

Principle 9 – Cross-Border Displacement of Affected Persons.

The final report of this Committee, which is due at the ILA Biennial Conference in Lisbon in 2022, will further examine those two topics, in addition to the question of the implications of sea-level rise with regard to Statehood and the issue of its disappearance or continuity.

There is a good synergy between the work of the ILA that, as a private body works in a different way, and the work of the ILC that is done in a very close relationship with States and the United Nations General Assembly Sixth Committee. Both the work of the ILA and ILC have already contributed to generating important discussions among academia, but also States, thus creating positive impacts for the furthering of the legal analysis of the implications of sea-level rise.

IV. HOW CAN INTERNATIONAL LAW CONTRIBUTE TO PROMOTING THE PROTECTION OF PERSONS IN THE CONTEXT OF CLIMATE CHANGE AND DISASTERS?

When considering what could be the contribution of international law, from a point of view of international lawmaking, one has to be aware that there is certainly, at this juncture in time, a great dose of what is sometimes called “treaty fatigue.” States do not have an appetite for new treaties. One can see that from the example of the Draft Articles on the Protection of Persons in the Event of Disasters, pending before the General Assembly since 2016 and, in fact, with regard to most projects undertaken by the International Law Commission in the last twenty years.

An alternative, more realistic perhaps, is not to have a proposal for a new treaty with regard to the protection of persons affected by sea-level rise (or climate change more generally), but a mapping exercise, a stocktaking exercise to identify the protections, in terms of legal principles and rules, that already exist in the different relevant applicable legal frameworks such as international human rights law, international humanitarian law, international refugee law, international migration law, international climate change law, international disaster law, etc. The duty to cooperate under international law also plays an important role and should be specified in the context of the protection of persons affected.

Such an exercise should attempt to present existing international legal protections for persons affected by sea-level rise in a holistic and coherent manner and identify areas for further development, so as to facilitate the work of states, international organizations and other relevant stakeholders. This would be important, at the same time, in order to facilitate that equally at the regional and national levels, States dispose of good legislation and good practices to help them deal in a more effective way with the challenges posed by disasters and the adverse impacts of climate change.

THE CASE OF *IOANE TEITIOTA V. NEW ZEALAND* AT THE HUMAN RIGHTS COMMITTEE: A COMMON SENSE APPROACH

doi:10.1017/amp.2021.148

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On October 24, 2019, The Human Rights Committee adopted a view in the case of *Ioane Teitiota v. New Zealand*; a case concerning the complaint of a national of Kiribati, seeking asylum in New Zealand, from the effects of climate change in Kiribati. With his claim being rejected by New Zealand, Mr. Teitiota was returned to his country; however, he insisted that by sending him back to Kiribati, New Zealand violated his right to life under the International Covenant on

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Civil and Political Rights (ICCPR) by exposing him to conditions that endanger his life. The conditions included the sea level rise in Kiribati due to climate change, resulting in the scarcity of habitable space, environmental degradation, and saltwater contamination of the freshwater supply.

The Committee accepted the factual narrative of the complainant, but concluded that the author did not demonstrate clear arbitrariness or error in the domestic authorities' assessment, as to whether he faced a real, personal and reasonably foreseeable risk of a threat to his right to life as a result of the situation in Kiribati.

The majority were of the view that since the entire country was subject to the same conditions, it would be opening the floodgates for others to seek asylum thereby causing a heavy burden to other countries. My view was that if you have a sinking boat and a voyager has already escaped, you do not force them back because others are still trapped in the ill-fated vessel.

I. GENERAL POINTS OF BENEFIT

Despite not finding in favor of the complainant, the Committee's decision is a significant step taken toward the recognition of climate refugees, especially as regards *non-refoulement* obligations under human rights law and the ICCPR (which contains broader protection). The decision affirms that treaty bodies and human rights judicial institutions more broadly, can be effective avenues for litigation on climate change issues and environmental matters. With an expansive approach to the protection of life—the focus on a life with dignity, the Committee presents the possibility that climate change may lead to the displacement of individuals and trigger the obligation of *non-refoulement*, even where the anticipated extreme risk (like the risk of an entire country becoming submerged under water) has not yet been realized.

The Committee also highlighted the role that the international community must play in assisting countries adversely affected by climate change. This is in addition to robust national efforts to curb the effects and progression of climate change. The Committee's decision advanced the general debate on the subject of climate refugees (asylum seekers) and the related states' human rights obligations with regard to the principle of *non-refoulement*.

II. AREAS FOR A BOLDER APPROACH?

I propose to reiterate the issues I raised in my dissenting view in the Committee:

Whereas the risk to a person expelled or otherwise removed, must be personal—not deriving from general conditions, except in extreme cases—the threshold should not be too high or unreasonable. It is critical to handle irreversible issues of climate change with an approach that upholds the sanctity of life. Thus, in the *Teitiota* case, the considerable difficulty in accessing fresh water because of the environmental conditions should have been sufficient to reach the threshold of risk, without needing to reach the point of a complete lack of fresh water supply.

It is the standard upheld in the Committee that threats to life can be a violation of the right to life, even if they do not result in the loss of life. The fact that the persons suffer significant health hazards on account of the environmental conditions is evidence of a violation for which the *non-refoulement* principle should apply.

The fact that in some cases the negative impact of climate change is a reality for many in the country, should not make it any more dignified for the persons living in such conditions, or any less relevant for an individual assessment of risk. Climate change is irreversible, and every related risk is significant.

We must reflect the fact that the right to life includes the entitlement of individuals to enjoy a life with dignity, and to be free from acts or omissions that are intended or may be expected to cause their unnatural or premature death. These conditions naturally include environmental degradation

and climate change, which are extremely serious threats to the ability of both present and future generations to enjoy the right to life.

III. CLOSINGS QUESTIONS FOR REFLECTION:

Is a human rights approach an effective means of addressing this problem? Could other rights, for example the protection against torture and inhuman and degrading treatment, provide better avenues for addressing issues of climate change? Generally, should we be more creative about the framing of this as a human rights issue? Should such issues be handled by an international quasi-judicial institution? How effective would this approach be?

REMARKS BY MOHAMED NASHEED*

doi:10.1017/amp.2021.149

Unlike most of you, I hope, I have spent quite a lot of time in jail. This is not because I am a criminal, even though those who jailed me have called me a terrorist and worse. It is because I am a campaigner for democracy. I believe everyone has a right to vote and to be represented by a government they choose as free citizens. For that I have spent many years behind bars.

The struggle for freedom and democracy in the Maldives was a long one. I was far from being the only one to suffer, and some people paid the ultimate price. I cannot remember how many times I have been arrested. My family thinks it is fourteen times, but I have certainly lost count. I spent most of my twenties in jail. And much of my thirties too. At one point I was locked in a wrought-iron cage, on the beach, under the blazing sun, and you could not lie down or stand up. Eighteen months was a long time to be locked in that metal cage. I have been tortured twice and beaten to within an inch of my life. But as I say I was one of the lucky ones, because at least I was not killed.

Before the year 2000, the Maldives was a country as closed and authoritarian as Iraq. The dictator had been in power for twenty-five years, as long as Saddam Hussein. In the mid-2000s, when the democracy movement was beginning to gain strength, a boy was killed in jail by the guards, and this sparked mass protests. I managed to slip out of the country to Sri Lanka where I set up the country's first political party, the Maldivian Democratic Party (MDP), in exile. We borrowed the principles of non-violent resistance from other movements, such as the Indian Independence Movement.

The regime just did not know how to respond to non-violence. Every time they beat people up in the streets, or went for a mass arrest, it made us stronger. Eventually, they capitulated, allowed political parties, and went for an election. This was 2008, and I was fortunate to win, and become the country's first democratically elected president. This might have been the end of the story, but it was only the beginning. I was not able to complete my term because the authoritarian forces had not given up. In 2012, they staged a coup and I was forced to resign at the point of violence. Not long after that I was back in jail, with a thirteen-year prison sentence given by a puppet court. By 2015, when I was jailed, it was clear that the new president, the old dictator's brother, was planning to strangle our democratic gains. And so the struggle for democracy had to start all over again.

But we had many strengths this time around. The regime could not disband our party, the MDP. We still had partially free media and courts. Although they fined, threatened, disappeared, and murdered journalists and bloggers, they could not stop Maldivians from speaking their minds. In elections in 2018, in spite of the odds, the Maldivian people rose up, and kicked out the violent, authoritarian regime, in a landslide vote for change. It was a shock victory, that the regime

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