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The Impasse of International Law on Climate-Induced Migration: Recent Developments and the United Nation's January 2020 Decision on Climate Refugees

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ABSTRACT *This paper aims to lay out the challenges and potentially fatal conflicts inherent in the emerging attempts to respect state sovereignty while crafting progressive and truly responsive sets of approaches to a sui generis global problem like the climate crisis. It examines general approaches and practices on climate refugees within the scope of a critical legal framework, taking as an example the 'Ioane Teitiota' case that attracted public attention as an international issue starting in 2013. In addition, we will examine from a legal viewpoint and with an eye to future consequences, the January 2020 United Nations' historical decision on climate refugees. We adopt Martti Koskennimi's terms, ascending and descending justifications, to show the oscillation that the legal mind experiences in between order and will. In this paper, we will claim that the legal mind fights a battle that eventually ends up with a deadlock due to the very structure of modern law.*

Keywords: Climate Change, Climate Crisis, Climate Refugees, International Law, Kiribati

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Introduction

Recent trends show that there has been a gradual increase in climate-induced migration around the world. In 2018, the United Nations General Assembly (UNGA) warned that "climate, environmental degradation, and natural disasters increasingly interact with the drivers of refugee movements."[1] The Internal Displacement Monitoring Centre (IDMC) analyzed data from 148 states and released the finding that 17.2 million people were displaced internally in 2018 as a result of climate change, whereas 10.8 million people were displaced due to violent conflicts.[2] Following this, approximately seven million people left their homes due to climatic reasons in the first half of 2019.[3] However, Myers predicted in 2002 that "200 million people overtaken by sea-level rise and coastal flooding, by disruptions of monsoon systems and other rainfall regimes, and by droughts of unprecedented severity and duration,"[4] would emigrate in the coming years, while the IDMC demonstrated that around 265 million people already had to leave their country of origin owing to climate-related disasters between 2008-2018.[5]

As climate change is associated with the increase in migration, it raises the question of whether the existing legal concept of refugees is adequate in the face of this challenge. The present legal framework is based on the 1951 Geneva Convention, which while critical for protecting refugee rights, cannot account for the status of climate refugees due to the novelty of the concept, in practice as well as in literature. Therefore, any new decision that could constitute case law in terms of refugee law is quite important. Taken together all these points raises the important question of how difficult it is to establish the objective legal status of climate refugees, an issue that constitutes the main topic of the argument of the study. In this paper, we will provide a legal and political review of climate-induced migration by examining the tension between state sovereignty and human necessities. In other words, by examining the relationship between climate-induced threats and sovereignty, we attempt to show how climate-induced problems could also undermine state sovereignty, which is deemed as the sole regulatory principle of the state system.

In doing so, we ask whether sovereignty is being jeopardized because of external physical effects such as climate change by investigating the case concerning Mr. Ioane Teitiota's, who sought refugee status from New Zealand in 2013, citing as causes of climate change, rising sea levels, and water shortages in Kiribati, and the rejection of his application in 2015, application to New Zealand for protection as a climate refugee, as this was the first of its kind. Ultimately, we conclude that the sole regulatory and indispensable principle of the state system, i.e., sovereignty, has been challenged in its primary position as the highest principle that denies any rule restricting it. The environment has been forcing sovereignty and sovereign states to adapt to new situations. Therefore,

in the legal sense, there are attempts by some authorities to mediate between state sovereignty and threats external to the state system, like climate change. We argue that this way of thinking ultimately will deadlock the system.

Climate has always naturally changed throughout history but for the first time, the world has been faced with human-induced climate change

In the next section, we will discuss the relationship between climate change and migration. Additionally, the paper contains a general background about climate change in Kiribati, focusing on how climate change affects this small island country in the Pacific (the Archipelagic State). After we analyze the case of Ioane Teitiota, we finally examine, through the field of migration studies, the historical decision by the UN in January 2020 on climate-induced refugees, that could lead to changes in state practices and therefore court decisions.

Environmental Migration: Relationship between Climate Change and Migration

Climate has always naturally changed throughout history but for the first time, the world has been faced with human-induced climate change. Even though this period has been called the 'Anthropocene Epoch' by many scholars,[6] this label is not yet officially accepted by the International Union of Geological Sciences (IUGS) and the International Commission on Stratigraphy, which specifies global units and determines the global time scales to fix the global standards.[7] The Industrial Revolution has been accepted as a turning point of human-induced climate change due to being associated with high carbon emissions and the production of various pollutants.[8] Although a significant part of the emissions is caused by fossil energy consumption, urbanization, and land use at various scales also have an important effect on climate change.[9] The causal role of emissions in climate change has been exemplified by greenhouse gases (GHGs) which have caused the 'greenhouse effect.'[10] To date, various studies have assessed the increase of atmospheric CO^2 since the Industrial Revolution.[11] For instance, the 2019 special report of the Intergovernmental Panel on Climate Change (IPCC) titled "The Ocean and Cryosphere in a Changing Climate" illustrates this point clearly.[12] According to the report, the level of global temperature has increased by 1.0 °C since pre-industrial levels. It means that the consequences of the current 1.0 °C increase in global warming are already with us in the form of extreme weather events, rising sea levels, the melting of the arctic ice, deforestation, and others.

Farbotko and Lazrus maintain that climate change is both a 'discursive' and 'material' phenomenon, hence it is essential that analyses of the regions af-

The status of climate-related refugees has begun to attract attention globally, however, there is a lack of a clear definition and protection within international law

fected by climate change should also consider the sociological, psychological, and biological aspects, otherwise results only obtained with scientific data may cause misinformation.[13] In this context, the concept of 'climate-induced migration' has emerged as a new phenomenon since the Cold War.[14] As Betsy Hartmann notes, the narratives of climate-induced migration "seem very much like old wine in a new bottle," as even 'migration' itself is as old as human history. The 2020 World Migration Report has highlighted factors that are associated with climate change and migration.[15] Previous approaches have rarely accepted a linear connection between climate change and migration due to the confounding interaction with economic, cultural, political, and demographic conditions that encourage people to either move or continue to stay in a locale.[16]

Antonio Guterres, then the UN High Commissioner for Refugees, maintained that climate change is one of the main driving forces of displacement with its direct impact on the environment, and as a trigger for extreme poverty and conflict.[17] Since 2018 there is a growing body of literature on how climate change and the ecological balance directly impact migration by reason of climate-related hazards, based on cases such as those of Mozambique, the Philippines, China, India, and the United States of America.[18] It is almost certain that the rates of climate-induced migration will increase in the near future, as even in 2018, almost three out of four of 144 cases of displacement movements had been caused by climate change, while only one of 55 cases were caused by conflicts and violence.[19]

While natural disasters such as the rise of the sea level in the Pacific, desertification in Africa, hurricanes in the U.S., have been mainly discussed in terms of material phenomenon, the legal status of displaced people, and even the redefinition of 'refugee' has begun to be discussed from the perspective of discursive phenomenon. Even though numerous terms are used to describe climate-induced migrants, such as climate refugee, ecological refugee, or environmental refugee, it was not until the late 1970s that research into climate-induced migration or displacement was considered worthy of scholarly attention. The term 'ecological refugees' was first used by Lester, Mcgrath, and Stokes in 1976.[20] They emphasize that the environmental impact of high human and livestock populations could result in desertification and correspondingly, migration rates would increase, and this process would continue to spread around the world as a cycle. The concept of 'environmental refugee'[21] is first used and popularized by Essem el-Hinnawi in 1985[22] and Myres in 1995.[23] According to Myres, these were "people who can no longer gain a secure livelihood in their

homelands because of drought, soil erosion, desertification, deforestation, and other environmental problems."[24] As a result, people desperately look for new places as permanent and semi-permanent safe abodes, either through force or voluntarily, as internally or externally displaced persons.

This much is certain, that climate-induced migration has become one of the major concerns for international law. The status of climate-related refugees has begun to attract attention globally, however, there is a lack of a clear definition and protection within international law. It is this incongruity between reality, interest, and legal status that creates problems. There are many definitions of 'refugee' that are used in studies but in practice, the label has not worked legally for a long time. Before discussing this issue, we wish to lay the groundwork for our case study by discussing the case of climate change and Kiribati.

Ioane Teitiota's Refugee Application to New Zealand and Debates on Climate-Related Refugees

A Sinking Island in the Pacific: Kiribati

> I am the same as people who are fleeing war. Those who are afraid of dying, it is the same as me.[25]

In March 2018, the World Bank published a report which focuses on the three regions most affected by climate change: Sub-Saharan Africa, South Asia, and South and Central America. The report points out that approximately 143 million people from these regions will be displaced by 2050.[26] A special report of the IPCC on "The Ocean and Cryosphere in a Changing Climate" highlights that as current greenhouse emissions continue to increase above pre-industrial levels, the world inescapably will witness a high percentage of ice sheets melting both in the Arctic and Antarctica.[27] Increases of the sea level have accelerated since 1870, averaging a 3.5 mm annual rate. This means regions below sea level will be the first to be affected in the 21st century, which will bring changes to the lives of potentially hundreds of millions of people living in coastal areas.[28] Hoesung Lee, Chair of the IPCC, warns that people may think that the Arctic, Antarctica, and high mountains are too far away to affect their lives, "but we depend on them and are influenced by them directly and indirectly in many ways –for weather, and climate, for food and water, for energy, trade, transport, recreation, and tourism, for health and wellbeing, for culture and identity."[29]

The Pacific region is among the regions most affected due to the threat posed by climate change to states made up of small islands located there, like the Marshall Islands, Tuvalu, and Kiribati, whose lands are only above three to four meters from the present sea level.[30] The Republic of Kiribati, comprised

Kiribati from the air, only a narrow strip of land in the middle of the ocean. With an average age of 22, Kiribati's future generations are at risk of potentially lethal sea level rise.

JONAS GRATZER / LightRocket via Getty Images

of 33 atolls (many of them uninhabited), is located at the center of the Pacific Ocean. The source of livelihood for the people mostly depends on natural sources such as indigenous fishery, tree crops, coconut trees, and pandanus trees. Consequently, a healthy ecological balance is essential for indigenous people to lead healthy and sustainable lives. This is put at risk by rising sea levels, increased storm damage, and their impacts on agriculture, and water usage. As the sea level rises, the atolls which are a source of clean water cannot carry clean water, destroying the crop-growing lands, and damaging access to clean water for humans.[31] According to the World Health Organization (WHO), between 50-100 liters of clean water should be consumed per person per day, but in case of water shortage, 20 liters per person per day is the minimum requirement for clean water. In Kiribati, the government highlights that their infrastructure provides far below the 50 liters limit.[32]

Food security in Kiribati is also put at risk. The water shortage, long-term droughts, and ocean acidification (overproduced carbon is absorbed in the oceans, causing it to acidify), and extreme weather have caused damage to fisheries, agricultural production, forestry, and clean water production in Kiribati.[33] According to the WHO, the recommended daily calorie consumption is 2000 calories for women and 2500 calories for men, but a recent study shows that the average calorie consumption in Kiribati is under 1,875 calories.[34]

Kiribati simply does not have the available funds to face these challenges. According to World Bank data, Kiribati had the world's lowest per capita gross

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domestic product (GDP) in 2018, and predictions are that the country will also suffer from economic damage to the tune of $8-16 million by 2050. This is for a country with an annual GDP of about $47 million.[35] The rising sea levels, natural hazards in conjunction with economic problems, food shortages, the issue of water salination, and health problems make it increasingly difficult for the population to secure safe conditions, fostering internal and external migration.

It appears that Kiribati is a very fragile region in terms of human security which in turn raises the issue of legal responsibility. In the following part, we will examine the case of Ioane Teitiota from Kiribati and his application for refugee status that brings these issues to the fore.

Ioane Teitiota: The First 'Climate-Related' Refugee?

Ioane Teitiota, from Kiribati, is the first person in the world who was about to be granted climate refugee status. He and his wife moved to New Zealand in 2007 and had three children there, but could not get citizenship due to the Citizenship Act of 1997 (1977, No. 61). According to Article 6 of the Citizenship Act, a person can be given citizenship if s/he was born after 2006, and at least one of her/his parents was a holder of New Zealand citizenship. Additionally, one of her/his parents should be "entitled in terms of the Immigration Act 2009 to be in New Zealand indefinitely, or entitled to reside indefinitely in the Cook Islands, Niue, or Tokelau."[36] According to official records, after their visas expired in 2010, they had to apply for refugee status based on climate-related disasters (not only physically, but also economically and socially) to avoid deportation under the Immigration Act of 2009,[37] which is in accordance with the 1951 Geneva Convention.[38] According to his interview at the *BBC*, Ioane Teitiota claimed that he and his family had struggled due to economic troubles caused by rising sea levels, and had decided to apply for refugee status in New Zealand.[39]

The application of Mr. Teitiota to be granted refugee or protected person status was based on the UN Refugee Convention, and the International Convention on Civil and Political Rights (ICCP), parts of which were incorporated into New Zealand law, and therefore, equally applicable for non-citizens. The application was declined by a refugee and protection officer. Mr. Teitiota argued that if his family was deported from New Zealand to Kiribati, they would face degradation of their living conditions due to water shortage, salinization of drinking water, and other aspects of life affected by climate change.

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For instance, Mr. Teitiota's legal advisor (lawyer) Michael Kitt claimed that "…rising seas had already swamped parts of Kiribati, destroying crops and contaminating water supplies." They also argued in an interview with Radio New Zealand, that access to freshwater is a human right that would be violated by deportation.[40]

In 2013, his application was rejected by the Immigration and Protection Tribunal (IPT), and then, his subsequent appeals were rejected again in 2013, 2014, and 2015 by the High Court, the Court of Appeal, and the Supreme Court, 'respectively.' Therefore, he and his family were deported to Kiribati.[41] The case did not end there and in January 2020, the United Nations Human Rights Committee (UNHRC) gave a historical decision on the topic of people who have to flee from their country of origin due to climate-related hazards and threats.[42] According to the UNHRC, first of all, New Zealand did not put the life of Mr. Teitiota and his family in danger. Although problems arise due to climate change, necessary precautions can be taken by the authorities. Second, the committee highlights that people who are affected by sudden-onset disasters (such as, flooding, intense storms, etc.), and slow-onset disasters (such as rising sea levels, salinization and, land degradation) may apply for the status of refugees in order to protect themselves. Third, the committee has clarified that countries cannot deport people seeking the status of refugee as a consequence of climate-related disasters.[43] We must bear in mind that all these guidelines are abstract formulations and subject to change due to the changing context when applied to concrete cases. In the Teitiota case, it was clear that an opening was created to avoid holding sovereign states accountable.

In this paper, we examine the hearing held by the UNHRC relating to climate refugees. We use a Critical Legal studies framework and focus on this case because it is a 'hard case' that challenges national sovereignty, as made evident by the difficulty of both the UNHRC and the court system of New Zealand to give an 'objective ruling' on the case.[44] Indeed, our analysis raises critical questions about the 'objectivity' claimed by modern liberal law. In doing so we argue that the modern (law) doctrine is neither objective nor impartial, rather it is fully subjective which undermines the normative power of law. Law, as Koskenniemi has argued, is subjective because it is either apologist or utopian. In this case, both the national courts and the UNHRC obfuscated reality and escaped into formalism and voluntarism in order not to challenge state sovereignty. We begin our critical analysis by first discussing the structure of modern 'law'

doctrine. To substantiate our argument, we will conduct a comparative investigation of almost all the judgments relevant to this case.

Modern Law, Sovereignty and Climate Change

The Structure of Modern 'Law' Doctrine

Modern 'law' doctrine "fights a battle on two fronts," according to Koskenniemi.[45] Lawyers, or at least those who believe in modern 'law' doctrine, try to ensure the objectivity of law by simultaneously stressing the concreteness and normativity of law. Law should rise from the concrete social environment, and the meaning of international law is created by the states themselves. However, law is and should be normative in order to ensure its binding power over even the creator of it. These two features should exist to guarantee the objectivity of law that necessarily entails the determinate and foreseeable character of law. However, incorporating both concreteness and normativity simultaneously is impossible. This is because these two features cancel each other out. As Koskenniemi puts it, law may be criticized as an apologist if it loses normativity while it may also be criticized as utopian when the distance between law and concreteness broadens. Therefore, binary oppositions reproduce themselves in the doctrine; both are political, and thus 'subjective.'

A similar recurring binary opposition seems to take place when authorities –in this situation both national and international courts– try to determine which normative outcomes are relevant for international disputes. Since there is no higher authority to determine what is lawful, there may be multiple claims of lawfulness. Additionally, the lack of a hierarchy of norms under international law ends up creating an absence of mediatory elements among individual states and the international state system.[46] In domestic law, the hierarchy of norms avert such an outcome, giving law normative power. As a result of the very structure of modern 'law' doctrine, states (or courts) may build their argument relying upon either normative principle or the concrete interests of sovereign states. Both are simultaneously relevant, applicable, and valid; however, these two arguments of justification cancel each other out. As a result, the law is more contradictory than the general view of its determinacy allows.

To clarify the argument, the various judgments of the International Court of Justice (the ICJ) can be given as examples. For instance, as Koskenniemi rightfully puts, in some cases –such as the Corfu Channel Case (1949) and the U.S. Military and Paramilitary Activities Case (1986)– humanitarian concerns played a principal role in the evaluation of the judgment. In other cases, the same concerns were dismissed, such as in the Southwest Africa Case (1966).[47] Why did the ICJ rely upon various justifications in different cases as warrant for its arguments?

Law should rise from the concrete social environment, and the meaning of international law is created by the states themselves

The discussion above seems to reconfirm Polat's note that for traditional law doctrine, 'sovereignty' is the sole principal of the international state system.[48] It is this doctrine that causes the instability, indeterminacy, and relativity of law. Arguments may be challenged by an opposite justification which, according to Koskenniemi, read as follows: "The weakness of international legal argument appears as its incapability to provide a coherent, convincing justification for solving a normative problem. The choice of solution is dependent on an ultimately arbitrary choice to stop the criticisms at one point instead of another."[49]

Due to this, Koskenniemi argues that there are two types of justification that states/courts rely on to make their argument, 'ascending' and 'descending' justification.[50] States or courts either take the concrete interests of sovereign states as a starting point for their evaluation or transcending principles such as human rights. The two types of justification are mutually valid and therefore, cancel each other out. The result is an incoherent doctrine that rewards political power when one side of the dispute is more powerful than the other.[51]

This contradictory nature of the legal argument is also emergent in the judgments/decisions relating to Mr. Teitiota. The national courts and UN Human Rights Committee avoided inciting the sovereign states. At the same time, these courts did not hesitate to touch upon transcendental principles regarding the people suffering from natural disasters. However, the Courts/UNHCR Committee cannot escape from facing the contradictions that emanate from modern legal doctrine. That is to say that another factor that undermines the law's objectivity, i.e. the distinction between law-making and law ascertaining, is that of 'interpretation', which also weakens the claim of simultaneous association of concreteness and normativity that judicial organs, in this case, constantly appealed. The result is continuing tension between order and will, or rights and social order. As Koskenniemi notes: "The liberal attempt to tackle with this conflict is by means of reconciliation, or paradox: to preserve freedom, the order must be created 'to restrict it.'"[52]

Our next step is to critically examine the UNHCR Committee's judgment on the merits, adopting a comparative approach that also investigates the decisions given by the New Zealand Courts.

Critical Investigation on the Consideration of the Case Merits

In this part, both national and international court decisions will be evaluated respectively and comparatively. As for the beginning, decisions given by the national courts of New Zealand will be touched upon, utilizing a comparative

approach. Additionally, and generally, this paper tries to give an account of the hearing of the Human Rights Committee.

At first, domestic judgments given by the New Zealand courts will be examined, claiming these courts are utilizing ascending arguments. Indeed, judgments upheld domestically indicate the apologist nature of the law system in New Zealand by narrowly interpreting the law.

However, the Committee, on the other hand, first benefited from a descending argument, acknowledging the right of the applicant by interpreting the law broadly. However, it ended up with an unconditional apology of state sovereignty. Thus, national courts and the Committee differentiate in forming their arguments towards the case at hand. In all stages of the process, national courts obey formalist reading of the law while praising state sovereignty. On the contrary, the Committee, at first, gives a historical decision accepting the legitimacy of whether climate-related refugees have a currency. The Committee cannot escape being trapped in the hands of apology. So, domestic and international judgments will be touched upon, respectively.

Domestic Judgments

The New Zealand Court of Appeal determined that "The point this judgment makes is that climate change and its effect on countries like Kiribati is not appropriately addressed under the Refugee Convention."[53] It is clear that the Court of Appeal mobilized an ascending justification for its arguments, taking concrete facts (here the will of sovereign states) as the starting point for its evaluation. In other words, the Court of Appeal hid behind the formalist reading of the law to protect the national interests of New Zealand. This way of thinking is also apparent in the New Zealand High Court decision, given by Judge Priestley J. saying:

> For the reasons apparent in previous sections of this judgment, a 'sociological' refugee or person seeking to better his or her life by escaping the perceived results of climate change is not a person to whom Article 1A (2) of the Refugee Convention applies… By returning to Kiribati, he would not suffer a sustained and systemic violation of his basic human rights such as the right to life under Article 6 of the ICCPR or the right to adequate food, clothing, and housing under Article 11 of ICESCR.[54]

Here the High Court unambiguously and strictly follows the definition that was put forward in Article 1(A) of the Refugee Convention, which identifies a refugee as "…owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."[55] First, according to the High Court, the applicant who claimed to migrate because of humanitarian and environmental concerns is not subject

to the prescriptions of the Refugee Convention.[56] Second, for the High Court, the applicant failed to convince that there is a substantial ground for possible persecution.[57]

As a result, for the High Court, the applicant's attempt to expand the scope of the Refugee Convention is misleading. The High Court refused to legislate, arguing that, "It is not for the High Court of New Zealand to alter the scope of the Refugee Convention in that regard. Rather that is the task, if they so choose, of the legislatures of sovereign states."[58] This is a hard case that may violate New Zealand's sovereign rights. The High Court, then, narrowly interpreted the law. However, in its decision the same Court did not hesitate to act like a legislative organ, citing the Immigration and Protection Tribunal's findings, determining that "It instead concluded that whilst the applicant's standard of living, if he returned to Kiribati, would be less than what he enjoyed in New Zealand, this did not constitute serious harm for Refugee Convention purposes."[59] Here, somehow the Court should have applied a test to evaluate whether or not refoulement to Kiribati constitutes serious harm under the stipulations of the Refugee Convention. Determining which test would apply, and how it would have an impact on the current situation is a matter of interpretation that is not covered by the Refugee Convention. Therefore, in making an interpretation we would argue that the High Court exercised a legislative function.

We can see that in the decision of the High Court legal formalism played a leading role in the final judgment. Generally speaking, according to the doctrine of legal formalism, the law is what is written.[60] As we see in the South Africa Case, the ICJ noted that "As is implied by the opening phrase of Article 38, Paragraph 1, of its Statute, the Court is not a legislative body. Its duty is to apply the law as it finds it, not to make it."[61] In other words, the High Court seemed to declare to uphold this doctrine in the case at hand by strictly obeying what the law is in the current situation. The High Court tried to omit interpretation from the process in order to ensure the objectivity and determinacy of the law. Literally, in its judgment, the High Court followed the same arguments that the ICJ expressed before, making the High Court an apologist for state behavior. Therefore, the High Court adopted the ascending justification to uphold the current case. Let us now look at how the decision of the UNHRC and the argument centered on the violation of the right to life of the petitioner under Article 6 of the International Covenant on Civil and Political Rights.[62]

The Case Before the Human Rights Committee

The committee, before examining the merits, made an evaluation on whether the case before it is admissible. Referencing its past communications, the Committee well established that "a person can only claim to be a victim in the sense

of article 1 of the Optional Protocol if he or she is actually affected."[63] What would measure the concreteness of the real risk is a matter of interpretation which the Committee also highlighted in the present communication stating that "It is a matter of degree how concretely this requirement should be taken."[64] In the present case, it is alleged by the state parties that the case is inadmissible because Mr. Teitiota failed to demonstrate that there was an imminent threat to his right to life (enjoying life with dignity). For instance, in its past communications, the Committee, on the admissibility of the case before it, noted that "(f)or a person to claim to be a victim of a violation of a right protected by the Covenant, he or she must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or that such an effect is imminent, for example on the basis of existing law and/or judicial or administrative decision or practice."[65] In its previous communication on the nuclear weapons and their effects on the right to life, the Committee precisely found out that there was no imminent risk to the life of the authors, which ultimately led the communication to be declared inadmissible. Although the Committee reached such a conclusion on the previous communication, which was also a hard case that would have violated sovereign rights of the states once any adverse decision was made by the Committee, in the present communication the Committee made a distinction between the merits of the communication and the admissibility of the communication. Therefore, the Committee found out, in the present communication, that Mr. Teitiota's claims on imminence were admissible because his removal does not constitute 'hypothetical future harm.'[66] Rather, as for the Committee, "the author sufficiently demonstrated, for the purpose of admissibility, that due to the impact of climate change and associated sea-level rise on the habitability of the Republic of Kiribati, and on the security situation in the islands, he faced as a result of the State party's decision to remove him to the Republic of Kiribati a real risk of impairment to his right to life under Article 6 of the Covenant."[67] Therefore, in terms of admissibility, the author's claim to be depicted as a victim of violations of the Covenant was admissible, according to the Committee. It is clearly seen in the present communication that the Committee adopted a descending argument, compared to previous communications, restating imminent risk phenomenon in terms of admissibility. Determining the criteria on which a concrete case constitutes sufficient grounds for attaching status of the victim of the Covenant is a matter of interpretation, as seen in "the Nicole Beydon and 19 Other Persons vs. France" case held in 2005, claiming that the authors failed to show adequately that they had been faced with an imminent risk to enjoying their right to life.[68] Therefore, the Committee precisely adopted a descending justification for its communication relating to the present case, whereas it had

The Committee also observed that severe environmental degradation can adversely affect an individual's well-being and lead to a violation of the right to life

When determining the potentially fatal effects of rising sea levels as a basis for non-refoulment, the Committee was of the view that it is not in the position to dub the efforts taken by the Government of Kiribati to provide positive measures to counter the rise in sea levels as insufficient

done the converse in its previous cases, those of which could have been depicted as a hard case that might have violated the sovereign rights of states.

At first glance, it may be said that the UN Human Rights Committee adopted a descending justification which led to a broad interpretation of the law, in comparison to the New Zealand courts. In the first few paragraphs of the 'Consideration of the Merits,' the Committee proposed a framework that identifies how and to what extent the Committee evaluates terms such as the right to life and refoulement. To start with, the Committee wrote down the claim of the petitioner, that New Zealand had violated the principle of non-refoulment since there had been a substantial threat to life as formulated by Article 6 of the Covenant. Furthermore, according to the petitioner, because it did not take any positive steps 'to assess the risk inherent in his removal,' the state party failed to obey the convention.[69]

In response to the petitioner's claim, the Committee first and foremost determined the conditions under which states are not to "extradite, deport, expel or otherwise remove a person from their territory."[70] Accordingly, state parties are not allowed to remove an asylum seeker if there is a "substantial risk of irreparable harm to life" inherent to his/her removal. This condition is followed by the principle that "risk must be personal, that it cannot derive merely from the general conditions in the receiving State."[71] The Court/Committee may reach a determination that may ignore the principle that the risk must be personal if only the conditions are so extreme in the receiving state as to render the principle superfluous. Even under such a situation, the Committee envisages a high threshold that must be passed by general conditions to substantiate a threat to life.

Another example that demonstrates the descending nature of the Committee's interpretation is that the Committee interprets the scope of Article 6 of the Covenant in a much broader way than how the term refugee is articulated in the Refugee Convention. According to the Committee, "… State parties must allow all asylum seekers claiming a real risk of a violation of their right to life in the State of origin" which necessitates a deep and detailed examination of the conditions of the State of origin, including the state of human rights.[72] Here the Committee extends the scope of the 'right to life' by utilizing the legislative role it bestowed itself via interpretation.

UN Secretary-General Antonio Guterres (2nd R) and UN Climate Change Executive Secretary Patricia Espinosa (R) attend the opening of the UNFCCC COP25 Climate Conference, Madrid, Spain on December 2, 2019.

SEAN GALLUP / Getty Images

In the following paragraphs, the Committee further reiterated its position saying that the "right to life cannot be properly understood if it is interpreted in a restrictive manner."[73] Here, the Committee underlines the responsibilities of states to take positive measures to prevent a possible violation of the right to life. In another word, the Committee urges states to act diligently. Additionally, the Committee by citing its own general comment No. 36, recalls 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."[74] Moreover, the Committee also further reminds that state parties have a duty to take positive measures for the "reasonably foreseeable threats and life-threatening situations that can result in loss of life."[75] Furthermore, state parties may be responsible even if these threats will not result in loss of life. Finally, the Committee's determination, by recalling general comment No. 36, regarding climate change is remarkable. It noted that "environmental degradation, climate change, and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life."[76] Accordingly, the Committee also observed that "severe environmental degradation can adversely affect an individual's well-being and lead to a violation of the right to life."[77]

Up until now the Committee unambiguously reinforced its position based on descending arguments. Its determinations are so progressive that the Committee cannot be accused of being an apologist for state sovereignty. However, as we will see in the rest of their communication, the Committee tries not to vex

sovereign states, by adopting a more secure and intermediated way between state sovereignty and human rights.

The Committee starts the next part of its decision by assessing whether the state party had conducted a clear, unbiased, and detailed investigation of the conditions in Kiribati, in order to determine if there was a real risk of threat to the right to life of the petitioner, before deciding on Mr. Teitiota's removal. According to the Committee, the state party accepted the applicant's claims and found them credible. Thus, the evaluation made by the state party was done under the scope of both the Refugee Convention and the Covenant. Just like the Committee, the Tribunal (IPT), and the New Zealand Supreme Court also recognized that "the effects of climate change or other natural disasters could provide a basis for protection."[78] Although both authorities accept the fact that climate change may provide a cause for the protection granted to asylum seekers, they found no evidence to establish that the state party had violated the law. Both authorities evaluated six different but interrelated criteria. According to the Tribunal (IPT), and the Supreme Court, there was no evidence that:

> (i) the author had been in any land dispute in the past, or faced a real chance of being physically harmed in such a dispute in the future; (ii) he would be unable to find land to provide accommodation for himself and his family; (iii) he would be unable to grow food or access potable water; (iv) he would face life-threatening environmental conditions; (v) his situation was materially different from that of every other resident of Kiribati; or (vi) the Government of Kiribati had failed to take programmatic steps to provide for the basic necessities of life in order to meet its positive obligation to fulfill the author's right to life.[79]

The Committee begins by arguing that the petitioner had failed to demonstrate whether he would face a risk to the right to life "as a result of violent acts resulting from overcrowding or private land disputes in Kiribati."[80] Similarly, the Committee also rejected the petitioner's claim that "he would be seriously harmed by the lack of access to potable water on Tarawa."[81] The Committee noted, citing the scientific report and testimony of John Corcoran, a climate change researcher, that the majority of Kiribati's population (residents) have access to potable water provided by public utilities.[82] Furthermore, the Committee also pointed out that the petitioner failed to provide sufficient proof demonstrating that "the supply of freshwater is inaccessible, insufficient or unsafe so as to produce a reasonably foreseeable threat of a health risk that would impair his right to enjoy a life with dignity or cause his unnatural or premature death."[83]

The Committee also dealt with the claim that the petitioner was "deprived of his means of subsistence."[84] As numerous times said before national courts, salt deposits on the ground prevented growing the crops that include the most needed nutrition a person requires. Again, the Committee rejected the claim, this time

through two different arguments. The first argument was based on the report of the local authorities that led the Committee to determine that even if it is hard to grow crops in Tarawa, it is not impossible. For the second argument, while the Committee recognized that "the lack of alternative subsistence livelihood may place individuals at a heightened risk of vulnerability;"[85] it rejected the claim of the petitioner because they did not provide the requested information about alternative sources of employment to meet basic humanitarian needs. Based on the available information, the Committee considered the claim of the petitioner inadmissible, as they could not provide enough and sufficient information to show that the "assessment of the domestic authorities was clearly arbitrary or erroneous in this regard or amounted to a denial of justice."[86]

The majority and dissenting opinions present an attempt of the UNHRC to find a middle way between the sovereignty of states and the ethical concerns at the center of the Human Rights legal tradition

Finally, the Committee also touched upon the topic of sudden-onset events and slow-onset events relating to the living standards of the inhabitants of Kiribati. In the present case, when determining the potentially fatal effects of rising sea levels as a basis for non-refoulment, the Committee was of the view that it is not in the position to dub the efforts taken by the Government of Kiribati to provide positive measures to counter the rise in sea levels as insufficient. For these reasons, the Committee determined that the processes before the national courts were not arbitrary, nor "amounted to a manifest error or denial of justice, or that the courts otherwise violated their obligation of independence and impartiality."[87] Therefore, the petitioner's right to life as articulated under Article 6 (1) of the Covenant was not violated by the Government of New Zealand.

On the other hand, Committee members Vasilka Sancin and Duncan Laki Muhumuza provided dissenting opinions to the decision, arguing that the majority opinion was misleading. First and foremost, Vasilka Sancin claims that potable water is not equal to access to safe drinking water. The former may have hazardous bacteria which can be harmful to the body, most particularly those of children who were not born in Kiribati and had not developed immunity. Additionally, as the Committee puts it, the primary responsibility to assess whether conditions in Kiribati are able to provide a life with dignity for the petitioner belongs to the authorities of New Zealand that are deciding on his removal, rather than on the petitioner themselves. Therefore, it is the state party (New Zealand) that must have investigated the situation carefully before making conclusions. According to Sancin, the government of Kiribati failed to implement the National Development Plan 2008-2011 which "contains policies and goals of direct relevance to the water." Further, the "2010 National Sanitation Poli-

In the future, it is probable that states, in reaction to migration flows caused by climate change, will need to modify their codes and regulations, including international treaties, via changes in contents or interpretations

cy's priorities set for the first 3 years have yet to be implemented."[88] These indicate that the investigation conducted by the state party lacked clarity and persuasiveness. Therefore, Sancin disagreed with the Committee's conclusion that "the facts before it does not permit it to conclude that the author's removal to Kiribati violated his rights under article 6 (1) of the Covenant."[89]

Duncan Laki Muhumuza, the other Committee member who gave a dissenting opinion, shared many of the points made by Sancin, saying that the present conditions of the petitioner (health, food, and water) meet the requirements to be granted legal protection. This is because their health conditions have degenerated daily due to increasingly problematic accessibility to fresh water and food. This is a reason enough to meet the threshold for protection that the Committee proposes. The Committee members Muhumuza and Sancin adopted a descending approach in regard to the present case.[90]

The majority and dissenting opinions present an attempt of the UNHRC to find a middle way between the sovereignty of states and the ethical concerns at the center of the Human Rights legal tradition. Because of this, the final finding is indeterminate and flexible, as critics of modern international law doctrine point out. As confirmed also by this case, the international state system is based upon the principles of sovereignty and equality of states. Any intervention into the domestic affairs of any state is regarded as a potential violation of the principle of sovereignty. The logical outcome is that no higher principle may be placed above sovereignty. Due to this a hierarchy of norms does not exist, leading to an arbitrary choice of rules and applicable principles. This arbitrariness was evident in this present case, and in the way, the UNHRC Committee navigated between state sovereignty and human needs.

Just a comparison of the conclusions of the majority and dissent Committee members exemplifies the extent to which arbitrary 'interpretation' plays a decisive role in determining what is lawful. The position taken by the Committee is a clear representative of the incoherent nature of international law. The Committee avoids a decision that can irritate and undermine the sovereign will of states. For instance, the Committee upheld the claim that climate-induced disasters may invoke non-refoulement under Article 6 of the Convention. This would be a progressive development in law about refugees. However, the Committee also upheld the refoulement decision passed down by the New Zealand court system. On the one hand, the Committee broadly interpreted the law

adopting the view that climate-induced disasters may invoke protection for the right to life with dignity of a person. On the other hand, the Committee took the side of the sovereign will of New Zealand as it was implementing the law in this concrete case. In pursuit of this middle way, the Committee marshaled both ascending and descending justifications, simultaneously, which led them to cancel each other. Thus, in the end, all that we are left with is an arbitrary decision. But this is the result of the very nature of the current legal doctrine.

Conclusion

Our aim in the present study was to critically analyze the general approaches and practices applied to climate-induced migration within the context of international law. We sought to grasp to what extent human-related climate change has an impact on daily life and the migration decision-making process of people. Our literature review indicates that human-induced climate change and its fatal impact on daily life is a reality that cannot be reversed unless the community of states takes adequate measures to prevent and mitigate the causes.

We analyzed the Case of Kiribati (Mr. Teitiota vs New Zealand) as an example, critically looking at how climate-induced migration and the related status of refugees is handled in terms of international law in the light of the United Nations UNHRC decision on this subject in 2020. We argue that Mr. Teitiota's application for refugee status to New Zealand due to climate-induced threats is a remarkable turning point in the law of refugees. This case is an excellent illustration of the clash between the sovereign will of states and human necessities as interpreted through the doctrine of human rights. Our analysis highlighted how the national courts of New Zealand utilized an apologist position that took the sovereign will of New Zealand as a starting point. On the other hand, the UNHRC Committee tried to mediate sovereign will and humanitarian necessities. However, both approaches proved to be subjective and partial, which contributes to insolubility. The position taken by the Committee is a clear representative of the incoherent nature of international law (see above the text between "Critical Investigation on the Consideration of the Case Merits" and "Conclusion"). The lack of a central enforcement mechanism and of a hierarchy of norms on the international stage leads to an unavoidable result of arbitrary warrants for legal arguments, which undermine the determinacy of law itself. Ultimately, this condition will lead the system to deadlock, as Koskenniemi pointed out.

However, we must point out the fact that the Committee's contributions on the interpretation of the law on refugees and non-refoulement can be deemed as a remarkable and progressive innovation. In the future, it is probable that states, in reaction to migration flows caused by climate change, will need to mod-

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Endnotes

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2. "Internal Displacement from January to June 2019," *IDMC*, (September 12, 2019), retrieved March 10, 2020, from https://www.internal-displacement.org/sites/default/files/inline-files/2019-mid-year-figures_for%20website%20upload.pdf.

3. "Internal Displacement from January to June 2019," p. 7.

4. Norman Myers, ''Environmental Refugees: A Growing Phenomenon of the 21st Century," *Philosophical Transactions of the Royal Society of London, Series B: Biological Sciences,* Vol. 357, No. 1420 (2002), p. 609.

5. "Disaster Displacement: A Global Review, 2008-2018," *IDMC*, (May 2019), retrieved April 5, 2020, from https://www.internal-displacement.org/sites/default/files/publications/documents/201905-disaster-displacement-global-review-2008-2018.pdf.

6. The term 'Anthropocene' was firstly introduced by Crutzen, a Nobel Prize-winner and Atmospheric Chemist, in 2006. For more information see, Paul. J. Crutzen, "The 'Anthropocene,'" in Eckart Ehlers and Thomas Krafft (eds.), *Earth System Science in the Anthropocene*, (Berlin, Heidelberg: Springer, 2006) pp. 13-18.

7. International Commission on Stratigraphy's (ICS) primary objective is to precisely define global units (systems, series, and stages) of the International Chronostratigraphic Chart that, in turn, are the basis for the units (periods, epochs, and age) of the International Geologic Time Scale; thus, setting global standards for the fundamental scale for expressing the history of the Earth. For more details see, http://www.stratigraphy.org/. In 2009, Anthropocene Working Group (AWG) was founded under the Sub commission on Quaternary Stratigraphy (SQS) which is a constituent body of International Commission on Stratigraphy (ICS). The aims of AWG are to provide scientific evidence and give opinion about whether the Anthropocene era has started or not. They presented a positive opinion in 2019 but ICS has not approved yet. For more details see, http://quaternary.stratigraphy.org/working-groups/anthropocene/ and http://quaternary.stratigraphy.org/. For the debate see, Paul. J. Crutzen, "The 'Anthropocene,'" in Ehlers and Krafft (eds.), *In Earth System Science in the Anthropocene*, pp. 13-18; Simon L. Lewis and Mark A. Maslin, "Defining the Anthropocene," *Nature,* Vol. 519, No. 7542 (2015), pp. 171-180; Will Steffen, Jacques Grinevald, Paul Crutzen, and John McNeill, "The Anthropocene: Conceptual and Historical Perspectives," *Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences,* Vol. 369, No. 1938 (March 13, 2011), pp. 842-867; "Working Group on an Anthropocene," *Subcommission on Quaternary Stratigraphy*, (May 21, 2019), retrieved March 17, 2020, from http://quaternary.stratigraphy.org/working-groups/anthropocene/.

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9. Thomas R. Karl and Kevin E. Trenberth. "Modern Global Climate Change," *Science,* Vol. 302, No. 5651 (2003), p. 1719.

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36. See, 6(1) b(ii) of *the Citizenship Act 1977*, (1977), No. 61.

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38. Kelly Buchanan, "New Zealand: 'Climate Change Refugee' Case Overview," *The Law Library of Congress, Global Legal Research Center*, (July 2015), retrieved April 9, 2020 https://tile.loc.gov/storage-services/service/ll/llglrd/2016295703/2016295703.pdf .

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42. See, UN Human Rights Committee, views adopted by the Committee under 5(4) of the Optional Protocol, concerning communication No. 2728/2016, UN Documents, CCPR/C/127/D/2728/2016, (January 7, 2020).

43. "UN Human Rights Ruling Could Boost Climate Change Asylum Claims."

44. In this piece, Martti Koskenniemi's approach is utilized to decode why UNHCR had to adopt the middle of the road approach. See, Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument,* (New York: Cambridge University Press, 2005).

45. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, p. 17.

46. Necati Polat, *International Relations Meaning and Mimesis,* (London: Routledge, 2012), pp. 103-123.

47. Koskenniemi, *From Apology to Utopia*, pp. 60-61.

48. Polat, *International Relations Meaning and Mimesis*, p. 103.

49. Koskenniemi, *From Apology to Utopia*, p. 67.

50. "There are two ways of arguing about order and obligation in international affairs. One argument traces them down to justice, common interests, progress, nature of the world community, or other similar ideas to which it is common that they are anterior, or superior, to State behavior, will or interest. They are taken as a given normative code which precedes the State and effectively dictates how a State is allowed to behave, what it may will and what its legitimate interests can be. Another argument bases order and obligation on State behavior, will or interest. It takes as given the existence of States and attempts to construct a normative order on the basis of the 'factual' State behavior, will, and interest." See, Koskenniemi, *From Apology to Utopia*, p. 59.

51. "The dynamics of international legal argument is provided by the contradiction between the ascending and descending patterns of argument and the inability to prefer either… The result is a curiously incoherent doctrine which is ad hoc and survives only because it is such." Koskenniemi, *From Apology to Utopia*, p. 65.

52. Koskenniemi, *From Apology to Utopia*, p. 71.

53. In the Court of Appeal of New Zealand, (May 1, 2014), CA50/2014 [2014] NZCA 173, p. 41.

54. In the High Court of New Zealand Auckland Registry, (October 16, 2013), CIV-2013-404-3528 [2013] NZHC 3125, ¶54.

55. See, Article 1(A)2 of the Convention Relating to the Status of Refugees 189 UNTS 137 (opened for signature July 28, 1951, entered into force April 22, 1954).

56. The High Court, ¶44.

57. The High Court, ¶51.

58. The High Court, ¶51.

59. The High Court, ¶56.

60. "Formalist' theories claim that (1) the law is 'rationally' determinate, i.e., the class of legitimate legal reasons available for a judge to offer in support of his decision justifies one and only one outcome either in all cases or in some significant and contested range of cases (e.g., cases that reach the stage of appellate review); and (2) adjudication is thus 'autonomous' from other kinds of reasoning, that is, the judge can reach the required decision without recourse to non-legal normative considerations of morality or political philosophy." See, Brian Leiter, "Legal Formalism and Legal Realism: What Is the Issue?" (University of Chicago Public Law and Legal Theory Working Paper, No. 320, 2010); later published by the Cambridge University Press in 2010.

61. *Southwest Africa*, Second Phase, Judgment, ICJ Reports, July 18, 1966, p. 6, ¶89.

62. See, "International Covenant on Civil and Political Rights," *UN General Assembly*, (December 16, 1966), UN Treaty Series, Vol. 999, p. 171.

63. See supra text accompanying note 42, The Committee, ¶8.4. Also see, Rabbae v. the Netherlands (CCPR/C/117/D/2124/2011), para. 9.5.

64. The Committee, ¶8.4.

65. Aalbersberg and 2,084 Other Dutch Citizens v. the Netherlands (CCPR/C/87/D/1440/2005), ¶6.3.

66. See, The Committee, ¶8.5.

67. The Committee, ¶8.6.

68. Nicole Beydon and 19 Other Persons v. France (CCPR/C/85/D/1400/2005), ¶4.4.

69. See, The Committee, ¶9.2.

70. The Committee, ¶9.3.

71. The Committee, ¶9.3.

72. The Committee, ¶9.3.

73. The Committee, ¶9.4.

74. The Committee, ¶9.4.

75. The Committee, ¶9.4.

76. The Committee, ¶9.4.

77. The Committee, ¶9.5.

78. The Committee, ¶9.6.

79. The Committee, ¶9.6. Author, here, refers to the petitioner.

80. The Committee, ¶9.7.

81. The Committee, ¶9.8.

82. The Committee, ¶9.8.

83. The Committee, ¶9.8.

84. The Committee, ¶9.9.

85. The Committee, ¶9.9.

86. The Committee, ¶9.9.

87. The Committee, ¶9.13.

88. Individual Opinion of Committee Member Vasilka Sancin (dissenting), *UN Human Rights Committee*, Views adopted by the Committee under Article 5(4) of the Optional Protocol, concerning communication No. 2728/2016, UN Documents, CCPR/C/127/D/2728/2016, (January 7, 2020), ¶1-6.

89. Individual Opinion of Committee Member Vasilka Sancin (dissenting), ¶1-6.

90. Individual Opinion of Committee member Duncan Laki Muhumuza (dissenting), UN Human Rights Committee, views adopted by the Committee under 5(4) of the Optional Protocol, concerning communication No. 2728/2016, UN Documents, CCPR/C/127/D/2728/2016, (January 7, 2020), ¶1-6.