Climate Change-Induced Migration — The Protection Gap and Pacific Island States

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Climate change-induced migration is a phenomenon newly recognised as climate change and its consequences are better understood. The increasing presence of climate change on the international agenda point outs the lack of protection for internationally displaced persons due to the impacts of climate change. Through the analysis of the international legal framework and the innovative use of climate change litigation, this article explores the possible answers to a legal vacuum concerning climate change-related migration. The analysis and interpretation of the Teitiota *case involving Kiribati, a Pacific Island state, and New Zealand, gives both a national and international answer to a case of climate change-induced migration. This article examines the Human Rights Committee's approach to climate change-induced migration which opens up possible protection on the international scale, while scrutinising international and national case law as well as customary international law to suggest how protection can be brought on a general basis.*

1. INTRODUCTION

The unprecedented global climate crisis is pushing or threatening millions of people to move due to the impacts of the climate on their home or livelihood.

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The United Nations High Commissioner for Refugees (UNHCR) estimated that 70.8 million people were forcibly displaced by the end of 2018,[1] as a result of "persecution, conflict, violence, or human rights violations".[2] The different migration causes are hard to assess since displacement is usually multicausal, and there is a lack of reliable data when it comes to environmental migration. However, future estimates show that climate migration will exponentially increase in the next decades.[3] The 2020 World Migration Report by the International Organization for Migration (IOM)[4] warns that scholars and academics have been critical of the reliability of such models. They still do influence national policies and media.[5] Either way, "[a]nthropogenic climate change is expected to increasingly affect migration and other forms of people moving to manage … changing risks", according to the IOM.[6] These changing risks include extreme "[d]isruptions such as cyclones, floods and wildfires" as well as "[s]low-onset processes — such as sea-level rise changes in rainfall patterns and droughts".[7] Those displaced will, more likely, move gradually and mainly internally.[8] Even though climate change migration causation is hard to evaluate, climate change has been recognised as a threat multiplier on security around national borders or food resource control.[9]

Climate change and its consequences will inevitably lead to increasing migration flux either in the short or long term; however, protection of climate-induced migration is not universally and officially recognised. Affected groups displaced by climate change can be described by many terms, including "climate refugees", "climate migrants", or "environmental migrants". Both in international law and between academics, there is no agreed definition and terminology about climate change displacement. For the purpose of this article, the terms "climate change-induced migration" and "climate change-induced migrant" will be used as the primary terminology to describe the groups affected by climate change impacts pushing them to move, to include all scenarios where there is a displacement of population due to climate change

1 United Nations High Commissioner for Refugees [UNHCR] *Global Trends: Forced Displacement in 2018* (UNHCR, Geneva, 2019) at 2.
2 At 2.
3 International Organization for Migration [IOM] *Migration and Climate Change* (Migration Research Series no 31, IOM, Geneva, 2008) at 9.
4 IOM *World Migration Report 2020* (IOM, Geneva, 2019) at 253.
5 At 253.
6 At 253.
7 At 253.
8 Phillip Dane Warren "Forced Migration After Paris COP21: Evaluating The 'Climate Change Displacement Coordination Facility'" (2016) 116(8) Colum L Rev 2113.
9 Intergovernmental Panel on Climate Change [IPCC] *AR5 Climate Change 2014: Impacts, Adaptation, and Vulnerability* (IPCC, Geneva, 2014) at 6.

impacts. It is understood that the terminology used encompasses all cases of population movement driven by climate change impacts on the environment of the displaced persons.

In part 2, the article conducts an analysis of the *lex lata* on climate change-induced migration through treaties, conventions and the international framework but also with non-governmental and other governance initiatives. Part 3 then uses specific case law both at the national and international level to illustrate how climate change litigation can address the gaps in international law. This part uses the context of climate change in Pacific small islands, and more specifically, the case of Ioane Teitiota, a Kiribati national in New Zealand. Part 4 introduces several legal and non-legal potential options to address the gap and introduces interpretations and solutions that can be developed, at national, regional and international level.

2. OVERVIEW OF THE SITUATION FOR CLIMATE CHANGE-INDUCED MIGRANTS

2.1 The Phenomenon of Climate Change-Induced Migration

2.1.1 Climate change and Pacific Island states

Pacific Island states designate Kiribati, Federated States of Micronesia, Nauru, Republic of Marshall Islands, Papua New Guinea, Samoa, Solomon Islands, Tonga, Vanuatu, and Fiji.[10] Pacific Island states will be treated as a group even though all its members are not politically or economically homogenous. There are nonetheless common characteristics to these countries, allowing the analysis. According to the Third Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) on Small Island States,[11] common characteristics are numerous.

The IPCC Special Report on Global Warming of 1.5°C shows the emergency of the situation for small island states where the risks associated with sea-level rise are higher at a 2°C global warming compared to 1.5°C.

10 Statement by HE Mr Robert G Aisi, Permanent Representative of Papua New Guinea to the UN and Chair of the PSIDS [Pacific Small Island Developing States] to the United Nations at the Open Working Group on Sustainable Development Goals (New York, 18 April 2013).

11 IPCC "Chapter 17: Small Island States" in *Climate Change 2001: Impacts, Adaptation, and Vulnerability, Contribution of Working Group II to the Third Assessment Report* (IPCC, Geneva, 2001).

Governments have accepted this temperature limit within the IPCC[12] but also more officially during the COP21, in the Paris Agreement. One of the main goals of the Paris Agreement is to keep "a global temperature rise this century well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5°C".[13] This number enables a slower rate of sea-level rise, allowing better planning for adaptation procedures globally.[14] However, for some vulnerable regions such as small island states, the experience of high "multiple interrelated climate risks" is very probable, even at global warming of 1.5°C.[15]

Under those circumstances, where weather and climate become less and less liveable, and due to the restricted physical characteristics of living on an island, the only plausible adaptation would be migration. The unfolding of displacement is another similar characteristic between these sovereign territories, which is inevitably international. Financial and legal barriers to international migration make it more likely that people will stay within island territories. It is highly unlikely that a considerable migration flux is going to develop between Pacific Island states to other areas like Australia or New Zealand.[16] Instead, people in these territories will experience a deterioration of living conditions on the islands, increase of unemployment and a higher morbidity.[17] The same economic barriers that prevent vulnerable people from migrating will make wealthier people cross borders, thus increasing already existing social inequalities.

Another similar aspect between the Pacific Island states is the strong ties linking the people with the land. Pacific Island states are the home to many cultures and traditions. Jane McAdam and Maryanne Loughry wrote about how Pacific Islanders from Kiribati and Tuvalu perceived the term "climate refugees".[18] Both countries rejected the term "refugees" since, for them, it suggests an idea of helplessness and lack of dignity. Furthermore, both are not

12 IPCC "Summary for Policymakers of IPCC Special Report on Global Warming of 1.5°C approved by governments" (press release, 8 October 2018) <https://in.one.un.org/un-press-release/summary-for-policymakers-of-ipcc-special-report-on-global-warming-of-1-5oc-approved-by-governments/>.

13 United Nations Framework Convention on Climate Change [UNFCCC] "The Paris Agreement" <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>.

14 IPCC, above n 11, at 849.

15 At 849.

16 IPCC, above n 12, at 1643.

17 IPCC, above n 11, at 846.

18 Jane McAdam and Maryanne Loughry "We aren't refugees" (30 June 2009) Inside Story <https://insidestory.org.au/we-arent-refugees/>.

signatories of the Refugee Convention.[19] Tuvaluans and i-Kiribati people affirm that it will be the actions of other countries that will drive them to migrate, not the actions of their leaders.[20] Pacific Island states are the lowest emitters of CO_2 and greenhouse gases (GHGs).[21] Still, they are one of the first countries to suffer from global warming and its consequences.

McAdam and Loughry also explained that the government of Tuvalu had refused relocation as an adaptation in international agreements.[22] There is a fear from islanders in general that industrialised countries will think that relocation is the solution to sea-level rise rather than acting towards reducing carbon emissions.[23]

2.1.2 Climate change and migration

These consequences are affecting people's everyday life. The land becomes barren and unable to fertilise; food and water are not sufficiently available; droughts and extreme weather events become more and more frequent. It can lead people to flee their habitat against their will, to settle somewhere where they can have access to food or escape the numerous natural disasters.

It is nonetheless challenging to attribute changes on Pacific Island states to climate change. The causation between human action and variations in temperature can be hard to establish; thus, it is difficult to justify and give a legal ground to climate change-driven migration. Climate change also influences and can exacerbate violence in areas where people are forced to compete for natural resources[24] or over the financial compensation of countries responsible for climate change to the countries which are affected.[25]

The phenomenon where people decide to migrate to another territory for environmental reasons raises questions concerning their legal status. This article will not cover internal displacement where an abundant literature already exists on the subject. The analysis will only cover the situation of international environmental displacement where the subject crosses an international border.

19 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 [Refugee Convention].
20 McAdam and Loughry, above n 18.
21 United Nations Environment Programme [UNEP] *Emissions Gap Report 2019* (UNEP, Nairobi, 2019) at 19.
22 McAdam and Loughry, above n 18.
23 McAdam and Loughry, above n 18.
24 McAdam and Loughry, above n 18.
25 McAdam and Loughry, above n 18.

2.2 Gaps in the International Legal Framework

2.2.1 The Refugee Convention

The main legal instrument in international law protecting refugees is the Refugee Convention adopted by the UN General Assembly.[26] The Refugee Convention appears to grant a broad scope for the protection of refugees. However, close reading of the text of the Convention reveals that the definition of refugee is quite strict, concerning only specific categories of displaced persons.

Article 1A gives an exhaustive list of requirements to the recognition of refugee status. It involves firstly a well-founded fear of persecution as well as the failure of state protection, either by unwillingness or inability. The Convention includes reasons at the source of the persecution enabling the recognition of refugee status. These Convention grounds are "race, religion, nationality, membership of a particular social group or political opinion" according to art 1A(2). To be recognised as a refugee, there is also the need to be outside the country of nationality. Besides, there is a criterion of inability or unwillingness to return to the country of nationality, owing to the fear of being persecuted. The "fear" is, in practice, hard to assess since it is subjective and specific to each individual. It could, in theory, include persons who leave their home country due to climate change, thus unwilling or, in some cases, unable to return due to a fear of being "persecuted". However, the challenge resides in considering environmental degradation as "persecution" in the sense in which it is used in the Refugee Convention.[27] There is also a need to link such persecution to one of the grounds set out in the Convention. It means that environmentally induced displacement falls outside the scope of the Refugee Convention and its additional Protocol.[28]

Although the preamble of the Refugee Convention sets out to protect refugees under international law, this instrument does not include the protection of climate change-induced migrants. A read-through of the Convention shows that there are no links to environmental aspects nor their consequences on migration.

There could be interpretations of the Convention that would allow environmentally displaced persons more protection. For instance, the principle of non-refoulement is recognised in treaty law at art 33 of the Refugee Convention.

26 Refugee Convention, above n 19.

27 Joanna Apap *The concept of "climate refugee": Towards a possible definition* (European Parliamentary Research Service, PE621.893, 2019) at 2.

28 At 2.

However, the principle is also recognised in the Convention against Torture,[29] as well as other international and regional treaties, showing its broad application. The principle of non-refoulement, in the Convention, is applied to the Convention grounds as well as the existence of the fear of being persecuted. These criteria are giving a frame of application to the principle of non-refoulement, which, in the context of the Refugee Convention, has a limited scope of use. Since the Refugee Convention does not recognise climate change as "persecution", climate change-induced migrants do not qualify for refugee status considering the principle of non-refoulement according to the Refugee Convention and, consequently, are not accorded the benefits of refugee status.

2.2.2 The United Nations High Commissioner for Refugees

The UNHCR focuses on an approach of integration of practices nationally and regionally.[30] By using this methodology, the responses are more adapted to the specificities of each situation, according to the organisation. There is little if no binding material upon states. The UNHCR is mostly concerned with internal environmental migration. Indeed, the UNHCR played a central role in the development of the Guiding Principles on Internal Displacement.[31] The UNHCR has a limited role concerning the development and strengthening of law or soft law related to international climate change displacement. In conclusion, the UNHCR helps regionally and nationally through disaster response but does not have a real influence on the international legal framework. Nonetheless, the UNHCR helped to create some soft law developments, for example, with the Nansen Initiative.

2.2.3 The Paris Agreement and the United Nations Framework Convention on Climate Change

Within the framework of the United Nations Framework Convention on Climate Change (UNFCCC), the COP16 adopted the "Cancun Agreements": a set of COP decisions which are not legally binding. The Cancun Agreements mention an adaptation component where one of its main objectives is to "assist the *particularly vulnerable people* in the world to adapt to the inevitable impacts

29 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

30 UNHCR *UNHCR, The Environment & Climate Change: An Overview (Updated Version)* (UNHCR, Geneva, 2015) at 7.

31 UNHCR *Climate Change and Disaster Displacement: An Overview of UNHCR's Role* (UNHCR, Geneva, 2017) at 9.

of climate change by taking a coordinated approach to adaptation".[32] This objective can be interpreted as adapting to climate change-induced migration by finding solutions. The outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action (LCA) under the Convention furthered this interpretation at para 14(f).[33] Parties thus recognised climate change-induced displacement and migration as a situation that requires attention and solutions.

The text of the Paris Agreement (PA) itself does not mention migration due to climate change.[34] Nonetheless, the preamble of the Agreement acknowledges that as "climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on [...] migrants".[35]

One of the main tools of the PA is the nationally determined contributions (NDCs), which represent the mitigation[36] action that a state party can take, found in art 4.2: "Each Party *shall* prepare, communicate, and maintain successive nationally determined contributions that it intends to achieve."[37] The use of the word "shall" gives a binding dimension to the NDCs, which state parties must prepare. However, their execution by state parties can be more challenging to achieve. NDCs show the commitments of the states to fight climate change effects. One-fifth of the state parties to the UNFCCC referred to migration in their submissions as well as strengthened these commitments at the PA.[38] According to the IOM, out of the 162 intended nationally determined contributions (INDCs) submissions to the UNFCCC before COP21, 33 submissions refer to migration,[39] eg in Kiribati INDCs. Reference to migration is encouraging on the national scale showing a growing interest in migration issues related to climate change.

In addition to mitigation, the PA gives a framework for climate change adaptation in art 7. Indeed, the state parties recognise the importance of enhancing their adaptive capacity to ensure the limit of global temperature rise

32 UNFCCC *Intro to Cancun Agreements* <https://unfccc.int/process/conferences/the-big-picture/milestones/the-cancun-agreements> (emphasis added).

33 UNFCCC *Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010* UN Doc FCCC/CP/2010/7/Add.1, Decision 1/CP.16, para 14(f) (emphasis added).

34 Paris Agreement [PA] (opened for signature 22 April 2016, entered into force 4 November 2016) UN Doc FCCC/CP/2015/10/Add.1.

35 PA, preamble.

36 According to UNEP, "Climate Change Mitigation refers to efforts to reduce or prevent emission of greenhouse gases": UNEP "Mitigation" <https://www.unenvironment.org/explore-topics/climate-change/what-we-do/mitigation>.

37 PA, art 4.2 (emphasis added).

38 Article 4.2.

39 IOM *Migration in the Intended Nationally Determined Contributions (INDCs) and Nationally Determined Contributions (NDCs)* (IOM, Geneva, 2016) at 6.

set in art 2, as well as the importance of adaptation to contribute to sustainable development.[40] Also, the PA recognises that adaptation measures must be adopted in a national, regional and local context,[41] while emphasising the urgent situation in developing countries which are more vulnerable to climate change effects.[42] Adaptation measures must be country-driven, but also inclusive (gender, minority groups, indigenous people).[43] While being country-driven, the PA highlights the importance of international cooperation.

The PA is an international agreement which is complete concerning all aspects of climate change: mitigation, adaptation, and loss and damage. The Agreement includes guidance and rules for state parties to follow concerning all those aspects. However, other than these remote links with climate change-induced migration, the Paris Agreement does not directly tackle environmental displacement at its core. It has recognised that climate change is affecting human lives, while mentioning migrants, without ever implementing concrete binding measures for state parties to apply.

2.2.4 Other governance initiatives

(i) The Global Compact for Safe, Orderly and Regular Migration

The Global Compact for Safe, Orderly and Regular Migration (GCM) is a non-legally binding global agreement prepared under the patronage of the UN. It adopts a common approach to international migration. The GCM promotes the values of human rights, non-discrimination, and responsibility sharing as well as recognises the importance of international cooperation regarding migration issues.

The GCM comprises 23 objectives to improve the managing of migration at all levels. Three of those objectives explicitly target climate change migration. First, objective no 2 of the GCM recognises that slow-onset environmental degradation and climate change impacts are drivers of migration and thus should be eliminated through "resilience and disaster risk reduction, climate change mitigation and adaptation".[44] Through this objective, the GCM gives a comprehensive list of possible responses to address drivers of environmental migration.[45] Also, the text recognises that adaptation and mitigation to climate

40 PA, art 7.1.
41 Article 7.2.
42 Article 7.2.
43 Article 7.5.
44 Global Compact for Safe, Orderly and Regular Migration (19 December 2018) UN Doc A/RES/73/195, Objective 2, 18(b).
45 Objective 2, 18(j).

change must be prioritised in the country of origin to minimise the drivers of migration.[46]

Second, objective no 5 recognises that, in some cases, the return of migrants might not be possible.[47] The GCM recognises then the importance of strengthening the natural migration pathways as migration management tools (for example, visa options or planned relocation).

Finally, the last objective including climate change migration is objective no 23: international cooperation, as well as regional cooperation, are essential to address the environmental drivers of migration.[48]

The GCM represents an achievement in terms of global governance and management of international migration. It is still a non-legally binding instrument, but the fact that the international agenda, through the auspices of the UN, places more and more emphasis on climate migration is a step in the right direction to fill the gaps of international law.

(ii) The Nansen Initiative

In October 2012 the governments of Norway and Switzerland launched the Nansen Initiative on Disaster-Induced Cross-Border Displacement (Nansen Initiative) to build consensus among states on building principles concerning the protection of cross-border migrants caused by natural catastrophes including climate change, as well as to set a plan for future action that can fit within existing domestic, regional and international structures.[49] The objective of the Initiative was and is not to create a new convention or to create soft law. Different states lead it through a bottom-up consultative process with the involvement of several stakeholders, states and civil society organisations.[50] The Initiative originally sprang from the Cancun Agreements previously mentioned where states recognised climate change-induced migration as an adaptation challenge.[51]

In 2015, after regional consultations, an Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disaster and Climate Change[52] (Protection Agenda) was supported by 109 governments.[53] The Protection

46 Objective 2, 18(i).
47 Objectives 5, 12.
48 Objectives 23, 32.
49 The Nansen Initiative <https://www.nanseninitiative.org>.
50 The Nansen Initiative, above n 49.
51 UNFCCC, above n 32.
52 The Nansen Initiative Protection Agenda is available at <https://disasterdisplacement.org/wpcontent/uploads/2014/08/EN_Protection_Agenda_Volume_I_-low_res.pdf>.
53 *The Nansen Initiative Global Consultation Conference Report, Geneva, 12–13 Oct 2015* (December 2015) at 59.

Agenda provides various tools of policy options and recommendations for governments and policy-makers.[54]

Even though the objectives of the Nansen Initiative are ambitious regarding the recognition and protection of climate change-induced refugees, it seems not to have a strong influence on decision-makers. It operates outside of the UN's system, where most of the decisions and debates take place. A broader organisational structure of more than 10 states would give more weight to the Initiative.

(iii) The Model International Mobility Convention

The Model International Mobility Convention (Mobility Convention) was finalised in April 2017 at Columbia University, New York. A commission of academics and specialists has developed the Convention in the fields of migration, human rights, national security, labour economics, and refugee law.[55] The Convention gives a framework for international mobility, and reaffirms the rights of mobile persons as well as the responsibilities of states.[56] The Mobility Convention is not legally binding: being the work of scholars and academics, this text can be valued as a "soft law" instrument, showing the direction of thought of scholars in the field of international migration. The Convention is open for signature but has only been signed by private persons, not states.

The Mobility Convention is exciting even though not legally binding since it sets out cumulative rights. Indeed, over 213 articles, the Convention starts by "establishing the minimum rights afforded to all people who cross state borders as visitors, and the special rights afforded to tourists, students, migrant workers, investors, and residents, forced migrants, refugees, migrant victims of trafficking and migrants caught in countries in crisis".[57] The large variety of situations represented in the Mobility Convention makes it unique and unprecedented.

The Mobility Convention also fills the gaps in international law mentioned earlier. Widely inspired by the diverse international instruments on migration such as the Refugee Convention or the International Covenant on Civil and Political Rights (ICCPR), art 125 of the Convention gives a plural definition of "forced migrant", one of them being "Any person who, owing to the risk of suffering serious harm, is compelled to leave her or his State of origin, or in the case of a stateless person, her or his State of former habitual residence".[58] Further, the Convention adopts a broad interpretation of the "serious harm"

54 The Nansen Initiative, above n 49.

55 Columbia University in the City of New York, Model International Mobility Convention [MIMC] <https://mobilityconvention.columbia.edu/about>.

56 MIMC.

57 MIMC.

58 Article 125.1(a).

criteria as that which "consists of a threat to an individual's physical survival, which is external to her or him, or threats of torture or inhuman or degrading treatment or punishment or arbitrary incarceration, such as may arise during indiscriminate violence, severe international or internal armed conflict, environmental disaster, enduring food insecurity, acute climate change, or events seriously disturbing public order".[59] This interpretation of the "serious harm" criteria is broader than any other international instrument of migration so far. It enables climate change-induced migrants to be recognised as "forced migrants" by this Convention, which also gives them rights.

The Mobility Convention wishes for a greater protection of all mobile persons. Even though this text is only a project led by academics, it is a great tool to imagine how the current international protection regime could be improved. This Convention highlights the legal gaps that migrants face today by presenting a rights-based approach to mobility.

The Mobility Convention can, however, appear a bit too far from reality and where states stand concerning international migration. It is a unique project that human rights defenders can support, but the sceptics amongst us may point to the fact that it might be too "utopic" to implement.

Although all these instruments and texts are focusing on climate change and its consequences, none of them grant protection to climate change-induced migrants in international law. There is a legal vacuum in this area where no real, long-lasting solutions are implemented. There is thus a need to develop and implement international legal protection for refugees on the grounds of climate change.

3. CASE STUDY: PACIFIC ISLAND STATES AND NEW ZEALAND

3.1 The Influence of Pacific Islanders on New Zealand's Immigration Policy

Pacific Islanders' streams influence the legal migration pathways which were developed in New Zealand. There are five possible categories to apply to enable permanent settlement.[60] From those, two are explicitly targeting Pacific Islanders (the Pacific Access Category[61] and the Western Samoan Scheme). There is also the International Humanitarian Migration[62] which is linked

59 Article 125.1(d).

60 Graeme Hugo "Chapter 2: Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific" in Jane McAdam (ed) *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart, Oxford, 2010) at 33.

61 At 33.

62 At 33.

with the Refugee Convention and the 1967 Protocol since New Zealand is a signatory to both texts. All the permanent migration channels are either targeted to Pacific Islanders, or at least can be used by Pacific Islanders to relocate to New Zealand. The fact that some of the *permanent* migration channels are specific for some Islanders' nationalities shows how vital Pacific Islanders are to New Zealand's immigration.

The different existing visas are not necessarily readily available to climate change-displaced people but can be made so with relatively little change (even though it would require a high level of cooperation and commitment by the governments administering the immigration system). Nonetheless, Hugo maintains that such modifications of existing channels of migration is more objectively achievable than the introduction of a new migration regime.[63]

New Zealand is one of the destinations historically chosen by migrants from Pacific Island states to relocate. As a result, and in light of the relatively recent climate change awareness, New Zealand has seen climate litigation flourish by Pacific Islanders wishing to relocate based on environmental grounds.

3.2 The *Ioane Teitiota* case at the Human Rights Committee

Ioane Teitiota is a citizen of the Republic of Kiribati who was living in New Zealand. He is a married Kiribati national who, before he immigrated to New Zealand with his wife in 2007, was unemployed relying on subsistence agriculture and fishing.[64] Being concerned about increasing coastal erosion and intrusion of saltwater onto the land during high tides, as well as being aware of the debate around climate change, the author appellant and his wife immigrated to New Zealand in 2007 where they had three children.[65]

His application for refugee status in New Zealand was rejected by a refugee and protection officer, and Teitiota appealed against the decision. After he exhausted all national remedies, he filed an individual communication to the Human Rights Committee (HRC) claiming that New Zealand violated his right to life under art 6 of the ICCPR by removing him to the Republic of Kiribati in September 2015.[66] The Committee may consider individual communications alleging violations of the rights outlined in the ICCPR by state parties to the First Optional Protocol to the ICCPR. The latter entered into force in New Zealand in 1989.

63 At 33.
64 *AF (Kiribati)* [2013] NZIPT 800413 (25 June 2013) at [40].
65 At [40].
66 UN Human Rights Committee [UNHRC], Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication no 2728/2016 (7 January 2020).

The decision commented on by the Committee is that of 25 June 2013 from the Immigration and Protection Tribunal of New Zealand (the Tribunal). First, the decision recalls the facts concerning the Republic of Kiribati. The different problems brought up by the author are linked with these issues. The Committee notes the problems of overpopulation and limited infrastructure development, especially in the area of sanitation.[67] The Committee also recognises the worsening of these problems by the effects of environmental events (both sudden and slow onset).[68] Nonetheless, the Committee acknowledges that the government of the Republic of Kiribati is taking action to remedy the problems as much as it can.

The author does not wish to return to Kiribati because of both the pressures of overcrowding and sea-level rise. For him, there is a problem of land availability and overpopulation upon return.[69] According to the author, this situation is widely experienced by people throughout the Republic of Kiribati, and one the government is powerless to act on.

The basis of this case (and all New Zealand immigration law) is the Immigration Act of 2009 (the Act). It gives a legal basis for New Zealand to meet its responsibilities under the Refugee Convention, the Convention Against Torture (CAT) and the ICCPR.[70]

3.2.1 The Refugee Convention

The author claimed, to the Immigration and Protection Tribunal, that he could be granted refugee status according to the Refugee Convention. However, the Tribunal concluded that the appellant was not facing a real risk of being persecuted if returned to Kiribati. Other national instances found the same result upon the different appeals of the author.

Firstly, according to the Tribunal, New Zealand refugee law jurisprudence applies the Hathaway concept of "being persecuted"[71] as the "sustained or systemic violation of core human rights, demonstrative of a failure of state protection". The persecution also rests on human agency for the Tribunal,[72] even though it is possible that "environmental degradation, whether associated with climate change or not, can create pathways to the Refugee Convention or protected person jurisdiction".[73] In that case, the problems the author brought

67 *AF (Kiribati)*, above n 64, at [39].
68 At [39].
69 At [41].
70 New Zealand Immigration "Immigration Law" <https://www.immigration.govt.nz/about-us/policy-and-law/legal-framework-for-immigration>.
71 *AF (Kiribati)*, above n 64, at [53].
72 At [54].
73 At [55].

up are faced by the whole population in general, with no discrimination.[74] According to the Tribunal, there is no evidence that the environmental conditions that he faced or was likely to encounter upon return are so harsh that he or his family will risk their lives.[75]

If they were facing a risk regarding the right to food, amounting to a "real risk of starvation"[76] according to the Tribunal, it could give a right to protection. There is, however, still a need for the discriminatory aspect of the risk.[77]

Also, according to the Tribunal, the risk of being persecuted must be well-founded under art 1A(2) of the Convention.[78] Well-founded can be justified when there is a "real, as opposed to a remote or speculative, chance of [occurrence]" of the harm.[79] In that case, the Tribunal notes that even if there are tensions over land and violence in Kiribati, there is no evidence that he will be facing violence.[80] On account of food difficulties raised by the author, the Tribunal disagrees and concludes that it does not amount to the impossibility to grow crops. Thus, the Tribunal found that there is no risk of persecution and that there are no Convention grounds in the first place, hence the refugee status being declined.

Moreover, all the national instances of New Zealand considered that the Refugee Convention was not the solution to the problem of the appellant. The High Court of New Zealand, in that case, confirmed that "the Refugee Convention is not an available avenue for [economic and environmental] migrants or refugees".[81]

However, even if the refugee status was declined in that case, the interpretation of "persecution" by the Tribunal is more comprehensive than what is usually understood under the Refugee Convention. Indeed, as mentioned previously, the Tribunal found that facing a "real risk of starvation" can amount to "being persecuted".[82] This interpretation is thus giving a broader scope to persecution than the strict human agency condition. It is even explicitly said by the Tribunal that the "requirement of some form of human agency does not mean that environmental degradation, whether associated with climate change or not, can never create pathways into the Refugee Convention or protected

74 At [75].
75 At [74].
76 At [68].
77 At [68].
78 Refugee Convention, above n 19, art 1A(2).
79 *AF (Kiribati)*, above n 64, at [53].
80 At [72].
81 *Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2013] NZHC 3125 at [44].
82 *AF (Kiribati)*, above n 64, at [68].

person jurisdiction".[83] For the Tribunal, persecution can have a broader meaning than what is included in the Refugee Convention.

Furthermore, the Tribunal states that "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".[84] This amounts to a case-by-case assessment of protected status. Concerning environmental change, there are as yet no set rules for the recognition of protection. The lack of set rules can be beneficial since migration based on environmental grounds is recent, and a case-by-case analysis can enable a well-adapted response to a currently evolving situation. However, without set rules that national and international courts can apply, their interpretations and assessments can change with time. Hence, displaced persons asking for protection on environmental grounds can experience legal insecurity.

Nonetheless, the Tribunal recognises that in any case, there is a legal criterion for displaced persons asking for protection on environmental grounds.[85] It is that the claimant must establish that the breach of a human right was in the past but also amounts to future risk, meaning a "real chance of a sustained or systemic violation of a core human right demonstrative of a failure of state protection which has sufficient nexus to a Convention ground".[86] The fact that the Tribunal uses the word "sufficient" affords more possibilities to the claimant. Indeed, the breach of a human right must be linked enough to a Convention ground; it does not have to be a "*strict* nexus to a Convention ground". Some freedom can be taken with the Convention grounds. For example, one could argue that the "nationality" Convention ground could be used by low-lying island states who are facing sea-level rise, which affects a whole territory, thus a whole nation.

Even if New Zealand and the Committee do not recognise this case as amounting to protection, they both delivered a broader interpretation of the Refugee Convention criteria.

3.2.2 The ICCPR and the right to life

The Committee, in its decision of January 2020, only considers the Tribunal and its conclusions focusing on the ICCPR and the right to life. The Tribunal indeed concluded that the appellant did not face a real risk of being persecuted if returned, and did not point to any omission or action by the government of

83 At [55].
84 At [64].
85 At [65].
86 At [65].

Kiribati that might indicate a risk that the appellant would be deprived of his life within the scope of art 6 of the Covenant,[87] where the risk of violation must have been imminent, or at least "likely to occur".[88] Here, according to the Tribunal, the risk was lying "only in the realm of conjecture or surmise considering the status of climate change", it was not in breach of art 7 of the Covenant. There was no evidence that "the government of Kiribati was failing to take steps to protect its citizens from the effects of environmental degradation to the extent that it could".[89] The appellant filed a complaint to the Committee that New Zealand violated his right to life under the Covenant.

To answer, the Committee first recalls para 12 of General Comment no 31[90] on "the nature of the general legal obligation imposed on states parties to the Covenant", referring more precisely to the obligation of state parties "not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant".[91] This risk must be personal; it cannot derive only from the general conditions of the receiving state, and the threshold for providing substantial grounds to establish a real chance of irreparable harm exists is very high.[92] These articles can remind us of the principle of non-refoulement in international refugee law. However, it is broader here since it protects all persons, even those who are not entitled to refugee status.[93]

Later, the Committee confirms that the protection of the right to life includes the implementation of positive measures by state parties.[94] General Comment no 36 of the Committee[95] maintains that the right to life is also the right to live with dignity.[96] The junction of the right to life with the right to live with dignity enables a broadened interpretation of the risk of harm. Indeed, risk can thus be a "reasonably foreseeable and life-threatening situation that can result in loss of life".[97] General Comment no 36, para 62 covers "environmental degradation, climate change and unsustainable development" as a situation of risk since

87 UNHRC, above n 66, para 2.9.
88 Paragraph 2.9.
89 Paragraph 2.10.
90 UNHRC *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant* (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13.
91 UNHRC, above n 66, para 9.3.
92 Paragraph 9.3.
93 Paragraph 9.3.
94 Paragraph 9.4.
95 UNHRC *General comment no. 36, Article 6 (Right to Life)* (3 September 2019) UN Doc CCPR/C/GC/35.
96 UNHRC, above n 66, para 9.4.
97 Paragraph 9.4.

they "constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life".[98]

Both the Committee and the Tribunal allow the possibility that climate change effects can provide a basis for protection.[99] According to these two institutions, the protection on climate change effects grounds would stem from the complicated relationship between "natural disasters, environmental degradation, and human vulnerability to those disasters and degradation".[100]

According to the Tribunal, climate change effects can provide a basis for protection in two scenarios. The first is where the climate change effects are dealt with in a discriminative way, where "natural disasters provide evidence of a political weighting of state response in which the recovery needs of marginalised groups are sometimes not met".[101]

The other scenario is where climate change effects pose threats to security and induce violence, armed conflict and insecurity.[102] The Tribunal gives the example of when "environmental degradation is used as a direct weapon of oppression against an entire section of the population".[103]

In both situations, the criterion of discrimination against a group (linked to a Convention ground) is present. These examples are also intrinsically linked with the right to life at art 6 of the ICCPR. However, in that case, the Tribunal did not find that the author was facing a risk of arbitrary deprivation of his life upon return to Kiribati.[104]

The author countered this argument in his complaint to the Committee by highlighting that land disputes in Kiribati lead to violence and, sometimes, deaths.[105] For the Committee, the threshold of violence is not met: only situations of general violence of sufficient intensity are considered to create a real risk.[106] In that case, the Committee noted the absence of a situation of general conflict in the Republic of Kiribati as well as the non-discriminatory feature of the violence since it is a general risk faced by all individuals.[107]

Another argument made by the author of the complaint regarding the breach of the right to life upon return was the lack of access to potable water.[108] However, this argument is rejected by the Committee, which says that there is

98 UNHRC, above n 95, para 62.
99 UNHRC, above n 66, para 9.6.
100 *AF (Kiribati)*, above n 64, at [57].
101 At [58].
102 At [59].
103 At [59].
104 At [59].
105 UNHRC, above n 66, para 9.7.
106 Paragraph 9.7.
107 Paragraph 9.7.
108 Paragraph 9.8.

no evidence to prove that potable water is "inaccessible, insufficient or unsafe to produce a reasonably foreseeable threat to health".[109]

Also, the author points out that upon return, he probably will be deprived of the means of subsistence since "no crops can grow" on his island.[110] For the Committee, this argument is not valid because of a lack of information and proof. There is a need for evidence that the author and his family would be exposed to "a situation of indigence, deprivation of food and extreme precarity that could threaten his life".[111]

Finally, the author feared a risk to his right to life because of the problem of overpopulation in the Republic of Kiribati, combined with recurrent flooding and breaches of seawalls.[112] The author points to scientific conclusions that "Kiribati will be uninhabitable in 10 to 15 years".[113] For the Committee, international and national efforts are essential to limit the effects of climate change on the rights of life of individuals under arts 6 and 7 of the Covenant.[114] It triggers thus non-refoulement obligations of sending states.[115] The fact that there is a risk of submersion underwater of whole countries goes against the right to life.[116]

However, the Committee considers that the timeframe given by scientists of 10 to 15 years provides plenty of time for the Republic of Kiribati, together with assistance from the international community, to take measures to protect (or even relocate) its population.[117] Accordingly, the Republic of Kiribati is deemed already to be taking actions to reduce the effects of climate change earlier in the case.[118]

Given all the above, the Committee thus found that the Tribunal gave an individualised assessment to the case and that New Zealand did not breach art 6(1) of the Covenant.

This case is a big step towards a recognition and better protection of environmental migrants since the Committee allows that environmental degradation can be a ground for protection. This finding, however, does not apply here because there is not enough proof. All the arguments and the answers given by the Committee show that the case is declined based on a matter of nuances, scales and thresholds. The justifications not to find a breach of the right to life seem a bit far-fetched and thin.

109 Paragraph 9.8.
110 Paragraph 9.9.
111 Paragraph 9.9.
112 Paragraph 9.10.
113 Paragraph 9.10.
114 Paragraph 9.11.
115 Paragraph 9.11.
116 Paragraph 9.11.
117 Paragraph 9.12.
118 Paragraph 9.12.

On the one hand, the burden of proof falls solely on the appellant and not on the state party. It is a bit unreasonable that a private person with limited funds must prove that a state fails to act, or that there is a risk for his life upon return. These demands are also related to the conditions on the island, maybe asking for scientific proofs.

On the other hand, from this case, we can ask ourselves: what is the engaging factor in allowing protection on climate change grounds? It seems as if for the Tribunal and the Committee, extreme natural catastrophe or death are qualifying as allowing factors. This seems counterproductive: the Committee reviews the right to life under the ICCPR, but demands for proof of real risk, maybe deaths, to prove said risk.

Though the case is very recent and opens new possibilities, no rules whatsoever have been set regarding how to interpret and apply the opinion of the Committee. However, this opinion, as well as the outcome of the case, are promising and show that there is indubitably a better understanding of the new phenomenon regarding climate change migration. There needs to be clarification of the rules, the conditions and the possibilities of the protection on the grounds of climate change.

Equally important, the opinion is contested by the very members of the Committee who do not agree on the outcome of the case. This shows the interest and controversy surrounding this subject.

3.2.3 Committee members' dissenting opinions

Two individual opinions of Committee members are available in addition to the communication from the Committee, one from Vasilka Sancin[119] and another from Duncan Laki Muhumuza.[120] Both are communicating reservations concerning the decision of the Committee. Sancin judges that the burden of proof should fall upon the state party to demonstrate that safe drinking water is available in Kiribati, thus complying with its duty to "protect life from risks arising from known natural hazards".[121] In addition, Laki Muhumuza judges that the burden of proof asked by the state party of the appellant concerning the establishment of a real risk and danger of arbitrary deprivation of life was too high.[122] Furthermore, Laki Muhumuza raises concerns about the "threshold for

119 UNHRC, above n 66, Individual Opinion of Committee Member Vasilka Sancin (dissenting).

120 UNHRC, above n 66, Individual Opinion of Committee Member Duncan Laki Muhumuza (dissenting).

121 Dissenting opinion, above n 119, para 5.

122 Dissenting opinion, above n 120, para 1.

providing substantial grounds to establish that a real risk of irreparable harm exists".[123]

These two dissenting opinions show that the protection of environmental migrants is highly debated, even internally, at the highest institutions protecting human rights. There is nonetheless an evolution and a growing awareness of the matter. The views adopted here by the Committee are very recent and show a clear step forward for environmental migrants. The dissenting opinions show an even greater possibility.

New Zealand is reluctant to give a broad interpretation of the Refugee Convention, even though environmental disasters can create pathways. Nonetheless, the threshold to trigger to do so is very high, almost entirely impossible to reach without any proven fatalities.

The dissenting opinions of the Committee members show the imbalance between what is required to trigger a violation of the right to life and what is happening. There should not be a requirement of previous deaths to justify a real harm to the right to life; it would accordingly be unproductive and inconsistent from human rights protection bodies.

New Zealand is not the only country to be reluctant to recognise environmental refugees,[124] showing a semblance of state practice. Thus, if national action is not the solution to grant more protection of environmental refugees, what else could step in?

4. SOLUTIONS TO BE DEVELOPED GRANTING PROTECTION OF CLIMATE CHANGE-INDUCED MIGRANTS

4.1 Amending the Refugee Convention

Since climate change-induced migration is a legal problem that needs a solution, scholars and academics have highly debated the possibility to amend the Refugee Convention to include climate change-related migrants. The different options would be to create a new asylum status for climate change-induced migrants or to include climate change in the idea of persecution or "harm" in the sense of the Convention for recognition of refugee status. Therefore, amending the Refugee Convention can appear as the most straightforward way to provide more protection for climate change migrants. Indeed, the Convention includes access to the judicial system, access to public education, and the right to work for recognised refugees. Also, the Convention is already implemented

123 Paragraph 3.

124 See, for example, *RRT Case No. 0907346* [2009] RRTA 1168, Australia: Refugee Review Tribunal (10 December 2009).

in 146 countries. Additionally, one can argue that the UNHCR, who already protects displaced persons by wars or conflicts, could protect those displaced by climate change on the same basis.[125]

However, there is a broad opinion amongst scholars that amending the Refugee Convention is not the right way to tackle the legal problem linked with climate change-related migration.[126] Despite the advantages that amending the Refugee Convention can bring, it will likely meet hard criticisms. One of them is the fear that amending the treaty will decrease and "devalue the current protection for refugees".[127] The current system of protection of refugees is already overwhelmed and opening the definition of refugee will likely add to the existing pressure.

There is a resistance from sovereign states to adopt a broader definition of the status of refugee. The different labels linked with displacement, such as "migrant", "refugee", or "asylum seekers" are all meaning bearing. For the UNHCR and many other organisations and scholars, the label "refugee" should only be used in cases linked with the Refugee Convention and its Protocol.[128] Therefore, a refugee is someone fleeing, not by choice, by fear of being persecuted and not being able to return.[129] On the other hand, according to Edwards, the label "migrant" designates people who flee by choice mainly to improve their lives and where return is possible.[130] These differences of meaning are also present in the media and national politics.

Consequently, the word "refugee" is charged with the responsibilities that the Refugee Convention imposes on states (right to education, provide identity papers, access to courts). Since refugee status is available in case of war or violence, to broaden its definition to climate change would increase the pressure on states which would inevitably have to welcome more people at their borders. There is also the fear that broadening the definition of refugee to climate change would lead countries to "make access to asylum programs even more difficult, inhibiting all potential applicants, not just [environmentally displaced persons], from qualifying for asylum".[131] To complicate the general access to asylum programmes would thus lead to a general worsening of the situation.

125 Warren, above n 8, at 2124.

126 Bonnie Docherty and Gianni Tyler "Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees" (2009) 33 Harv Envtl L Rev 349 at 361.

127 See, for example, Sumudu Atapattu "Climate Change, Human Rights, and Forced Migration: Implications for International Law" (2009) 27 Wis Int'l LJ 607 passim.

128 Adrian Edwards "UNHCR viewpoint: 'Refugee' or 'migrant' — Which is right?" (11 July 2016) UNHCR <https://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html>.

129 Edwards, above n 128.

130 Edwards, above n 128.

131 Warren, above n 8, at 2125.

The political tenor of the situation around the migrant crisis in the Mediterranean Sea confirms that some European countries are already under pressure. Vast migrant camps in Greece and Italy already show the difficulty with which countries deal with a massive influx of displaced persons.

4.2 Adapting Regional Migration Policies

An alternative to amending the Refugee Convention can be found in adapting regional migration policies. Hugo points out that it would be easier to change local migration policies rather than amending or even creating new international migration instruments.[132] Indeed, adapting regional instruments to climate change-induced migration can lead to a better adaptation to specific situations in each region, where climate migration and its consequences can vary profoundly.

Moreover, the adaptation of regional migration instruments would be easier to implement than in a global context since fewer countries are involved in the decision-making process, thus encountering less opposition. As well, regional context enables an assessment well adapted to the region, which is hardly achievable at the global scale.

Regional instruments also include cultural differences between countries.[133] Cultural integrity can be preserved when those displaced — for example, from small island states — have a say in their relocation.[134] The respect of culture might seem futile or superficial in comparison with a severe problem such as mass displacement due to climate change. However, cultural integrity is intrinsically linked to the principle of self-determination,[135,136] an essential principle of international law. People who are displaced should, thus, have a voice (at least through their government) on a relocation destination that suits them, and their economic, social and cultural development.

Quota-like schemes to dispatch climate change migrants based on historical emissions, for example, can constitute a fair solution.[137] However, Jane McAdam has argued that "a protection-like response may not necessarily

132 Hugo, above n 60, at 33.
133 Warren, above n 8, at 2135.
134 At 2135.
135 International Covenant on Civil and Political Rights [ICCPR] (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 1: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."
136 Warren, above n 8, at 2135.
137 At 2135.

respond to communities' human rights concerns, especially those relating to cultural integrity, self-determination and statehood".[138]

Nonetheless, detractors can emphasise that one problem with regional migration policies is that some regions would have a higher "burden" than others. Some areas where developing countries are highly vulnerable to climate change effects already show today, and these would not be helped from developed countries, which have less vulnerability. There is a need for international cooperation, even in a regional assessment of the crisis.

In practice, two regional bodies have implemented their expansion of the Refugee Convention's definition. First, the Organization of African Unity[139] expanded the definition to people leaving their country of origin "owing to external aggression, occupation, foreign domination or events seriously disturbing the public order in either part or the whole of his country of origin or nationality".[140] The other regional instrument is the Cartagena Declaration,[141] a non-binding declaration between Central American countries. The text includes a broadened definition to the "persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order".[142]

These two unique definitions include contexts where the "public order" is disturbed. Here, climate-related disasters can implicitly tally with disturbing the public, thus giving some protection for climate change-induced migrants, even though the protection was never explicitly intended.[143]

4.3 Case Law and International Organisations

More protection could be developed by both national and international case law as well as international organisations. A way that could bring more protection to climate change-induced migrants can spring from recent case law. The case of Ioane Teitiota is not the only one of its kind, and many other small islanders

138 Jane McAdam "Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer" (2011) 23(1) Int J of Refug Law 2 at 17.

139 Organization of African Unity *Convention Governing the Specific Aspects of Refugee Problems in Africa* (10 September 1969) [OAU Convention].

140 OAU Convention, art 1(2).

141 Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (22 November 1984) <https://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf>.

142 Cartagena Declaration, III.3.

143 Warren, above n 8, at 2123.

have used the same path to ask for more protection as climate-related displaced persons.[144]

Nevertheless, climate change litigation, in general, can also start to pave the way for more recognition and protection of climate change migration. In the last few years, climate change litigation has thrived and developed in numerous areas. Some cases give great examples of possible exploitations to the climate migration cause. Primarily, climate change litigation rests upon states' obligations and the standard of action for states.

The Torres Strait Islanders case is an example. The Torres Strait Islands are a group of low islands located north of Australia, between mainland Australia and Papua New Guinea.[145] Eight Torres Strait Islanders submitted a petition against the Australian government to the UNHRC. The plaintiffs allege that the government of Australia because it fails to address climate change, is violating their fundamental human rights under the ICCPR.[146] Indeed, the Islanders are asking Australia for more protection of the Torres Strait from climate change by, for example, funding adequate measures such as coastal defence, but mainly by reducing Australia's GHGs.[147] The case has not been answered by the Committee yet. Even if the Committee finds a violation, there is no possibility to force Australia to comply with its obligations,[148] but it would be a great and unique example of states' responsibility in climate change effects.

The Marshall Islands Initiative to the International Court of Justice (ICJ) is another example. The Republic of the Marshall Islands filed against the nine states in possession of nuclear weapon (US, UK, France, Russia, China, India, Pakistan, Israel and North Korea)[149] in 2014. The Marshall Islands claimed that all these governments were in breach of their obligations relating to nuclear disarmament under the Treaty on the Non-Proliferation of Nuclear Weapons as well as customary international law.[150] Of the nine nuclear-armed states, only the UK, India and Pakistan accepted the compulsory jurisdiction of the ICJ where the judgments are binding on the parties.[151] However, the ICJ found that it did not have jurisdiction in the case based on the absence of a dispute.[152] Alternatively, if the judgment on the merits would have been issued, it would

144 See, for example, *AC (Tuvalu)* [2014] NZIPT 800517-520 (4 June 2014); or *AD (Tuvalu)* [2014] NZIPT 501370-371 (4 June 2014).

145 ClientEarth.

146 ClientEarth.

147 ClientEarth.

148 ClientEarth.

149 Jürgen Scheffran, John Burroughs, Anna Leidreiter, Rob Riet and Alyn Ware *The Climate-Nuclear Nexus: Exploring the linkages between climate change and nuclear threats* (World Future Council, London, 2015).

150 Scheffran and others, above n 149.

151 Scheffran and others, above n 149.

152 International Court of Justice *Obligations concerning Negotiations relating to*

have been binding as to whether states were required to engage in negotiations towards the abolition of nuclear weapons.[153]

It might seem odd to use a case about nuclear disarmament obligations to illustrate climate change obligations, but both are linked. Both are recognised to create real security risks, but they are not recognised as interfering with each other.[154] Climate change, as treated previously, can contribute to global insecurity. Global insecurity increases the chance of a nuclear weapon being used, for example.[155] Besides, from climate change springs extreme weather events in all parts of the world, leading to environmental degradation and possible instability of nuclear installations, threatening their security.[156]

This case showed that the ICJ, with its binding power over states in contentious cases, can develop a new jurisprudence on climate change, changing their obligations and condemning breaches of said obligations. Obligations in the matter of climate change can be broadened to climate change migration. However, the problem of causality linking a state's responsibility in climate change and its effects on another vulnerable state remains.

The recent case of *Urgenda v The Netherlands* is also an example, quite successful, illustrating a possible change in the standard of action for states. In essence, the Supreme Court of the Netherlands declared that only to implement adaptation measures does not satisfy the state's duty of care. For the Court, mitigation (referring to all efforts made to reduce or prevent the emission of GHGs) is the only effective "remedy". The Netherlands has thus a duty to mitigate as quickly and as much as possible.[157]

Furthermore, the Court discarded the argument that the limitation of Dutch emissions would only reduce global emissions by a ludicrous amount, diminishing the importance of such efforts. The Court said that "it has been established that any anthropogenic greenhouse gas emission, no matter how minor, contributes to an increase in CO_2 levels in the atmosphere and therefore to hazardous climate change".[158] This case is an excellent example of a state's responsibility for their own GHGs and the effects these can have on the climate.

This type of litigation is nowadays abundant and has the potential to change the nature of states' obligations concerning climate change and thus, their human rights obligations linked with climate change. Indeed, national

Cessation of the Nuclear Arms Race and to Nuclear Disarmament (5 October 2016) (Marshall Islands v India; Marshall Islands v United Kingdom).

153 Scheffran and others, above n 149.

154 Scheffran and others, above n 149.

155 Scheffran and others, above n 149.

156 Scheffran and others, above n 149.

157 *Urgenda v The Netherlands*, Supreme Court of The Netherlands, Civil Division Number 19/00135 (20 December 2019) paras 4.73–4.75.

158 Paragraph 4.79.

and international courts can develop a new practice forcing states to take more action to mitigate but as well to adapt to climate change. Litigation can then open to climate change migration where states can see their obligations increase in that matter.

Another development would be the progress of the UN Security Council's practice. Indeed, as discussed previously, climate change can lead to security issues.[159] Climate change is widely considered as a threat multiplier exacerbating existing tensions and instabilities.[160] "Environmentally-induced human migration" could be a "conflict-prone impact of climate change", according to Christina Voigt.[161] Article 39 of the UN Charter[162] sets out the function of the Security Council, which is to "determine the existence of any threat to the peace, breach of the peace".[163] In the past, the Council used a broad interpretation of "threat to peace", including refusal to act against terrorism or internal conflict.[164] It means that threat to peace does not always amount to the use of force.[165] This is why an even broader interpretation of art 39 of the UN Charter could lead the Council to determine "whether an environmental threat amounts to a threat to peace", or not.[166] Thus, the Security Council might find a new role in cases of environmental migration.

4.4 Evolution of Customary International Law

The principle of non-refoulement is a principle of international law which is considered as customary international law. In General Conclusion no 25 of the Executive Committee of the UNHCR, the principle of non-refoulement is viewed as "progressively acquiring the character of a peremptory rule of international law",[167] arguing in favour of its *jus cogens* recognition. State practice also highlights a full and absolute application of the non-refoulement principle through abundant case law.[168] In contrast to the application of the

159 Scheffran and others, above n 149.

160 Christina Voigt "Security in a 'Warming World': Competences of the UN Security Council for Preventing Dangerous Climate Change" in C Bailliet (ed) *Security: A Multidisciplinary Normative Approach* (Nijhoff, Leiden, 2009) 294.

161 At 293.

162 Charter of the United Nations (24 October 1945) 1 UNTS XVI Chapter VII, art 39.

163 Article 39.

164 Voigt, above n 160, at 297.

165 At 297.

166 At 297.

167 Executive Committee 33rd session *General Conclusion on International Protection No. 25 (XXXIII)* (1982) UN Doc No 12A (A/37/12/Add.1).

168 See, for example, ECtHR *Chahal v The United Kingdom* Appl No 70/1995/576/662 (15 November 1996); *Saadi v Italy* Appl No 37201/06 (28 February 2008).

principle by art 33 of the Refugee Convention, the customary principle of non-refoulement applies to all persons, irrespective of their citizenship, nationality, statelessness, or migration status, and it applies wherever a state exercises jurisdiction or effective control, even when outside of that state's territory.[169] The principle applies to the entire international community, where the prohibition of refoulement is universal and non-derogable. From this, results the fact that the principle of non-refoulement applies to climate change-induced migration.

Here is a sensitive issue where climate change-induced displaced persons cannot be sent back to a territory where they would face a threat to their life, while not being legally recognised as refugees. Are they bound to live in camps without any possibility to work or settle down? This situation raises an issue concerning the principle of non-refoulement, which grants high protection from human rights violations in refugee and international human rights law. The principle of non-refoulement does not allow enough protection for climate change-induced migrants who find themselves stuck in the middle of a legal vacuum, in need of better recognition.

However, even with its utmost importance, some countries disrespected this principle when exercising extra-territorial pushbacks in the Mediterranean Sea: sea patrols rejected boats with migrants on board before they could even reach the shores of the national territory, where it would not have been possible to return them to their country, due to the principle of non-refoulement.[170]

It is arguable to consider how European states reacted to the migrant crisis in the Mediterranean Sea as representative of state practice and customary international law since it concerns a small part of the international community. The principle of non-refoulement remains an important one both in refugee and humanitarian law, and states which pushed back migrants on the sea were condemned by the international community.[171]

Besides state practice, the word of international courts and international organisations can give a hint on the evolution of international customary law. As treated previously, the innovative *Teitiota* case at the HRC sparked debates within the walls of the Committee; we can imagine that the very high threshold

169 Office of the High Commissioner for Human Rights *The Principle of Non-Refoulement Under International Human Rights Law* <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>.

170 Tineke Strik *Pushback policies and practice in Council of Europe member States* (Report, Committee on Migration, Refugees and Displaced Persons, Doc 14909, 8 June 2019).

171 See, for example, ECtHR *Hirsi Jamaa and others v Italy* Appl No 27765/09 (23 February 2012).

set by the Committee is not set in stone and can be lowered. A lowered threshold could allow humanitarian protection to climate and environmental migrants.

Even though the HRC is not a court, small clues can be interpreted as a drift in its legal interpretation of the ICCPR. The HRC can, indeed, use the legal vacuum surrounding the situation of climate change migration to strengthen its position and act as a "court" and create new jurisprudence. In August 2019 the Committee issued its decision concerning a complaint made by a family of rural workers against Paraguay in the *Portillo Cáceres v Paraguay* case.[172] The plaintiffs alleged that Paraguay failed to control adequately large "agribusinesses" in the area, thus leading to the widespread use of chemicals, resulting in a death and severe health problems in the neighbouring community.[173] The HRC found that Paraguay was in breach of ICCPR art 6 (the right to life) by failing to act following community members' reports of physical symptoms associated with the chemicals and the death of Portillo Cáceres.[174] The Committee also found a breach of art 7 (the right to private and family life and home) because Paraguay failed to protect the environment victims rely on for their livelihood.[175]

It is the first time that the HRC recognised that environmental harms could undermine rights protected by the ICCPR.[176] This decision has the potential to strengthen the recognition of environmental protection as fully part of human rights protection. In the near or far future, the HRC, or other institutions and treaty bodies, might rise as leaders in environmental migration cases involving states.

4.5 *De Lege Ferenda*

Regarding the international legal framework around climate change-related migration, there is a clear conclusion that there is no real protection of climate change and environmental migrants in *de lege lata*. There is thus a need to make their situation more legitimate and grant them more protection.

In my opinion, *de lege ferenda* would be inspired by the Mobility Convention treated in part 2 above. However, the Mobility Convention seems

172 *Portillo Cáceres v Paraguay* Communication No 2751/2016, Views of 9 August 2019, UN Doc CCPR/C/126/D/2751/2016.

173 At para 2.1.

174 At para 7.5.

175 At para 7.7.

176 International Justice Resource Center *UN Human Rights Committee Recognizes Environmental Harm as Rights Violation* (22 August 2019) <https://ijrcenter.org/2019/08/22/un-human-rights-committee-recognizes-environmental-harm-as-rights-violation/>.

a bit far from reality, even undemocratic at times. Indeed, the understanding of the Convention is reserved to an elite that is already qualified in the field of human rights and refugee law. Also, the Convention looks hard to implement in practice considering the length and specification of some articles. It is nonetheless the most comprehensive text existent in the field of migration since it includes climate change-induced migration.

There are already signs showing the effects of extreme weather events on Pacific Island states, with threats to health and life in some cases. The debate around "human agency" for the definition of persecution in refugee status is shifting the focus away from the real problem. It is, as of today, too complicated to find a direct legal causal link between climate change and human action. It is thus counterproductive to focus on the *how*; we should instead focus on the *now*. Today, people are being affected, enough that some are willing to go through the process of using national litigation pathways to find protection. Even international organisations are being called upon to fill the legal gap. These legislative procedures ask for much time, dedication and money from private actors.

An evolution to lower the threshold of protection regarding the right to life by the HRC would be the most straightforward way to grant more protection to climate change migrants. The urgency of the situation is already understood by some members of the Committee, and the fact that there are dissenting opinions shows that the shift might not be too far away. It might take years, but eventually and hopefully, climate migration will be protected, and states will have obligations towards climate change-displaced persons.

5. CONCLUSION

The analysis of the current situation through the international legal framework in part 2 of this article showed that there is indeed, as of today, no protection for climate change-induced displaced persons in the international scale, even though the gravity of the situation in some regions, such as in the Pacific, requires legal solutions. This legal vacuum is dealt with by non-governmental initiatives, but they do not carry enough weight to make a real difference in practice.

Although no protection is currently available in international law for climate change-induced migrants, there are hints on possible developments for protection. Recently, UN treaty bodies have admitted the possibility of a basis for protection on environmental grounds, with an unfortunately high threshold to meet. The subject of climate change-related migration is relatively new at the global scale and sparks off debates even within the UN on the admissibility of such a request. Through flourishing climate litigation, the practice of the

HRC as well as other institutions, and hints of developments in customary international law, some evolution towards a protection is slowly emerging.

However, the evolution of customary international law and the development of a protection framework will be a long process. Considering states' reluctance, the current global situation around refugees and migration, challenges to the procedural development of a protection mechanism for climate change-induced migration persist. The terminology itself around "climate change-induced migration" is debated today. The lack of consistent terminology makes it difficult to obtain reliable data on climate change migration. Without data, climate change migration can be overwhelmingly underestimated, marginalising one of the most vulnerable groups currently affected by climate change. That is why there is a need for a global consensus on terminology and status, enabling a better understanding of the subject, hopefully pushing forward climate change migration on the international agenda. As discussed in part 4, regional initiatives might be more adapted than international ones; nonetheless, the protection of climate change-induced migrants is required to build a sustainable future around the climate crisis ahead.