

Human rights of people living in States threatened by climate change

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1. *Introduction*

Sea level rise is a dramatic phenomenon of growing concern to the international community, as it will directly affect some 70 coastal and island States and indirectly affect almost all States due to problems arising from increased migration and lack of natural resources.¹

This is clear from the last IPCC (Intergovernmental Panel on Climate Change) Report which estimates that, if CO₂ emissions are not reduced, sea levels will rise from 60 cm to 1 meter by the end of the century (plus the risk of more frequent tropical storms).² Considering that 680 million people live in coastal areas, at a maximum height of 10 meters above sea level, the scale of the phenomenon and its global reach are obvious.

These issues obviously concern areas of international law such as the law of the sea; the continuity or loss of statehood; and the impact on the protection of human rights.

This contribution focuses on this latter aspect: after briefly recalling the rights that are likely to be further restricted due to sea level rises, the article will focus on the existence of a relationship between the obligation of States to protect human rights and the need to take measures to protect

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¹ See International Law Commission (ILC), 'Sea-level rise in relation to international law, recommendation of the Working-Group on the long-term programme of work' (2018).

² It has been estimated that even if emissions are reduced in accordance with the Paris Climate Agreement, there will be a rise in sea levels of 30-40 cm by the end of the century. See IPCC, *Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities* 411.



the environment from climate change; it will then focus on the legal framework for the protection of human rights and the issue of environmental migration. The aim is to highlight gaps in the international legal order and to identify more appropriate means for the protection of human rights.

2. *The impact of sea level rise on human rights and the relationship with States' obligations under international environmental law*

Sea level rise poses a serious threat to the enjoyment of fundamental human rights, such as the right to life and related rights to adequate food,³ to water⁴ and the right to the highest attainable standard of physical and mental health,⁵ as well as rights of a relative and, in some cases,

³ Art 11 International Covenant on Economic, Social and Cultural Rights (ICESCR). Its core content implies the 'availability of food in sufficient quantity and quality to meet the nutritional needs of individuals'. See *Committee on Economic, Social and Cultural Rights* (CESCR), General Comment No 12, *The Right to Adequate Food (Art. 11 of the Covenant)* (12 May 1999) para 8. There is a high probability that livelihoods will be disrupted due to storm surges, coastal flooding and sea-level rise in low-lying coastal areas and in small island developing states and other small islands. In particular, food production will be severely affected due to rising temperatures, changing rainfall patterns and salinity that will render previously productive land infertile. A significant impact will be felt, for example, by fisheries, which are a major source of food for many coastal regions, due to both increased frequency of extreme weather events and migration of fish species. See J McAdam, B Burson, W Kälin, S Weerasinghe, *International Law and Sea-Level Rise: Forced Migration and Human Rights* FNI Report 1/2016 (January 2016) paras 32-33.

⁴ The right to water is not expressly provided for in the ICESCR but is considered implicit in the right to an adequate standard of living or the right to the highest attainable standard of health (Art 12 ICESCR). In 2003, the CESCR, General Comment No 15, *The Right to Water (Arts. 11 and 12 of the Covenant)* UN Doc E/C.12/2002/11 (20 January 2003) recognized 'water' as an independent right as well as a prerequisite for the realization of other human rights. Some international instruments expressly recognise the right to water, eg, art 24 of the Convention on the Rights of the Child and art 14(2)(h) of the Convention on the Elimination of Discrimination against Women. It is already a reality that climate change and other climate-related extreme events, including flooding, cause water supply disruptions and adverse effects, and are also linked to saltwater intrusion into freshwater supplies.

⁵ Art 12 ICESCR. It is evident that rising sea levels and extreme weather events increase the potential for malnutrition and impoverishment with an impact on the right to health and that climate change can affect the intensity of a wide range of diseases (mosquito-borne diseases, water- and food-borne diseases, heat stress, etc). Consider also



derogable nature, such as the right to adequate housing⁶ and rights aimed at the protection of cultural identity.⁷ Indeed, rising sea levels not only pose a risk to the existence and safety of private dwellings, but also to the possibility of access to drinking water, due to more frequent saltwater intrusion, as well as to the possibility of having access to adequate food due to increased land sterility and impacts on fisheries. This is particularly evident when one considers the plight of inhabitants of small island States and exposed coastal areas who are most at risk of seeing these human rights compromised and who would probably be forced to move, both within their own countries and across national borders.

The prospect of total flooding of a small island State also threatens the right to self-determination of these peoples, which is an extremely important collective right that is closely linked to the ability of the affected populations to realise their individual human rights.⁸ In the case

the impact of climate change on general mental well-being due to changes in natural habitats as well as the unpredictability of phenomena.

⁶ Art 11 ICESCR. The basic elements of the right include legal security of tenure (including protection against forced eviction), availability of services, access to facilities and infrastructure, and habitability. See CESCR, General Comment No 4, *The Right to Adequate Housing (Art. 11 (1) of the Covenant)* UN Doc E/1992/23 (13 December 1991) para 8. The observed and predicted impacts of climate change will have several direct and indirect implications for the enjoyment of the right to adequate housing, and there is no doubt that poor quality housing will be the most vulnerable to extreme events, including flooding.

⁷ Art 27 International Covenant on Civil and Political Rights (ICCPR) and art 15 ICESCR. The notion of culture is broad and inclusive, 'encompassing all manifestations of human existence' and has been defined by UNESCO as 'set of distinctive spiritual, material, intellectual and emotional features of society or a social group and [...] encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, [and] traditions and beliefs'. See Universal Declaration on Cultural Diversity, Annex I (2001). It is clear that climate change will have significant implications for the enjoyment of the right to cultural identity, posing particular challenges for many indigenous peoples due to the loss of much of their land. Particularly significant in this regard is the UN Declaration on the Rights of Indigenous Peoples, UN Doc A/RES/61/295 (13 September 2007), which emphasises the interconnection between environment and cultural identity (see in particular art 8(1) which states that: 'Indigenous peoples and individuals have the right not to be subjected to forced assimilation or the destruction of their culture'). On this point F Francioni, 'Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity' (2004) Michigan J Intl L 1209, 1213 ff.

⁸ On this aspect see, A Maguire, J McGee, 'A Universal Human Rights to Shape Responses to a Global Problem? The Role of Self-Determination in Guiding the



of the land being flooded, it is also significant the risk of a new form of ‘climate statelessness’.⁹ Deprivation of nationality (or citizenship) without replacement by another nationality could have serious consequences in terms of preserving civil, political and socio-economic rights such as, for example, the right of entry, residence, return and diplomatic protection.¹⁰

It is clear that the effective enjoyment of the referred rights depends to a large extent on the measures taken by States to protect the environment from the damage caused by climate change. The existence of a strong relationship between the obligations of States under international environmental law and the rights potentially affected by climate change has been highlighted both by the Human Rights Committee (HRC) in General Comment No. 36 on the right to life¹¹ and by the European Court of Human Rights (ECtHR) in the *Cordella* case.¹² It is therefore worth briefly recalling the international law provisions aiming at protecting the environment. Significant in this regard are article 24 of the African Charter on Human and Peoples’ Rights, article 11 of the Additional Protocol to the American Convention on Human Rights in the Field of Economic, Social and Cultural Rights as well as some documents adopted within the framework of the United Nations. These include the 1972 Stockholm Declaration on the Human Environment, which enshrines man’s ‘solemn duty’ to ‘protect and improve the environment for the benefit of present and future generations’ (Principle 1) and the prohibition of transboundary pollution (Principle 22); the 1992 Rio Declaration on Environment and Development, which affirms the well-known principle of common and differentiated responsibility, as well as the 1992 UN

International Legal Response to Climate Change’ (2017) *Rev Eur and Intl Environmental L* 54.

⁹ See E Piguet, ‘Climatic Statelessness: Risk Assessment and Policy Options’ (2019) 45 *Population and Development Rev* 865.

¹⁰ See L Van Waas, ‘The Intersection of International Refugee Law and International Statelessness Law’ in C Costello, M Foster, J McAdam (eds), *The Oxford Handbook of International Refugee Law* (OUP 2021).

¹¹ HRC, General Comment No 36, *Article 6 (Right to Life)* (3 September 2019) para 62.

¹² ECtHR, *Cordella and Others v Italy*, App no 54514/13 and 54264/15 (ECtHR, 24 January 2019) para 156. For more details see, A Longo, ‘Cordella et al. v. Italy: Industrial Emissions and Italian Omissions Under Scrutiny’ (2019) *European Papers* 337 available at <www.europeanpapers.eu>.



Framework Convention on Climate Change, the 1997 Kyoto Protocol and the 2015 Paris Agreement. On the other hand, the European Convention on Human Rights (ECHR) does not contain a specific provision aimed at protecting human rights in relation to climate change.¹³ However, the Strasbourg judges, through an extensive interpretation of Article 2 on the right to life and Article 8 on private and family life, have recognized that States are burdened with positive obligations to prevent environmental risks that may endanger the right to life and affect the quality of private and family life¹⁴. These instruments impose positive obligations on States to keep greenhouse gas emissions within certain predetermined limits¹⁵ as well as positive obligations to conduct prior environmental impact assessment investigations during the execution of public works. States are also obligated to prevent and repress violations committed by private parties, as referred to in the *Cordella* case mentioned above.

3. *The legal framework on the protection of human rights in the event of rising sea levels: The State responsibility to protect and the international community's duty to cooperate*

With regard more specifically to the protection of human rights in the context of sea level rise, it should first be noted that there are no binding instruments concerning this topic. Despite these gaps in international law, some principles can be derived on the basis of existing international human rights standards, which have been referred to by the

¹³ It must be underlined that the Parliamentary Assembly of the Council of Europe called on 28 September 2021 for the adoption of an Additional Protocol to the ECHR expressly dedicated to the right to a healthy environment; see <<https://assembly.coe.int/LifeRay/SOC/Pdf/TextesProvisoires/2021/20210909-HealthyEnvironment-EN.pdf>>.

¹⁴ See *Öneryıldız v Turkey*, App no 48939/99 (ECtHR, 30 November 2004); *Budayeva and Others v Russia*, App no 15339/02, 11673/02, 15343/02, 20058/02 and 21166/02 (ECtHR, 20 March 2008); *Powell & Rayner v UK*, App no 9310/81 (ECtHR, 21 February 1990); *Hatton and Others v UK*, App no 36022/97 (ECtHR, 8 July 2003); *López Ostra v Spain*, App no 16798/90 (ECtHR, 9 December 1994).

¹⁵ On this issue see the important *Urgenda* case, in which the Dutch Supreme Court, in a judgment dated 20 December 2019, established the positive and 'individual' obligation of the Dutch State to reduce CO2 emissions into the atmosphere by at least 25% by the end of 2020.



International Law Association in the 2018 Sydney Declaration on the Protection of Displaced Persons in the Context of Sea Level Rise,¹⁶ by the International Law Commission (ILC) in its 2016 Draft articles on the protection of persons in the event of disasters¹⁷ as well as in recent reports of the Human Rights Council.¹⁸

The overarching principle is that States have a primary responsibility to provide protection and assistance to people residing in their territories and/or under their jurisdiction who are affected by sea-level rise.¹⁹ In fact, international human rights norms establish minimum standards of human rights protection, which are substantiated, for example, by the positive obligation to take appropriate and effective measures to reduce the risks of natural disasters by providing ‘a legislative and administrative framework that provides effective deterrence against threats to the right to life’.²⁰ It is recalled that, according to the provisions of the main human rights treaties, States have an obligation to ‘protect the right to life’ even in situations of ‘public emergency threatening the life of the nation’.²¹ The duty to protect the right to life may oblige States to adopt mitigation and adaptation measures which could include, in addition to the necessary reduction of greenhouse gas emissions, plans for crop diversification

¹⁶ See ILA Committee on International Law and Sea Level Rise, ‘Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise’ (2018) available at <www.ila-hq.org/images/ILA/Resolutions/ILAResolution_6_2018_SeaLevelRise_SydneyDeclaration.pdf>.

¹⁷ See ILC, ‘Draft articles on the protection of persons in the event of disasters’ (2016) which set out positive obligations of States to protect the human rights of persons under their control and/or jurisdiction as well as duties of international cooperation. Note that the Draft articles are designed, however, for environmental disasters that are not permanent in nature. These principles cannot be an adequate guide for States in the case of emergencies related to sea level rise, both because they were designed for situations of environmental disasters that are not permanent in nature and because they pay little attention to the issue of human rights protection. The only principles that expressly call for the protection of human rights within the Draft Articles are arts 4 and 5.

¹⁸ See, in particular, HRC, ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ UN Doc A/74/161 (15 July 2019).

¹⁹ Principle 4 of Sydney Declaration (n 16).

²⁰ This principle was affirmed, amongst others, by the ECtHR in *Budayeva and Others v Russia* (n 14) para 138.

²¹ See, in particular, art 6 ICCPR; art 15 ECHR; art 4 of the American Convention on Human Rights. On this point, see G Cataldi, ‘Art. 15’ in S Bartole, P De Sena, V Zagrebelsky (eds), *Commentario breve alla Convenzione europea dei diritti dell’uomo e delle libertà fondamentali* (CEDAM 2012) 555 ff.



and water desalination, as well as action to build dams, like in the case of Venice.²² Evacuation measures for people at imminent risk of damage from storms, floods and other sea level rise events are also particularly significant.²³ This obligation to evacuate takes the form of both a duty to facilitate voluntary evacuations and a duty to order forced evacuations, with the consequence that in such cases a tension will arise between the State's duty to protect life, on the one hand, and, on the other, the individual's right to freedom of movement and choice of residence,²⁴ and therefore his/her 'right to remain'.²⁵ Added to this tension are the significant problems associated with the loss of the cultural identity of relocated peoples, as this is often linked to the territories in which they reside, as well as the problems of interaction with different cultures and populations.

These concerns also emerge in a communication submitted to the Human Rights Committee in May 2019 by Torres Strait Islanders against Australia. The Islanders claimed that Australia's failure to reduce emissions, combined with the absence of adequate climate adaptation measures, violated their fundamental human rights, including their rights to life and culture. In particular, the applicants stated that sea level rise had already impacted on their cultural identity through the destruction of some cemetery sites²⁶ and that the likely relocation to the neighbouring

²² See art 7 of the 2015 Paris Agreement. In this sense, National Adoption Plans (NAPs) are a particularly significant tool for countries to identify and address their medium- and long-term priorities for climate change adaptation. It is interesting to note that many of these NAPs make explicit reference to the need to protect the human rights of the populations most affected by climate change. See, for example, the NAP adopted by Brazil in 2016 in which, in addition to a generic reference to human rights, the right to food (para 10.2-3), water (para 10.4, Guideline 1), housing (para 3) as well as the rights of indigenous peoples (Guideline 4) are recalled (text available at <<http://extwprlegs1.fao.org/docs/pdf/bra186564.pdf>>).

²³ *Budayeva and Others v Russia* (n 14) para 152.

²⁴ See art 13 of the Universal Declaration of Human Rights; art 12 ICCPR; Protocol No 4 to the ECHR, as modified by Protocol No 11 art 2.

²⁵ HRC, General Comment No 27 (67), *Article 12 (Freedom of movement)*, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999).

²⁶ In particular, due to severe flooding in 2006, the *Warraber* and *Saibai* cemeteries were washed away, causing much distress to the community. For more details, see D Green, 'How Might Climate Change Affect Island Culture in the in the Torres Strait?' CSIRO Marine and Atmospheric Research Paper (November 2006).



Cape York region would pose risks related to interaction with the Aboriginal population living there.²⁷

Therefore, it is preferable for States to adopt preventive measures such as planned relocations, seeking to involve local populations in advance in order to find a solution with the least possible impact on human rights.²⁸ A good example of this is Fiji, where the authorities have already relocated 4 villages due to sea level rise and another 80 communities are set to be relocated in the future.²⁹ Another innovative strategy has been recently promoted in Bangladesh by creating ‘migrant friendly’ cities to support the decision to stay in the country, a solution that could work for countries that have very little space for retreat from vulnerable hotspots.³⁰

Finally, it should be emphasized that the ‘primary’ responsibility of States must be complemented by the responsibility of the international community to cooperate with countries affected by sea-level rise,³¹ with particular attention on Small Island Developing States, which will be disproportionately affected by sea-level rises.³² Their ability to respond is

²⁷ For more details on the case, see Client Earth, Press Release on Torres Strait FAQ available at <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190513_Not-Available_press-release.pdf>.

²⁸ It is clear that planned relocations need to be approached with considerable care and caution with a necessary balance of the human rights of the relocated groups with those of the communities they are relocating to. In this regard reference is made to the *Sendai Framework for Disaster Risk Reduction 2015-2030* para 30. On this topic see J McAdam, E Ferris, ‘Planned Relocations in the Context of Climate Change: Unpacking the Legal and Conceptual Issues’ (2015) *Cambridge J Intl and Comparative L* 137.

²⁹ See A Piggott-McKeller et al, ‘Fiji’s Climate Change Refugees: Four Communities Have Already Had to Relocate and More Are Set to Follow’ *Newsweek* (30 April 2019).

³⁰ See IPCCAD, *Building Climate-Resilient, Migrant-Friendly Cities and Towns* (July 2018).

³¹ It is worth recalling that the duty to cooperate is a fundamental principle of international law and is a central objective of the United Nations Charter (arts 1.3 and 56), reflected in numerous international instruments (Rio Declaration and Tokyo Protocol as well as ICESCR arts 2, 11, 15, 22 and 23). In the case of environmental disasters, States must strengthen international cooperation among themselves and with relevant international organisations and agencies to assist, prevent, avoid and respond to all types of risks. Such cooperation should include assistance in evacuating people where necessary to save lives, technical and financial support and facilitation of cross-border migration by expanding access to temporary protection options. For more details, UNHCR Division of International Protection, ‘Guidelines on Temporary Protection or Stay Arrangements’ (February 2014).

³² See Parliamentary Assembly of the Council of Europe, *A Legal Status for Climate Refugees*, Resolution 230(2019) (3 October 2019) para 5.4.



already hampered by their geographical isolation, dependence on climate-sensitive sectors such as agriculture, limited natural resources and fragile economies.³³

4. *Environmental migration: The gaps in the legal framework*

Of particular relevance is the issue of forced migration in the event of rising sea levels and the lack of specific protection for environmental migrants. A significant reference to the protection of environmental migrants is contained in the 2018 UN Global Compact for Migration,³⁴ where it is specified that if national measures for adaptation and resilience to natural disasters are not sufficient, States have an obligation to cooperate to identify, develop and strengthen solutions for environmental migrants.³⁵ Also significant is the reference in the 2015 Paris Agreement, whose Preamble reminds States that, in their efforts to combat climate change, they must take into account the effects of their actions on human rights, particularly those of migrants. In the Paris Agreement, a Task Force on Displacement was also set up, involving both the signatory States to the Agreement and a number of UN agencies (e.g., UNHCR and IOM). The aim of this is to collect as much data as possible on the current situation of people displaced by natural disasters and to encourage States to combat this phenomenon and to ensure decent conditions for these people.³⁶

Another instrument that may be relevant for the protection of environmental migrants at EU level is the Temporary Protection Directive (Directive 2001/55/EC), recently activated to accommodate Ukrainian

³³ Note that the ILC's Draft articles on the protection of persons in the event of disasters highlight the duty of states affected by a natural disaster to seek assistance from the international community 'where appropriate', and also affirm the 'fundamental value of solidarity in international relations and the importance of strengthening international cooperation in relation to all phases of a disaster' (art 11).

³⁴ The Compact was approved by the UN General Assembly on 19 December 2018. For a commentary, see G Cataldi, A Del Guercio, 'I Global Compact su migranti e rifugiati. Il Soft Law delle Nazioni Unite tra spinte sovraniste e potenziali sviluppi' (2019) *Diritto, immigrazione e cittadinanza*.

³⁵ See Objective 2(i) and Objective 5.

³⁶ For further information see: <<https://unfccc.int/process/bodies/constituted-bodies/WIMExCom/TFD>>.

refugees following the invasion of Ukraine by Russia in February 2022.³⁷ This directive, once activated, provides for an obligation on States to issue a temporary residence permit, valid for one year, which may be extended for a maximum of a further two years, if the circumstances of insecurity in the country of origin continue over time.³⁸

Although environmental migrants are sometimes referred to as ‘climate refugees’, this expression is misleading, as environmental migrants cannot be recognized as refugees under the known requirements of Article 1 of the 1951 Geneva Convention. Nevertheless, the UNHCR has recently emphasised that the environmental element should be a factor to be taken into account in the assessment of an asylum application when it is connected to acts of persecution.³⁹ It is certainly possible to interpret these requirements broadly in case law, but this would only apply to a specific case and would not ensure (as would be desirable) formal legal recognition of refugee status for migrants fleeing natural or environmental disasters.

The other fundamental rule of the Geneva Convention, namely the prohibition of refoulement provided in Article 33, is a different matter. In fact, this principle has a much broader scope than what is strictly provided for by the Geneva Convention, as it is also provided for by other international treaties, such as the UN Convention against Torture (Article 3) and the Convention on Enforced Disappearance (Article 16). Furthermore, as the ECtHR and the HRC have repeatedly clarified, the international standards on the protection of the right to life also have an extraterritorial scope. In this regard, reference can be made to the well-

³⁷ On the directive see A Skordas, ‘Temporary Protection Directive 2001/55/EC’ (2016) EU Immigration and Asylum Law 1055.

³⁸ Despite the fact that the Directive mentions some of the main causes of such mass influxes of migrants from one State to another, this list is not exhaustive and can therefore be expanded to include other causes of mass migration, e.g., environmental disasters. Article 7 of the Directive also allows Member States to extend the categories of persons to whom temporary protection may be granted and this is a further element of flexibility in the Directive.

³⁹ See UNHCR, *Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters* (2090). At p 5-6 the UNHCR mentions the persecution that may arise from the deliberate omission of a State in refusing to assist part of its population, for example an ethnic or religious minority, affected by an environmental disaster.



known ECtHR case *Hirsi*⁴⁰ and to the HRC General Comment No 36 in which it is stated that:

‘the obligation not to extradite, deport or otherwise transfer, pursuant to Article 6 of the Covenant may be broader than the scope of the principle of non-refoulement under international refugee law, since it may also require the protection of aliens not entitled to refugee status. States parties must, however, 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’.⁴¹

It is exactly this rule which was subject to extensive interpretation with reference to the condition of environmental migrants in the case of *Teitiota v New Zealand*, decided by the HRC on 24 October 2019.⁴² It is necessary to briefly recall the facts that led to the decision in question. Mr Teitiota, a citizen of the Republic of Kiribati, left his home State because the rising ocean level, in addition to the risk of extinction of the atoll itself, had created a situation of internal unrest among the inhabitants who sought to occupy safer land in the interior of the island. In addition, saltwater contamination had significantly reduced the amount of

⁴⁰ *Hirsi Jamaa and Others v Italy*, App no 27765/09 (ECtHR, 23 February 2012) paras 70-75. For further information on the decision and on the criteria for the exercise of extraterritorial jurisdiction see A Liguori, ‘La Corte europea dei diritti dell’uomo condanna l’Italia per i respingimenti verso la Libia del 2009: il caso Hirsi’ (2012) 95 *Rivista di Diritto Internazionale* 415.

⁴¹ *Hirsi Jamaa and Others v Italy* (n 40) para 31. See also HRC, General Comment No 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004).

⁴² HRC, *Ioane Teitiota v New Zealand*, UN Doc CCPR/C/127/D/2728/2016 (7 January 2020). On this decision see, among many others: S Behrman, A Kent, ‘The *Teitiota* Case and the Limitations of the Human Rights Framework’ (2020) 75 *QIL-Questions Intl L* 25; M Montini, ‘Verso una giustizia climatica basata sulla tutela dei diritti umani’ (2020) *Ordine internazionale e diritti umani* 507; A Maneggia, ‘Non-refoulement of Climate Change Migrants: Individual Human Rights Protection or ‘Responsibility to Protect’? The *Teitiota* Case Before the Human Rights Committee’ (2020) 14 *Diritti umani e diritto internazionale* 635; M Ferrara, ‘Looking behind the *Teitiota v. New Zealand* case: Further Alternatives of Safeguard for ‘Climate Change Refugees’ under the ICCPR and the ECHR?’ in G Cataldi, A Del Guercio, A Liguori (eds), *Migration and Asylum Policies Systems. Challenges and Perspectives* (Editoriale Scientifica 2020) 291 ff.; E Sommaro, ‘When Climate Change and Human Rights Meet: A Brief Comment on the UN Human Rights Committee’s *Teitiota* Decision’ (2021) 77 *QIL-Questions Intl L* 51.

fertile land and made drinking water an increasingly scarce resource. Due to these circumstances, the applicant moved with his family to New Zealand, where he applied for asylum invoking the 1951 Geneva Convention on refugee status. However, the New Zealand Immigration Court (Judgment of 25 June 2013) rejected the application for asylum on the grounds that the applicant had failed to adduce evidence that he was at risk of physical suffering as a result of the violent situation described, or that he had experienced difficulties in gaining access to drinking water and food. The decision was upheld by both the New Zealand Court of Appeal in 2014 and the Supreme Court in 2015, the latter pointing out that the Government of Kiribati had in no way failed to protect its citizens in relation to sea level rise issues.⁴³ Having exhausted domestic remedies, Mr Teitiota submitted an individual communication to the HRC under Article 5(4) of the Optional Protocol to the ICCPR alleging that New Zealand's deportation to Kiribati violated his right to life and the prohibition of torture and inhuman and degrading treatment under Articles 6 and 7 of the ICCPR. On the assumption that the applicant's allegations did not relate to a hypothetical future harm, but to a real situation, the Committee stated that the risk of a violation of the right to life had been sufficiently proven for the complaint to be admissible.⁴⁴

Turning to the merits, the Committee considered that the situation encountered in the Republic of Kiribati, even if difficult, was not such as to constitute a real, individualized and reasonably foreseeable risk to the right to life of Mr Teitiota and his family, substantiating at most a generalized problem.⁴⁵ The Committee, while recognizing that 'the right to life also includes 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',⁴⁶ stated that the main negative effects of climate change, including the risk of total inhabitability of the country of origin (Kiribati), would only

⁴³ See F Maletto, 'Non-refoulement e cambiamento climatico: il caso Teitiota c. Nuova Zelanda' SIDIBlog (23 March 2020).

⁴⁴ HRC, *Ioane Teitiota v New Zealand* (n 42) para 8.5.

⁴⁵ The Committee further submitted that the applicant had not provided sufficient information to indicate that the supply of drinking water was inaccessible, insufficient or unsafe (para 9.8) nor that there was a risk of being exposed to a situation of indigence, food deprivation and extreme insecurity because even if more difficult, cultivation was not impossible and Mr Teitiota could have requested financial assistance from the Republic of Kiribati (para 9.9).

⁴⁶ *ibid* para 9.4.



be realized within 10-15 years and in the absence of significant corrective measures by the State concerned ‘with the assistance of the international community’.⁴⁷ The innovative significance of the decision lies in the fact that the Committee, recalling General Comment No 31 on the nature of the general obligations incumbent on States Parties,⁴⁸ stated that the reasonable foreseeability of a natural event that may threaten the right to life or the enjoyment of life in a dignified manner, coupled with the inability of the State of nationality to fulfil its positive obligations to protect, generates for third States a negative obligation not to refuse entry to the country in question. However, in order for this obligation to be operative there must be a real risk of an irreparable violation of the right to life and such risks must be ‘personal in nature and cannot derive merely from the general conditions in the receiving State, except in the most extreme cases’.⁴⁹

It is a particularly high-risk threshold which, in the case of risk deriving from the general conditions of the State, must take the form of the total inhabitation of the country or even the collapse of State structures.⁵⁰ It should also be noted that the rising sea levels in Kiribati have resulted in a shortage of habitable space, leading to violent territorial disputes, freshwater contamination and the destruction of food crops. Even if the State is taking measures to mitigate climate change, the current situation appears to be incompatible with the standards for the enjoyment of a decent life referred to by the Committee itself. The protection of the right to life must not be delayed to be effective and therefore it should not be necessary to wait for high rates of mortality or generalised violence to trigger the non-refoulement obligation. Furthermore when a range of rights are impacted,

⁴⁷ *ibid* para 9.12: ‘the time frame of 10 to 15 years, as suggested by the author, could allow for intervening acts by Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population’. In this passage, the Committee seems to be revisiting and adapting the doctrine of the responsibility to protect to the consequences of climate change, particularly with regard to the role of the international community.

⁴⁸ HRC, General Comment No 31 (n 41).

⁴⁹ HRC, *Ioane Teitiota v New Zealand* (n 42) para 9.3.

⁵⁰ See A Maneggia (n 42) 640. It should be noted that there is a lack of international consensus on how significant a disaster must be to be considered as such and that a specific determination by the UN General Assembly or UHNCR would be desirable.

as in the *Teitiota* case, a lower risk threshold is more appropriate.⁵¹

It is interesting to note that the principle affirmed by the HRC was quickly applied in Italian jurisprudence by the Court of Cassation in 2021.⁵² With regard to the influence that the UN Committee's decision may have on the jurisprudence of international courts, it will be interesting to note what may happen in the ECtHR' case law. To date, this Court has not yet been seized of applications directly concerning environmental migrants; however, its jurisprudence on environmental as well as migration issues shows how the Convention is a living instrument that adapts to new and different needs and through the extensive interpretation of the Strasbourg judges it is likely that provisions such as Article 2 ECHR could also be applied in relation to the issue of environmental migration.

5. Conclusions

The international legal framework for the protection of the human rights of populations affected by sea level rise and for environmental migrants is inadequate. In addition to the considerations already set out, it should be noted that environmental migrants are in a particularly vulnerable situation because they are excluded both from the protection offered by the Geneva Convention and, at the European level, from subsidiary protection.⁵³ Neither the possible recognition of temporary protection

⁵¹As Judge Muhumuza has correctly expressed in his dissenting opinion to the *Teitiota* decision the current situation in Kiribati is sufficient to consider the risk to the right to decent life integrated for the purposes of non-refoulement. The Judge stated that it would be totally 'counterintuitive to the protection of life to wait for deaths to be very frequent and considerable in order to consider the threshold of risk as met': HRC, *Ioane Teitiota v New Zealand* (n 42) Individual opinion of Committee Member DL Muhumuza (dissenting) Annex 2 para 5. See also S Behrman, A Kent *The Teitiota Case* (n 42) 25 ff.

⁵²Court of Cassation (Second Civil Section), Order of 24 February 2021 No 5022. For a commentary, see F Perrini, 'Il riconoscimento della protezione umanitaria in caso di disastri ambientali nel recente orientamento della Corte di Cassazione' (2021) *Ordine internazionale e diritti umani*.

⁵³The need to include environmental migrants in the scope of the subsidiary protection, in addition to migrants fleeing from war situations, has been highlighted in the study '*Climate refugees*'. *Legal and policy responses to environmentally induced migration*, prepared in 2011 by the International Centre for Migration Policy Development at the request of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs.



envisaged by some Member States nor the Temporary Protection Directive provides adequate protection. This because of the temporary nature of any residence permits and the uncertainties surrounding the application of the Directive.⁵⁴ It is necessary to adopt more effective regulatory responses, either through the conclusion of an *ad hoc* international treaty or by extending the scope of existing legal instruments (e.g. widening the scope of beneficiaries of international protection under the Geneva Convention and Directive 2004/83/EC). Efforts are also needed to counter the risk of statelessness for inhabitants of small island States whose statehood is at risk. States should strive for wider ratification of the 1954 and 1961 Conventions on Statelessness and should negotiate special agreements to address nationality issues. An appropriate measure could be to provide for the exercise of administrative and governmental functions within another State and to establish inter-state agreements on 'dual nationality'.

It is clear that a phenomenon as complex as climate change requires collective and coordinated responses. The adoption of preventive measures will be particularly important as will the cooperation to protect persons affected by sea-level rise. This may include scientific and technical assistance and financial assistance to small island States which are likely to disproportionately suffer the consequences of climate change because of their particularly vulnerable situation. Regional cooperation will also be extremely important, especially in the Pacific, but only through a global solution will it be possible to offer protection to displaced people.

⁵⁴ As regards the time limits for temporary protection, consider for example, with reference to the Italian legal system, art 20*bis* of the Consolidated Immigration Act, according to which the residence permit in cases of natural disaster is valid for six months, renewable if the conditions of serious disaster persist. As regards the uncertainties in the application of the Temporary Protection Directive, only activated in the current Russian-Ukrainian conflict, it should be noted that the definition of displaced persons does not include environmental refugees and what constitutes a 'mass influx' is not clear because no specific threshold is given.