussed below, in the context of climate *migration*, this bridge may not be enough.

a) The causal link question, in the specific context of climate migration

The context of climate migration requires a causal link between emissions and the final act of migration. This implies a *two-step* link: it is not enough to show that emissions have caused a specific impact on the environment, but also that the said impact on the environment has led to migration. While advances in science may provide clearer answers vis-à-vis the link between emissions and specific environmental impacts, the link between environmental impacts and the act of migration involves complex and often nebulous sociological factors.

Much has been written on the link between the impacts of climate change and migration and the reader can rely on this literature in order to become better informed.⁸⁴ In a nutshell, and at the risk of over-simplifying a complicated debate, many authors who have examined specific case-studies question whether climate change-related events are in fact the cause of individuals migrating, especially where the migrants themselves have attributed their movement to other economic and social reasons. Indeed, the decision to

⁸³ Rupert Stuart-Smith et al. 'filling the evidentiary gap in climate litigation (2021)11 Nature Climate Change 651.

⁸⁴ See for example Amelie Bernzen et al 'climate change-induced migration in coastal Bangladesh? A critical assessment of migration drivers in rural households under economic and environmental stress' (2019)9(1) Geosciences; Kees van der Geest et al 'Climate change, ecosystem services and migration in the Marshall Islands: are they related?' (2020)161 Climatic Change 109; Richard Black et al. 'Demographics and climate change: Future trends and their policy implications for migration' (2008) Development Research Centre on Migration, Globalisation and Poverty Working Paper T-27; Matthew Welsham, 'Assessing the evidence: environment, climate change and migration in Bangladesh' (2010, IOM); Robert Oakes, Kees van der Geest & Cosmin Corendea, 'Any port in a storm? Climate, mobility, and choices in Pacific Small Island Developing States' in Simon Behrman & Avidan Kent (eds) *Climate refugees: global, local and critical approaches* (CUP 2022). We provide a comprehensive review of this topic in chapter 1 of our forthcoming monograph, Avidan Kent & Simon Behrman, *Re-framing international law on climate-induced migration* (CUP forthcoming).

migrate is hardly ever made due to one reason alone; it depends on numerous social (e.g. family-related), legal (e.g. safe and easy legal routes for migration) and economic (e.g. having the resources to migrate) factors. This is not to argue that climate change is not a driver for migration, only to point out that establishing a clear, causal link between the two is a complex task.

4. Further developments in the making?

Finally, there are several recent developments in international climate change litigation, which may indicate further evolution of the legal framework. These developments are future facing – they may build on the above-discussed decisions, and develop them further. Given the non-binding nature of the UN HR committees jurisprudence, these developments – while also non-binding – will add authority and persuasiveness to this evolving jurisprudence.

First, the governments of Chile and Colombia have asked the Inter-American Court of Human Rights to issue an Advisory Opinion regarding the climate emergency and human rights.⁸⁵ In their request, the two governments state that ‘[t]he Andes region is among the most sensitive areas in the world to migration and displacement associated with climate change’⁸⁶ and that ‘this displacement will have differentiated impacts on the most vulnerable populations, including coastal populations and island dwellers, indigenous peoples, Afro-descendant communities, peasants, among others’.⁸⁷ These states therefore ask *inter alia*:

‘what is the scope that States should give to their conventional obligations in the face of the climate emergency, in terms of:

[...]

v) the determination of impacts on people, such as human mobility – migration and forced displacement -, effects on health and life, loss of non-economic assets, etc.’

And,

⁸⁵ Chile Ministry of Foreign Affairs, *Request for an Advisory Opinion* (January 9th 2023) <http://climatecasechart.com/non-us-case/request-for-an-advisory-opinion-on-the-scope-of-the-state-obligations-for-responding-to-the-climate-emergency/>.

⁸⁶ IACtHR *Request for an Advisory Opinion* (n 85) 4.

⁸⁷ *Ibid*, 5.

‘Considering that one of the impacts of the climate emergency is to aggravate the factors that lead to human mobility – migration and forced displacement of people:

3. What obligations and principles should guide the individual and coordinated actions to be taken by States in the region to address non-voluntary human mobility exacerbated by the climate emergency?’

These questions get to the heart of the ‘legal gap’, along with uncertainties that currently exist in the context of climate migration. There is much hope that a clear and detailed answer for these questions will contribute to clarification and guidance on the legal situation.

Second, on March 1st 2023, the United Nations General Assembly requested the International Court of Justice (ICJ) to issue an Advisory Opinion on the obligations of States in respect of climate change.⁸⁸ Interestingly, the request asks the ICJ to pay ‘particular attention’ to a number of sources of international law, including those that were discussed in the cases above (*inter alia* the ICCPR and human rights more broadly, customary environmental laws such as the ‘no harm’ rule and preventive action, and more).⁸⁹ The prospects for developing the scope and application of these sources is therefore significant.

The request for an Advisory Opinion is fairly general in its nature. It mentions displacement as one of the many harms caused by climate change. It asks the ICJ to explain the obligations on states, and the consequences where lack of compliance ‘have caused significant harm’. The ‘harm’, it is explained in more detail, is in respect to ‘states, in particular small island developing states’, and ‘Peoples and individuals of the present and future generations affected by the adverse effects of climate change’. Both references suggest that climate migration will, or the least should, be discussed by the ICJ.

One issue to note at this early stage is that the Court is asked to address the consequences of international law obligations, where these have ‘caused significant harm’, implying a return to the ‘causality’ conundrum. In light of the above discussion, it will be interesting to see how the ICJ approaches the

⁸⁸ UNGA, ‘Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in respect of climate change’ (1 March 2023) UN Doc A/77/L.58.

⁸⁹ UNGA (n 88) 3.

question of causality. As also discussed above, if the ICJ does address migration, the causality question could be a hard issue to solve as it remains hard to identify or isolate climate as a driver for migration.

Our final example is not entirely a 'case', and it is not entirely 'international' in nature. It does however include elements of both. This 'case' concerns a complaint submitted to a number of UN special rapporteurs on the 'rights of indigenous peoples in addressing climate-forced displacement'.⁹⁰ The complainants are five indigenous tribes located in the US States of Louisiana and Alaska. They are accusing the USA of breaching a long list of rights, including international human rights, self-determination, and more. As with the *Daniel Billy* case, here the complainants stress the special link between their lands and their traditional ways of life and culture. The adverse impacts on their environments, they claim, will therefore affect the survival of their culture and tradition. They demand *inter alia* funding for adaptation, and in some cases (the Alaska Native Village of Kivalina and Isle de Jean Charles Indian Tribe), also support for tribal-led relocation.

This complaint indeed prompted the said Rapporteurs to write to the US government, broadly mirroring the complainants demands.⁹¹ While we are not aware of any official reaction to the Rapporteurs' letter, it *could be* that it has had some impact: A year later (October 2021), the White House issued a report on climate migration⁹² and in November 2022 a substantial investment in climate affected communities was announced. In a speech delivered by President Biden, he commented:⁹³

'I've flown over literally several thousand acres of the storms and the fires set in the West in particular and also down in the Southwest. And it's devastating. That's why today I'm announced a \$135 million commitment to help 11 Tribal communities from Maine, Louisiana, Arizona, Washington State,

⁹⁰ Alaska Institute for Justice, 'Rights of Indigenous Peoples in Addressing Climate-Forced Displacement' (15 January 2020).

⁹¹ Letter from UN Rapporteurs to the Government of the USA (September 2020).

⁹² White House, *Report on the impact of climate change on migration* (White House 2021).

⁹³ The White House 'Remarks by President Biden at the White House Tribal Nations Summit' (November 30th 2022) <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/11/30/remarks-by-president-biden-at-the-white-house-tribal-nations-summit/>.

and Alaska to move, in some cases, their entire communities back to safer ground and pay for that.'

IV. CONCLUDING COMMENTS: HAS CLIMATE LITIGATION HELPED TO RE-SHAPE THE GLOBAL GOVERNANCE OF CLIMATE MIGRATION?

We would like to conclude by answering the question that we opened with: has the wave of climate litigation affected the legal landscape on climate migration? The answer to this question is: to a certain extent, it did.

Importantly, the cases we have discussed have provided some clarifications on the application and, therefore, the usefulness of international human rights law. It seems unlikely that rights such as the right to life will be successfully invoked in this context; the bar is simply set too high at present to allow for successful claims. Claims based on other rights, notably rights to culture, privacy, family and home, seem more likely to succeed, especially in the context of indigenous communities whose culture and ways of life are closely linked to their lands. These rights are also less dependent on the individualised nature of the harm, and the threshold in this respect is placed lower.

Some headway has been achieved with respect to the 'internationalisation' of the responsibility to protect affected communities, where tribunals accepted that states owe a duty to those who reside in different countries. In the context of climate migration, this point is important: climate migration is happening mostly in the Global South, in states that contributed only very marginally to global emissions. Without such a development, large emitters will rarely be held liable for the damage caused by climate migration.

In terms of the financial gap, here also some conclusions can be made. To begin with, where claimants are asking for reparation, the establishment of a causal link between the act of pollution and the harm – migration - will be challenging. Development in attribution sciences are expected to solve only a part of this problem (the link between emissions and climate-related events), while the link between climate change and the act of migration will have to be carefully established in a more multi-dimensional way.

Furthermore, the cases described above have *possibly* revealed the soft impact of litigation. In two of these examples (the Torres Strait Islands and the USA), governments decided to invest significant resources in adaptation measures following the initiation of the cases. Where states understand that this investment is necessary for compliance with their international commitments – and could be used as a legal defence – they may be more willing to make these investments.

Other elements, notably the right to cross a border when such action is required, have not been resolved. As reviewed above, based on the *Teitiota* case, it seems that this element is unlikely to be resolved by tribunals such as the HRC, perhaps due to the huge implications in effectively extending the right to cross borders and the creation of a new ‘climate refugees’ status. Also here, however, there is at least some recognition that the door is not entirely closed, even if the gap left is extremely narrow. Perhaps, as stated above regarding the nature of strategic litigation, this decision is simply placing foundations for future developments that will eventually widen this gap.

To conclude, while law-making institutions have not developed the legal framework governing climate migration, it seems that, due to the wave of climate litigation, this framework is also not entirely static. As the trend of climate litigation is accelerating and the number of cases is proliferating, climate migration scholars and practitioners should pay more attention to this space and expect further developments.

Another thing to watch will be states’ reaction to this emerging jurisprudence. States have been historically reluctant to act on these issues, and tribunals’ decisions are effective only insofar as states follow them and acknowledge their legal force. Indeed, HRC member Duncan Muhumuza Laki has questioned whether the HRC is the right forum for resolving such issues, asking ‘[s]hould such issues be handled by an international quasi-judicial institution? How effective would this approach be?’.⁹⁴ Similar concerns were also expressed by some of the responding states in the cases discussed above.⁹⁵

⁹⁴ Duncan Muhumuza Laki (n 31).

⁹⁵ See for example Committee on the Rights of the Child (Germany) (n 66), para 7.4; Committee on the Rights of the Child (France) (n 66), para 8.3.

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