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The First Acknowledged Climate Change Refugee?

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The First Acknowledged Climate Change Refugee?

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Abstract: *Climate change and, in particular, sea-level rise mostly affect the coasts of the low-lying island states from the Pacific Ocean, creating the premises for a future humanitarian crisis, because the affected population will have to be relocated to other territories. What should be done for the protection of the environmentally displaced persons? Could States agree to grant them the equivalent protection guaranteed to a refugee? The recent case of a national from the Republic of Kiribati, who searches refugee status in New Zealand after his homeland risks to be submerged, has brought us to the conclusion that sea-level rise could not be ignored anymore. The case was clearly a great opportunity for the acknowledgement of the "climate change refugee" status and showed that, in the future, we may witness a wave of migrants whose right to life is endangered by sea-level rise. Since complementing the legal definition of the refugee or creating new legal tools would be burdensome, we analysed the human rights perspective, which could be an appropriate alternative for enhancing the protection of the individuals affected by sea-level rise.*

Key-words: *climate change, refugee, sea-level rise, human rights.*

1. Introduction

"Climate change is a reality that now affects every region of the world. The human implications of currently projected levels of global heating are catastrophic. Storms are rising and tides could submerge entire island nations and coastal cities. Fires rage through our forests, and the ice is melting. We are burning up our future – literally" – Michelle Bachelet,

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United Nations High Commissioner for Human Rights, 9 September 2019, Opening Statement to the 42nd session of the Human Rights Council.

One of the most frightening outcomes of climate change, sea-level rise, could create insurmountable issues for the people who live along the vulnerable coastlines. In fact, the disappearance of the small low-lying island nations from the Pacific Ocean is not just an ominous outcome. It could become a reality in the next years if the actual trend of sea level rise does not stop or simply diminish. According to scientific studies, the islands of Tuvalu, home for at least 11,000 people, are expected to be totally submerged by 2054 due to the adverse effects of global warming[1] and we would witness what we might name the 'second Atlantis' (the Fifth Assessment Report of the Intergovernmental Panel on Climate Change predicted that sea level would rise by 2100 with up to 70 cm compared to the level measured in 1990). What are the optimum solutions in order to protect the lives of those endangered people and to preserve a decent standard of living? Would it be appropriate to call them refugees, forcing somehow the old definition of this term, or should we create a distinct category for those who flee from their origin States about to sink.

Recently, the case of a national of the Republic of Kiribati who claimed that his right to life was put in danger because of the increasing ocean level has been brought for analysis before the Human Rights Committee of the United Nations. His request for refugee status in New Zealand was denied and the Committee, even though it has largely agreed with the solution, slightly opened the door of a possible acknowledgement of the "climate refugee" in the future.

2. The Challenge to Protect the Individuals Affected by Sea-Level Rise

Tackling the problem of the evacuation of the Pacific islands that are in high danger of disappearance, local leaders have tried to search for help from the neighbouring countries, such as New Zealand or Australia if we speak about the relocations of the 11,000 Tuvaluans, but the feedback is not quite satisfactory (another example could be the Maldives, a State that took into consideration buying lands in India or Sri Lanka for the resettling of their

[1] Rebecca E. Jacobs, "Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice", 14 *Pac. Rim L & Pol'y J.*, 2005, p.103.

370,000 inhabitants).[1] New Zealand has agreed in the past to accept small numbers of Tuvaluans (around 75 immigrants per year), if they met specific immigration criteria, while Australia has refused to host those environmental refugees,[2] but offers substantial aids for the small island developing countries and also provides jobs for their citizens. We must question if States like Australia or New Zealand are truly legally obliged to cooperate with the small Pacific Islands to host their population. But beyond this great task lies a bigger problem: the correct legal qualification of the status of these people. Australia may have reasons to be reserved in their hospitality since their government does not see a legally acceptable solution and this reserved behaviour lies in the fact that the traditional definition of the refugee cannot be extended at the moment to the "environmental refugees" or "climate change refugees". Efforts are being made towards this extension as it is a crucial game-changer for the fate of the people affected by sea-level rise. We must evoke here the representatives of Tuvalu who have been vocal in support of a new legal framework for climate refugees.

In 2016 Tuvalu Prime Minister Enele Sopoaga declared: "We have a real situation on our hands right now - 62,000 people every day are displaced by the impacts of climate change", and he reminded that "The Refugee Convention does not cover people displaced across borders by environmental degradation or climate-related disasters, and more recent initiatives to address the problem are non-binding".[3] At the same meeting, the President of Nauru requested support for the creation of a new Special Representative for climate-related security threats: "A new Special Representative[...]would be a lasting legacy of the World Humanitarian Summit and demonstrate to vulnerable countries and communities that we take seriously one of the greatest security threats of our generation".[4]

[1] Andrew C. Revkin, *Maldives Considers Buying Dry Land if Sea Level Rises*, New York Times, 10 November 2008, available at https://www.nytimes.com/2008/11/11/science/earth/11maldives.html, last visited 31/08/2020.

[2] Tiffany T.V. Duong, "When islands drown: The plight of climate change refugees and recourse to international human rights law.", in *U. Pa. J. Int'l L.* 31 (2009), p. 1248, note 40.

[3] https://www.reuters.com/article/us-humanitarian-summit-climatechange-mig/tuvalu-pm-urges-new-legal-framework-for-climate-migrants-idUSKCN0YF2UD, last visited 31/08/2020.

[4] Ibid.

3. Refugee Law

The refugee has been traditionally seen as a person who, „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" (Article 1 of the Convention Relating to the Status of Refugees, 28 July 1951).

This definition should be completed with the particular mention that it must be understood together with the principle of *non-refoulement*, which establishes that refugees must not be forced to return to a territory where their lives or liberty would be threatened.[1] Other definitions of the refugee may be found, for example, in art. 1(2) of the 1969 Organization of African Unity (OAU) Convention, which describes a refugee as "any person compelled to leave his or her country 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", or in the 1984 Cartagena Declaration on Refugees, which states that refugees are "persons who have fled their country because their lives, security or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order".

Today, the 1951 Refugee Convention is signed by 145 States and may be seen as legally binding not only as an international treaty, but also as customary international law, given its constant application reflected in the States' practice. There is no discussion whether the treaty is binding or not, but it must be noted that there is no enforcement authority instructed to supervise the compliance with the Convention. Of course, at the level of the United Nations, we have the United Nations High Commissioner for Refugees, who is in charge of protecting refugees against abuse, but formally, the Convention itself states that the complaints should be referred to the International Court of Justice,[2] but only the States may file such complaints. This is a mechanism that has never been used before, as States try to avoid complaining about others' practice in the refugee field.

[1] Article 33 of the Convention Relating to the Status of Refugees, July 28, 1951 (entered into force April 22, 1954).
[2] Article 38 of the Convention Relating to the Status of Refugees, July 28, 1951 (entered into force April 22, 1954).

Therefore, an individual who considers that his rights guaranteed by the Convention are violated, after the exhaustion of the national remedies, may have the following solutions: to file a complaint with the UN Human Rights Committee under the International Covenant on Civil and Political Rights, the ICCPR, or with the UN Committee on Economic, Social and Cultural Rights under the International Covenant on Economic, Social and Cultural Rights, the ICESCR (regarding these two last covenants, we would like to remind that the ICCPR guarantees the respect of the civil and political rights of individuals, provides the right of an alleged victim to file a petition and is monitored by the United Nations Human Rights Committee, not to be confused with the United Nations Human Rights Council, while the ICESCR guarantees economic, social, and cultural rights and is monitored by the UN Committee on Economic, Social and Cultural Rights). In fact, as in the most cases of international law practice, it is almost impossible to ensure solid enforcement of the norms of a treaty just in the name of the principle *pacta sunt servanda*. As an example, being criticised for its restrictive refugee policies, Australia may face at most, as scholar suggested, mere international criticism: "it might be subject to widespread criticism, which could in some way or another affect Australia's reputation, but it is most unlikely that it would go to the international court".[1]

Before making a thorough analysis of the conditions to be met in order to be declared a refugee, we must make a clear distinction, for the beginning, between refugees and asylum seekers. Prior to being recognized as a refugee, the individual who flees form his origin State is undoubtedly an asylum seeker, as this is the general name for someone seeking international protection. It may also refer to a person who has applied for refugee status and has not yet received a final decision on his application. In the end, invariably, not every asylum seeker will be recognized as a refugee. However, an asylum seeker, while his application is being examined, should be equally protected by the principle of *non-refoulement*, so he should not be sent home. We could argue that sending back individuals from sea-level rise affected areas expose them to a serious risk of death or inhuman or degrading treatment, as they lack fresh water sources, their crops are compromised and their houses are inhabitable, but we recognize that this reasoning should be applied only in exceptional situations through the lens of the human rights perspective, as also acknowledged by the Human Rights Council: "human rights-based approaches could help disaster-affected persons to gain admission to and to stay in States of refuge. In exceptional

[1] https://www.crikey.com.au/2012/11/29/crikey-clarifier-does-australias-refugee-policy-breach-un-rules/, last visited 31/08/2020.

cases, obligations of nonrefoulement under international human rights law could impose constraints on the return of persons to States affected by disasters. […] more than 50 States had used their discretion to admit persons affected by disasters. This was particularly common in cases where persons were seriously and personally affected by a disaster. While States based their decisions on humanitarian grounds, they took into consideration human rights principles".[1] In addition, there is also a clear difference between the refugee and the migrant, understood as a person who freely chooses to move, but in order to find work, for education, family reunion, or other personal reasons, and not as a result of some life threats. Thus, migrants are not afraid of persecution or serious harm in their countries of origin, as they are still protected by their governments and may return home when they wish, unlike refugees who are deprived of this possibility. Once again, we stress that the conditions to be declared a refugee are: a well-founded fear of being persecuted because of his race (I), religion (II), nationality (III), membership of a particular social group (IV), or political opinion (V) – the five classic allowable grounds-, and he also finds himself outside his country of origin or habitual residence and is unable or unwilling to avail himself of the protection of that country or to return there because of fear of persecution. Additionally, he must not be explicitly excluded from refugee protection and his refugee status must not cease because of a change of circumstances.[2]

4. May Persons Affected by Sea-Level Rise, Who are Forced/Wish to Leave Their Homeland, Be Regarded as Refugees?

At first glance, it is hard to believe that Tuvaluans, for example, or other small Pacific islands' citizens who flee their homes because of the sea-level rise may be declared refugees in Australia or New Zealand, signatories of the 1951 Refugee Convention, as they do not seem to comply with the abovementioned five criteria that could be a reason for persecution. So, at the beginning they may still be seen as asylum seekers and they may file claims for gaining the refugee status, but in the end, interpreting the norm inscribed in Article 1 of the Refugee Convention, it becomes clear that they may, at least, be categorised as migrants, because they still enjoy the protection of their governments. The International Organization for

[1] Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights*, Thirty-seventh session, 26 February – 23 March 2018, A/HRC/37/35, par. 18.

[2] UNHCR, The UN Refugee Agency, *A guide to international refugee protection and building state asylum systems*, Handbook for Parliamentarians N° 27, 2017, pp.17-18.

Migration even published a glossary with terms related to migration, environment and climate change, where they offered the definition of the environmental migrant: "Environmental migrants are persons or groups of persons who, predominantly for reasons of sudden or progressive change in the environment that adversely affects their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad".[1] Of course, questions may be asked in the case where an entire population or governments themselves must flee in exile to avoid being submerged, but that will be analysed later.

As we stated before, at first sight, like other scholars may have observed, climate change displacement is not a well-founded fear based on that five relevant accepted grounds, so the actual definition of the refugee does not respond to the necessities of the people affected by sea-level rise. The Refugee Convention is nowadays an aged document, that has not taken into view the major challenges produced by climate change. While some may be in favour of Georg Nolte's approach on subsequent practice ("As their context evolves, treaties face the danger of either being 'frozen' into a state in which they are less capable of fulfilling their object and purpose, or of losing their foundation in the agreement of the parties. […] Subsequent agreement and subsequent practice aim at finding a flexible approach to treaty application and interpretation, one that is at the same time rational and predictable"),[2] others may refuse the trend for including environmental migrants in the old definition of a refugee (we must note that the definition of the refugee is still unchanged since 1951) and ask for enhanced protection under new specific international laws,[3] underlining the low capacity of the current norms to be constantly adapted faced to a rapidly evolving field such as climate change law ("While some individuals displaced by natural disasters and climate change may be "persecuted" in connection with a characteristic protected by the Refugee Convention, the vast majority of these newest forced migrants will need new norms developed to address their unique situations. No doubt what is understood now in connection with disasters and climate change will evolve. Any new norms developed to ensure that states address the needs of these displaced persons should be

[1] International Organization for Migration (IOM), *Migration, Environment and Climate Change: Evidence for Policy (MECLEP), A Glossary*, 2014, p.13.
[2] George Nolte, *Treaties Over Time, In Particular: Subsequent Agreement and Practice*, Rep. of the International Law Comm'n, 60th Sess., May 5-June 6, July7-Aug. 8, 2008.
[3] Kara K. Moberg, "Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection", 94 *Iowa L. Rev.* 1107, 2009.

capable of adapting to such changes").[1] The situation of the endangered Pacific islanders, who do not fulfil the conditions for being declared refugees, is not an isolated one and, unfortunately, most of the people who originate from third-world countries do not leave their homes fearing persecution, as they often leave because of wars, economic or political instability caused by rebellions and natural disasters. We might conclude that the notion of "persecution", as seen by the 1951 Refugee Convention, is rather restrictive in the general contemporaneous context.

However, the so-called "climate change refugees" are a reality that cannot be ignored. We are not talking only about our recurrent examples of people displaced by sea-level rise, but we should also mention environmental events such as drought, hurricanes, deforestation, famine, extreme pollution, events caused equally by climate change. International law should grant protection to these people despite some norms inscribed in an international convention in the 1950s. Studies have shown that the number of the environmentally displaced persons worldwide could grow up to 150 million by the year 2050,[2] with some numbers going up to 250 million, according to others.[3] Nowadays, at the end of 2019, according to the Global Report on Internal Displacement, at least 5.1 million people were internally displaced by disasters across 95 countries and territories, this being the first time when reports compile a figure of people forced to move because of natural disasters.[4] Most of the disaster displacements were the result of tropical storms and monsoon rains in South Asia and East Asia and Pacific,[5] but we incline to believe that slow processes of degradation of the environment, such as sea-level rise will produce even greater tragedies, leaving no possibilities to rebuild homes or communities in the same places. Storms may come and go, but the submergence of an island is most likely an irreversible process, which implies not only internal displacements, but also international ones. Dark scenarios predict that States like Tuvalu (in the Pacific Ocean) or the Maldives (in the Indian Ocean) will vanish and render their citizens stateless if greenhouse gas emissions will continue to rise.

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[1] Andrew I. Schoenholtz, *The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century*, Georgetown University Law Center, 2015, p.126.
[2] Dana Z. Falstrom, "Perspective: Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment", 13 *Colorado Journal of International Environmental Law. & Pol'Y Y.B.* 1, 4, 2002.
[3] Rachet Baird et al., *Human tide: the real migration crisis*, A Christian aid Report, May 2007, p.6.
[4] Internal Displacement Monitoring Centre, *Global report on internal displacement*, April 2020.
[5] https://migrationdataportal.org/themes/environmental_migration, last visited 31/08/2020.

Nevertheless, The World Bank offers solutions in a recent document, stating that, with the correct guidance and firm decisions such as cutting greenhouse emissions, we should be able to avoid the worst-case scenario of over 140 million displaced persons and to reduce the number by as much as 80 per cent, which equivalates with more than 100 million people.[1]

In light of these very likely future scenarios, it is highly advisable that international lawyers and professors, together with the specialists who represent the governments and the international organizations responsible for the protection of the migrants, should work to create a safe and uniform legal framework including the so-called "climate change refugees", who are, in some parts of the planet, forced to leave their disappearing environments.

5. Acknowledging the Concept of Climate Change Refugee?

One of the first mentions of the status that people affected by natural events may achieve was in a report for the United Nations Environment Programme, where the author used the term "environmental refugee" to designate the persons who are "forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life".[2] Nowadays, the use of the term "climate change refugee" is heavily disputed, because it is not defined by the 1951 Refugee Convention or other international norms and was, generally, seen as a misnomer. Terminology may vary, as other designations have emerged, such as "environmental refugee" or "ecological refugee", "forced environmental migrant", "environmentally motivated migrant", "disaster refugee", "ecologically displaced person" or even "climate exiles" for those who flee from disappearing States, in danger to become stateless persons.[3] A case has been founded for the following neutral, but much more versatile term: "environmentally displaced persons". An author argues, and not wrongfully, that the latter term is more flexible and will appropriately concentrate the protection of these persons more on the human rights perspective and less on the problematic international refugee law: "Rather than waste time arguing a tentative position under the Refugee Convention, Tuvalu and other states can then focus on their infringed human rights and

[1] Kanta K. Rigaud, ed., *Groundswell: Preparing for Internal Climate Migration.* World Bank, Washington, DC, 2018.
[2] Essam El-Hinnawi, *Environmental Refugees*, United Nations Environment Programme, 1985, p.4.
[3] https://www.nytimes.com/2005/05/09/opinion/before-the-flood.html, last visited 31/08/2020.

the obligations created from those rights in order to find liability for climate change and its environmental effects".[1] The aforementioned IOM's Glossary with terms in relation with migration, environment and climate change supports the view that involving the term "refugees" in the legal description of the people affected by climate change would be inappropriate. It proceeds to define an environmentally displaced person as someone "who is displaced within their country of habitual residence or who have crossed an international border and for whom environmental degradation, deterioration or destruction is a major cause of their displacement, although not necessarily the sole one. This term is used as a less controversial alternative to environmental refugee or climate refugee (in the case of those displaced across an international border) that have no legal basis or raison d'être in international law, to refer to a category of environmental migrants whose movement is of a clearly forced nature".[2]

Even the leaders of the directly involved States question the use of the term "refugee" and advocate for permanent migration and relocation in case of total disappearance underwater: "We want to begin that [the migration process] now, and do it over the next twenty, thirty or forty years, rather than merely, in fifty to sixty years' time, simply come looking for somewhere to settle our one hundred thousand people because they can no longer live in Kiribati, because they will either be dead or drown. We begin the process now, it's a win–win for all and very painless, but I think if we come as refugees, in fifty to sixty years' time, I think they would become a football to be kicked around".[3]

6. A Complementary Protection Centred on Human Rights: an Alternative for the Inability to Expand the Refugee Policies to Persons Affected by Sea-Level Rise

If we stand against an extensive understanding of the term "refugee", we tend to ignore the violation of the human rights to a decent livelihood, to property, to shelter, in its basic forms. Action at the international level must be taken, even though there is still reluctancy in accepting the idea of "climate change refugees". Even the UNCHR has admitted that "there may be situations where the refugee criteria of the 1951 Convention or broader refugee criteria of regional refugee law frameworks may apply, for example

[1] Tiffany T.V. Duong, *op.cit.*, p. 1252, note 55.
[2] International Organization for Migration (IOM), *Migration, Environment and Climate Change: Evidence for Policy (MECLEP), A Glossary*, 2014, p.13.
[3] Former President Anote Tong of Kiribati, quoted by Jane McAdam, *Climate Change, Forced Migration, and International Law*, Oxford Univ. Press, Oxford, 2012, p. 1.

if drought-related famine is linked to situations of armed conflict and violence",[1] but has refused specialised protection, at least at speech level, for people who could not justify a manifest persecution from the State. Generally, refugee law requires a connection between the natural disasters and an act of persecution from the State, which, in this case, appears *post factum* and uses the natural event as a pretext. In other cases, refugee law may be applied if the natural disaster results in a "serious disruption of public order" (as provided by the Organization of African Unity Convention or the Cartagena Declaration). However, the recent case of Ioane Teitiota before the UN Human Rights Committee has shown that the adverse effects of sea-level rise cannot be ignored anymore and that violation of human rights inscribed in the International Covenant on Civil and Political Rights (ICCPR), provoked by climate change, may lead to the application of the principle of *non-refoulement* and thus to accepting asylum for an environmentally displaced person. In our opinion, this is the right path that must be chosen in order to grant protection to this emergent "particular social group" that fear persecution based on the inability of their origin States to support them, even though this might seem like a burdensome task for the States that are fighting sea-level rise or other worse effects of climate change. Enhanced protection of the human rights must be the key to overwhelm the "tyranny" of the traditional perceptions on the concept of "refugee". Therefore, we must analyse how people affected by climate change and, in particular, sea-level rise, may invoke their fundamental rights (enshrined by either the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights) in order to enjoy the same treatment as a refugee, as a so-called "complementary protection".

The well-known case of Ioane Teitiota from Kiribati showed that New Zealand sticks to the strict conditions of the old Refugee Convention and does not allow extensive interpretations. In the *Teitiota v Chief Executive Ministry of Business, Innovation and Employment Case* before the Court of Appeal (and, later, confirmed by the High Court of New Zealand), a Kiribatian applied for refugee status and claimed that he feared to lose his life because of sea-level rise in case he returned home, but, ultimately, he was denied permanent residence in New Zealand. Judge Wild considered that even though we could not deny the adverse effect of sea-level rise on Mr. Teitiota's livelihood (the rise in the level of the Pacific Ocean has affected crops, coconut palms or freshwater supplies), the plaintiff has not

[1] *Climate change and disaster displacement*, available at https://www.unhcr.org/climate-change-and-disasters.html, last visited 31/08/2020.

brought enough evidence to prove the sufficient threat to life: "the Tribunal was right to find that the supplies of food and water for Mr. Teitiota and his family would be adequate if they were required to return to Kiribati. The Tribunal readily accepted that the standard of living of the Teitiota family back in Kiribati would compare unfavourably to that it enjoyed in New Zealand. But the Tribunal was, on the evidence it heard, entitled to find that Mr Teitiota and his family on return to Kiribati could resume their prior subsistence life with dignity".[1] Furthermore, the Court of Appeal's decision relied on the theory that the "persecution" criterion, requested in order to qualify as a refugee, must originate from a human being, including governmental authorities or non-state actors and not from natural causes as in the case of sea-level rise. In the end, Judge Wild concluded by stating crystal clear that "no one should read this judgment as downplaying the importance of climate change. It is a major and growing concern for the international community. The point this judgment makes is that climate change and its effect on countries like Kiribati is not appropriately addressed under the Refugee Convention".[2] However, New Zealand judges did not exclude the possibility that in the future "environmental degradation could create pathways into the Refugee Convention or protected person jurisdiction".[3] Thus, the road to the acknowledgement of the "climate refugees" is not decisively blocked and, as we should see, later on, the efforts of Mr. Teitiota have opened the path to the recognition of a potential *non-refoulement* in the particular situations of those persons that leave their home because of sea-level rise and other climate change impacts.

7. Ioane Teitiota: A Potential "Climate Change Refugee"

We recall that Mr. Teitiota was forced to leave Kiribati because of the environmental degradation and increasing sea-level rise (as claimed by the author of the complaint, the habitability of the capital city of the country was at one of the worst levels: "The situation in Tarawa has become increasingly unstable and precarious due to sea level rise caused by global warming. Fresh water has become scarce because of saltwater contamination and overcrowding on Tarawa. Attempts to combat sea level rise have largely been ineffective. Inhabitable land on Tarawa has eroded,

[1] *Ioane Teitiota v Chief Executive of Ministry of Business, Innovation and Employment*, 2014, New Zealand Court of Appeal 173 at par. 37.
[2] Ibid. par. 41.
[3] CCPR/C/127/D/2728/2016, Human Rights Committee - Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016, 7th January 2020, par. 2.2.

resulting in a housing crisis and land disputes that have caused numerous fatalities. Kiribati has thus become an untenable and violent environment").[1] He wanted to settle in New Zealand and applied for refugee status under section 129 of New Zealand's Immigration Act 2009, but his application was unsuccessful. The domestic courts could not ascertain refugee status and did not acknowledge a violation of article 6 of the ICCPR.

The New Zealand judges have pursued the analysis of the refugee conditions with the utmost care, not excluding the possibility to expand the scope of the Refugee Convention: "while in many cases the effects of environmental change and natural disasters will not bring affected persons within the scope of the Refugee Convention, no hard and fast rules or presumptions of non-applicability exist. Care must be taken to examine the particular features of the case".[2] Firstly, they tried to find the persecutor and, as explained before, they failed to find an action or an omission of a State or a non-state actor that would generate a fear of persecution in Kiribati. It should have been demonstrated that Kiribati failed to take the necessary steps in the face of a natural disaster. Teitiota defended his opinion and claimed that, even though Kiribati has taken some measures to protect the lives of their citizens (for example, building sea-walls along the coast), these efforts would prove to be useless without international cooperation and identified the industrialized States that contribute the most to pollution as the main "persecutors". However, the arguments were rejected as there was no proof of special intention to do harm from the international community against low-lying developing States as Kiribati. Secondly, the argument of the well-founded fear was also rejected, as there was no proof of any physical menace in Kiribati and food or water was still accessible on the island, although the standards of living have considerably diminished in the context of increasing sea-level rise. Thirdly, it is very hard to claim that persecution is founded on the five grounds provided by the Refugee Convention in the context of climate change which generally affects all people without discrimination, although "refugee protection may be available if environmental issues gave rise to armed conflict targeting a particular segment of the population or to politicized humanitarian relief that discriminated against a particular social group".[3] Finally, it was admitted that "although the environmental degradation caused by both slow and

[1] CCPR/C/127/D/2728/2016, Human Rights Committee - Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016, 7th January 2020, par. 2.1.
[2] Ibid., par. 2.8 quoting the decision of the Immigration and Protection Tribunal.
[3] *Ioane Teitiota v Chief Exec. of the Ministry of Bus., Innovation & Emp't [2013] NZHC*, 3125, par. 27.

sudden-onset natural disasters in Kiribati is a "sad reality," that reality did not bring Teitiota's experience within the scope of the Refugee Convention",[1] which is a legal document that does not cover for the moment the special situation of the environmentally displaced persons. As a result, Ioane Teitiota was described as a "sociological refugee" who pursued a better life "by escaping the perceived results of climate change".[2]

Following his unsuccessful efforts to convince the judicial bodies of the feared persecution and the risk to life experienced in an unstable environment, Ioane Teitiota filed an individual complaint with the UN Human Rights Committee. As presented before, the UN Human Rights Committee is not an ideal solution for requesting claims based on ICCPR violations, as it was very reluctant to truly ascertain the infringements. In the past, it has required that the threat to life put by nuclear weapons should be imminent, although it has admitted in a General Comment that nuclear weapons are one of the greatest threats to life ever created by humankind, supported their prohibition and recognized their use as crimes against humanity (or cases where it highlighted the difficulties to be categorised as a victim, implying the need to prove the alleged risk as being more than a theoretical possibility).[3] These were from the start serious signs that successful claims based on sea-level rise issues are not very foreseeable at the horizon, but, in our opinion, the recent decision of the UN Human Right Committee in the case of Ioane Teitiota has done more good than harm. Moreover, as presented before, Mr. Teitiota had already faced refusals to acknowledge his status of "climate refugee" and the violations of his rights in front of New Zealand's Court of Appeal and High Court, as he thoroughly exhausted the domestic remedies before addressing the issue to the UN Human Rights Committee, a condition imposed by the Option Protocol to the Covenant.

Mr. Teitiota essentially claimed that his removal from New Zealand and the forced return to Kiribati violated article 6 of the ICCPR, as "sea level rise in Kiribati has resulted in: (a) the scarcity of habitable space, which has in turn caused violent land disputes that endanger the author's life; and (b) environmental degradation, including saltwater contamination of the freshwater supply".[4] New Zealand sustained the line of reasoning of its

[1] *A.F. (Kiribati), [2013], NZIPT* 800413, New Zealand: Immigration and Protection Tribunal, par. 75.
[2] *Ioane Teitiota v Chief Exec. of the Ministry of Bus., Innovation & Emp't [2013] NZHC*, 3125, par. 54.
[3] UN Human Rights Committee, *S. Aumeeruddy-Cziffa and 19 Other Mauritian Women v. Mauritius*, Communication No. 35/1978, par. 9.1.
[4] CCPR/C/127/D/2728/2016, op.cit., par. 3.

judicial bodies and asserted that the author of the complaint is not subject to any real risk of being persecuted or losing his life because there was no evidence that he could not find proper accommodation, raise crops or find potable water at present in the State of Kiribati. Of course, the protection of the right to life in the context of a natural hazard includes positive obligations from the State, but there was no proof that the government of Kiribati omitted to take action at such degree that it would pose a significant threat to life (as shown before, in the author's opinion, Kiribati's capacities should not be taken into consideration, as the sea-level rise is an unjust and disproportionate adversary of this State). Moreover, in reference to the lack of evidence, New Zealand could not find precedents that would justify the fear of death in front of a slow-onset phenomenon: "no evidence had been provided to establish that deaths from such events were occurring with such regularity as to raise the prospect of death occurring to the author or his family members to a level rising beyond conjecture and surmise, let alone a risk that could be characterized as an arbitrary deprivation of life".[1] Accordingly, New Zealand found the communication inadmissible because the claim should not be based on hypothetical violations that may arise in the future,[2] so the risk was not imminent, as requested by the Committee in the precited case of *Aalbersberg et al. v. the Netherlands* or as encompassed in *Beydon et al. v. France*, the claimant did not "show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or that such effect is imminent".[3] Thus, the risk remained "in the realm of conjecture or surmise".[4] Additionally, New Zealand justified their denial to accept the existence of the risk to life by citing a previous decision of the Committee where *non-refoulement* was not applied, because there was no proof of a direct threat to the life of the claimant,[5] similarly, in their opinion, with the situation of Mr. Teitiota who does not experience a substantiated, immediate threat. The Kiribatian countered New Zealand's views and showed the bad effects of salinization to the health of his family or the compromising of the agricultural crops and drinking water sources. He reiterated that he faces an indirect risk of harm in Kiribati, as the country is expected to be submerged in maximum 15 years[6] (we could assert that, although at *prima facie* sea-level rise is a natural event, it has been the result of anthropogenic activities that harmed the

[1] CCPR/C/127/D/2728/2016, op.cit. 2.9.
[2] *V.M.R.B. v. Canad*a (CCPR/C/33/D/236/1987), par. 6.3.
[3] *Beydon et al. v. France* (CCPR/C/85/D/1400/2005), par. 4.3.
[4] CCPR/C/127/D/2728/2016, op.cit., par. 4.6.
[5] *Lan v. Australia* (CCPR/C/107/D/1957/2010), para. 8.4.
[6] CCPR/C/127/D/2728/2016, op.cit, par. 7.1.

environment, so the threat really is, in an intermediate manner, the outcome of human "exploits").

After considering the compliance of the communication with the procedure rules, the Committee noted that the harm feared by the author of the complaint is not based on mere assumptions: "the author's claims relating to conditions on Tarawa at the time of his removal do not concern a hypothetical future harm, but a real predicament caused by lack of potable water and employment possibilities, and a threat of serious violence caused by land disputes"[1] and declared admissible Ioane Teitiota's claim: "the author presented to the domestic authorities and in his communication, the Committee considers that the author sufficiently demonstrated, for the purpose of admissibility, that due to the impact of climate change and associated sea level rise on the habitability of the Republic of Kiribati and on the security situation in the islands, he faced as a result of the State party's decision to remove him to the Republic of Kiribati a real risk of impairment to his right to life under article 6 of the Covenant".[2] The Committee then proceeds to acknowledge the States' obligation not to extradite, deport or expel individuals that fear violations of articles 6 and 7 of the Covenant in their homeland. It is a comprehensive obligation that extends beyond the principle of *non-refoulement* under refugee law and protects individuals who do not meet the requirements for refugee status. Thus, "States parties must allow all asylum seekers claiming a real risk of a violation of their right to life in the State of origin access to refugee or other individualized or group status determination procedures that could offer them protection against refoulement"[3] and all relevant circumstances related to human rights protection from the origin country must be thoroughly analysed. The right to life must be interpreted broadly, including "the right of individuals to enjoy a life with dignity and to be free from acts or omissions that would cause their unnatural or premature death"[4] or even "foreseeable threats and life-threatening situations that can result in loss of life".[5] The Committee even recalls its remarks on the compromising effect of climate change on the full enjoyment of the right to life: "environmental degradation, climate change and unsustainable development constitute some

[1] CCPR/C/127/D/2728/2016, par. 8.5.
[2] Ibid., par. 8.6.
[3] Ibid., par. 9.3.
[4] UN Human Rights Committee, General Comment No. 36: Article 6 (Right to Life), CCPR/C/GC/36, par.3.
[5] *Toussaint v. Canada* (CCPR/C/123/D/2348/2014), para. 11.3.

of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life".[1]

However, the Committee failed to find the injustice done by the national courts of New Zealand, as it did not believe that Kiribati is in the situation of an imminent general conflict that would cause irreparable harm under articles 6 or 7 under the Covenant or that Mr. Teitiota is in a particularly vulnerable situation that would justify the fear of death.[2] National courts have emphasized the imminent character of the threat to life as a special requirement, requested that the feared arbitrary deprivation of life should come from the action of the government and mentioned that the cruel, inhuman or degrading treatment from article 7 of the ICCPR should not cover general socio-economic conditions, unless they are the outcome of the State's acts or omissions, such as a discriminatory denial of humanitarian assistance[3] (imminence was also been highlighted in an abovementioned case that founded the decision of New Zealand's authority to deny permanent residence of a Kiribatian citizen; the applicant could not prove that there was a sufficient risk to his life at the time of his claim, as the environmental conditions should be "so parlous that his life would be placed in jeopardy, or that he and his family would not be able to resume their prior subsistence life with dignity").[4] The Committee also rejected the argument that freshwater is inaccessible, even though 60 per cent of the capital's inhabitants receive rationed supplies of water from the authorities. It admitted the difficulty to obtain potable water or to grow crops on a salinized soil, but it requested the evidence of effective inaccessibility. Moreover, although it accepted that Kiribati could be submerged in 10 or 15 years, the Committee suggested that there is sufficient time to take appropriate action and relocate all the affected population. As we can clearly see, generally, the reasoning of the Committee was in line with the position of the national courts, rejecting a manifest error or a denial of justice from them. It concluded that "without prejudice to the continuing responsibility of the State party to take into account in future deportation cases the situation at the time in the Republic of Kiribati and new and updated data on the effects of climate change and rising sea-levels thereupon",[5] the

[1] UN Human Rights Committee, General Comment No. 36, op.cit., par. 62.
[2] *Jasin v. Denmark* (CCPR/C/114/D/2360/2014), par. 8.8, 8.9.
[3] A.C. (Tuvalu), [2014] NZIPT 800517-520, New Zealand: Immigration and Protection Tribunal, 4 June 2014, available at: https://www.refworld.org/cases,NZ_IPT,585151694.html, last visited 31/08/2020.
[4] A.F. (Kiribati), [2013], NZIPT 800413, New Zealand: Immigration and Protection Tribunal, par. 74.
[5] CCPR/C/127/D/2728/2016, op.cit., par. 9.14.

deportation to Kiribati did not take place in circumstances that would allow a successful claim on article 6 violations. However, what was really ground-breaking is a certain assertion of the Committee that would open the door for future climate refugees' claims: harm could also be induced through slow-onset events, which do not have the imminent nature of a sudden-onset impact. Even though it refused to ascertain the violation of the right to life in the particular case of Ioane Teitiota, considering that sufficient measures of protection were put in place, the Committee recognised that "without robust action on climate at some point in the future it could well be that governments will, under international human rights law, be prohibited from sending people to places where their life is at risk or where they would face inhuman or degrading treatment".[1] It went on to note the extreme nature of the risk of States' disappearance underwater and to admit that the "conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized".[2]

To sum up, this landmark decision is the first one from the Committee's case law to settle on asylum claims based on the negative effects of sea-level rise. The Committee made it clear that this is not a phenomenon that could be ignored and called for international assistance to efficiently counter the undeniable impact on low-lying developing islands. It did not deny a possible successful claim in the future on violations of the right to life endangered by slow-onset processes as sea-level rise, but for the moment it considered that there is still enough time to solve the relocation issue. However, we consider that the Committee has inappropriately founded its arguments on the adaptive measures of Kiribati, a minnow on the international scale. The threshold required to justify a violation of article 6 should have been decreased in such particular cases were the hardships of life deepen in the context of climate change. Is there really sufficient water, sufficient food or accommodation on an atoll with 500 km^2? As Committee member Duncan Laki Muhumuza noted in his dissenting opinion, the threshold should not be an unreachable one: "The State Party placed an unreasonable burden of proof on the author to establish the real risk and danger of arbitrary deprivation of life – within the scope of Article 6 of the Covenant […] the Committee needs to handle critical and significantly irreversible issues of climate change, with the approach that seeks to uphold the sanctity of human life".[3] In his opinion, the author has sufficiently

[1] https://www.theguardian.com/world/2020/jan/20/climate-refugees-cant-be-returned-home-says-landmark-un-human-rights-ruling, last visited 31/08/2020.
[2] CCPR/C/127/D/2728/2016, op.cit, par. 9.11.
[3] Ibid., Annex 2, Individual opinion of Committee member Duncan Laki Muhumuza (dissenting), par. 1.

demonstrated the health issues and future problems that may arise due to the lack of proper sources of food and water, considering that we should not wait for increasing deaths caused by the negative effects of sea-level rise in order to ascertain with no doubt the threat to life: "even if deaths are not occurring with regularity on account of the conditions […] it should not mean that the threshold has not been reached".[1] He appreciated the efforts made by Kiribati, but he expressed scepticism their solutions could be fruitful: "Even as Kiribati does what it takes to address the conditions; for as long as they remain dire, the life and dignity of persons remain at risk".[2] In a very expressive manner, he concluded that "New Zealand's action is more like forcing a drowning person back into a sinking vessel, with the "justification" that after all there are other voyagers on board".[3]

Although still inefficient for Mr. Teitiota, the decision is a guarantee that international human rights bodies are not completely ignorant to the suffering of the individuals from the sinking low-lying islands from the Pacific Ocean and that the Refugee Conventions' restrictive provisions could be overcome by a human rights analysis that could trigger a *non-refoulement* obligation when the individual risks to lose his life or to be subject to torture. We should remind that the decision of the Committee is not legally binding, but it represents, however, a relief and a glimmer of hope that jurisprudence of other national or international courts will follow this path.

8. Conclusion

The case of Ioane Teitiota, the national from the Republic of Kiribati, who flees from the "murky waters" that threat to engulf his home, has certainly created new opportunities for claiming an enhanced protection of the individuals affected by sea-level rise and, in particular, for the reassessment of human rights' importance for the environmentally displaced persons. The respect for the right to life as inscribed in the Article 6 of the ICCPR should not be a negotiable obligation for the State Parties. Although the violation was not acknowledged, the views adopted by the Committee are clearly a warning that the tides might change. The possible destination States must be prepared to take the appropriate decision for the future in order to guarantee

[1] Annex 2, Individual opinion of Committee member Duncan Laki Muhumuza (dissenting), par. 5.
[2] Ibid., par. 6.
[3] Ibid., par. 6.

the protection of the right to life for the persons who might be known as "climate change refugees".

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