Prospects for Protection in Light of the Human Rights Committee's Decision in *Teitiota v New Zealand*

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Introduction

The recent decision of the Human Rights Committee (HRC) in the case between Ioane Teitiota and New Zealand[1] was hailed by many as an important step towards the protection of climate refugees. For the first time, it seems that a window has been opened in international law for the legal protection of those having to migrate due to the catastrophic results of climate change. The United Nations Office of the High Commissioner for Human Rights referred to it as a 'historic' decision that 'opens [the] door to climate change asylum cases'.[2] Media outlets have labelled this ruling as a 'landmark' decision, and organisations such as Amnesty International defined it as 'a ground-breaking asylum case'.[3]

We believe that this decision provides a useful opportunity to engage with certain long-standing debates, including some that have been considered by many as done and dusted. For some time a debate was had about the correct terminology for defining people forced to leave their homes due to the effects of climate change. Much of this centred on which field of law was most appropriate for filling the protection gap that is widely acknowledged to exist for these people. Yet, in recent years a certain number of points have apparently become settled within mainstream discussions on the subject. First, they should not be classified as 'refugees'; the existing framework of international refugee law was not designed with these types of people in mind. The 1951 Refugee Convention defines 'refugees' only as those facing the threat of persecution by either state or non-state actors,

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1 *Ioane Teitiota v. New Zealand (advance unedited version),* CCPR/C/127/D/2928/2016, UN Human Committee (HRC), 7 January 2020.

2 UHCHR, 'Historic UN Human Rights case opens door to climate change asylum claims' < https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25482&LangID=E>. (Accessed 12 May 2020)

3 Amnesty International, 'UN landmark case for people displaced by climate change' < https://www.amnesty.org/en/latest/news/2020/01/un-landmark-case-for-people-displaced-by-climate-change/>. (Accessed 12 May 2020)

a definition that undoubtedly excludes the situation of 'climate refugees'.[4] Second, that there were inherent problems in trying to collapse into a single category those escaping sudden disasters as well as those fleeing the effects of slow-onset environmental degradation. As such, there could be no catch-all legal solution to the phenomenon of climate-induced forced migration. Finally, therefore, it is argued by many that the solution lays primarily in stitching together a range of regional best practices and global human rights norms.[5]

The decision of the Human Rights Committee (HRC) in the case of Ioane Teitiota has once again reopened some of these arguments. In our view, while there are some positive aspects to the judgment, it also demonstrates some of the inherent limitations in relying too much on a purely human rights approach, and shows why the dismissal of the refugee concept in the context of climate change displacement may be both premature and ill-founded.

In what follows we offer a critical analysis of the legal reasoning of the HRC in this case, and end with a few concluding remarks on the importance of this decision, as well as on its limitations. But first, we outline the salient facts of the case and the issues that were raised before the HRC.

Teitiota v New Zealand

Mr Ioane Teitiota is a national of the Republic of Kiribati, one of a number of low-lying small island states in the Pacific that are most at risk to the effects of rising sea levels resulting from climate change. These islands have long been considered the 'canary in the mine' of climate change; the global threat of climate change will be experienced there most acutely as a foretaste of what is to follow elsewhere. Much empirical research and legal speculation has been devoted to exploring how the communities on these islands can best adapt to the

4 UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137. Article 1A contains the key definition of a 'refugee'.

5 See, for example, Jane McAdam, *Climate Change, Forced Migration, and International Law* (OUP 2012); Platform for Disaster Displacement, 'State-led, regional, consultative processes: opportunities to develop legal frameworks on disaster displacement' in Simon Behrman & Avidan Kent (eds), *'Climate Refugees': Beyond the Legal Impasse?* (Routledge 2018).

effects of climate change, and what pathways to safe migration away from their homelands may be possible if and when they are no longer inhabitable.[6]

In his Communication, Mr Teitiota portrays a set of extremely difficult life conditions. Since the 1990s increased flooding and coastal erosion in smaller more low-lying islands caused people to move to the larger slightly more secure islands within the Kiribati archipelago. The results of rising sea levels were dire: the main islands became overcrowded, some fresh water sources were contaminated and the economy suffered. Teitiota further claimed that these events have led to increased violence as land disputes became more common. These were the push factors that led Teitiota and his wife to leave for New Zealand in 2007.

Initially, the couple entered New Zealand on ordinary temporary migrant visas, but these expired in 2010. Two years later Teitiota and his family (the couple now had three children born in New Zealand) applied for refugee status and also for protected person status on the basis that their return to Kiribati would violate their right to life or cruel treatment under articles 6 and 7 of the 1966 International Covenant on Civil and Political Rights (ICCPR).[7] From the initial decision all the way up to New Zealand's Supreme Court, the decisions were consistent: Teitiota did not fall within the legal definition of a 'refugee' under international law, and it was held that the conditions of life in Kiribati did not reach the threshold of danger to engage the protections of the ICCPR. The one chink of light in this legal process was the Supreme Court leaving open the possibility that the effects of climate change could in the future create a pathway to refugee protection.[8] The substance of this speculation was based on the assumption that climate change could result in acute competition over scarce resources, which in turn could lead to violence and thus persecution. Yet, for now at least, the door to refugee status for climate displaced persons remains shut.

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6 See, for example, Michael B. Gerrard & Gregory E. Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (CUP 2013).

7 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

8 *Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment*, [2015] NZSC 107, at para. 13.

Teitiota and his lawyers attempted one more roll of the legal dice by bringing a claim before the HRC, the body which adjudicates on alleged breaches of the ICCPR. Following the New Zealand Supreme Court rejection of his asylum application Teitiota and his family were deported back to Kiribati. The claim before the HRC was that by doing this New Zealand had violated their right to life (Article 6 of the ICCPR) as the ever-decreasing amount of inhabitable land on the islands was leading to violent disputes, and the lack of safe drinking water was endangering the family's health and wellbeing. On the first point – violent disputes over land – the evidence appears sketchy. But the issue of lack of safe drinking water is well attested by facts accepted by the HRC, and indeed by New Zealand itself. In addition, it was accepted fact that it has become increasingly hard to grow crops due to salination of the land, a particularly acute issue in a largely subsistence economy such as Kiribati. It was also accepted fact that at least one of the Teitiota children has suffered from a blood infection caused by drinking poor-quality water.

On the face of it, Teitiota's claims are not unreasonable. The HRC has already confirmed in an earlier interpretive note (2018) that the right to life 'should not be interpreted narrowly':

> It [the right to life] concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity. [9]

The HRC further explains that the right to life implies also a prohibition on deportation, where individual's lives are at threat:

> The duty to respect and ensure the right to life requires States parties to refrain from deporting, extraditing or otherwise transferring individuals to countries in which there are substantial grounds for believing that a real risk exists that their right to life under article 6 of the Covenant would be violated. Such a risk must be personal in

9 Human Rights Committee, 'General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life' (30 October 2018) CCPR/C/GC/36, para 3.

> nature and cannot derive merely from the general conditions in the receiving State, except in the most extreme cases.[10]

In *Teitiota* the HRC recalls this wide interpretation of the right to life and, importantly, confirms that indeed '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.'[11]

Obstacle #1: The personal nature of the claim

And yet, the HRC found no violation of Article 6. Why? First, the danger faced by Teitiota and his family was essentially the same as that faced by all other inhabitants of Kiribati. As stated in the interpretive note quoted above, the obligation to refrain from deportation arises only when the risk is personal to the claimant. The HRC recalls that claims that are based on general conditions will be accepted only in 'the most extreme cases, and that there is a high threshold for providing substantial grounds to establish that a real risk'.[12]

Following on from this, in spite of the fact that it was acknowledged by all parties that material conditions in Kiribati were bad and deteriorating, Teitiota did not show that his conditions would be significantly worse than anyone else there.[13] Indeed, here there is an overlap with international refugee law, in which persecution must be shown to be directed at a specific individual or group, but generalised violence or threat to life is insufficient to warrant refugee status. And yet, this criteria presents a real problem for potential claimants in the context of climate change, as that is precisely a phenomenon that affects communities in general, rather than specific individuals.

Importantly, the HRC's 2018 interpretive note on the right to life (quoted above) emphasises the existence of an exception to the 'personal nature' requirement. It is stated that in 'extreme circumstances' this requirement will be overlooked. The (implicit) rejection

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10 Ibid, para 30.

11 *Teitiota v. New Zealand,* para. 9.4, as well as para 9.5.

12 Ibid, para. 9.3.

13 Ibid, para. 9.6, 9.7.

of Kiribati's dire conditions as 'extreme' enough for entering into the scope of this exception therefore raises some questions. First, it seems the HRC's threshold is placed at a fairly high level, well above Kiribati's conditions. As to the possibility to grow crops, it is stated that 'while the author stated that it was difficult to grow crops, it was not impossible' and that 'most nutritious crops remained available in the Republic of Kiribati.'[14] Regarding residents' access to water, the HRC decided that 'there was no evidence that the author would lack access to potable water in the Republic of Kiribati.' They further stated:

> While recognizing the hardship that may be caused by water rationing, the Committee notes that the author has not provided sufficient information indicating that the supply of fresh water 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.[15]

The HRC's determination regarding the conditions in Kiribati was contested by two of its members. In his dissent, Duncan Laki Muhumuza stated that the majority's threshold was 'too high and unreasonable':

> In my view, the author faces a real, personal and reasonably foreseeable risk of a threat to his right to life as a result of the conditions in Kiribati. The considerable difficulty in accessing fresh water because of the environmental conditions, should be enough to reach the threshold of risk, without being a complete lack of fresh water. There is evident significant difficulty to grow crops. Moreover, even if deaths are not occurring with regularity on account of the conditions (as articulated by the Tribunal), it should not mean that the threshold has not been reached. It would indeed be 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.[16]

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14 Ibid, para. 9.9.

15 Ibid, para. 9.8.

16 Ibid. Annex 2, para 5.

Much emphasis was put by the HRC on the fact that there was adequate potable water available on Kiribati. According to the Oxford English Dictionary "potable" means 'fit or suitable for drinking; drinkable'. The majority of the HRC appears to see this as synonymous with 'safe to drink'. Yet as Vasilka Sancin points out in her dissenting opinion: 'Water can be designated as potable, while containing microorganisms dangerous for health, particularly for children'.[17] Sancin further mentions that certain important plans and policies on water and sanitation in Kiribati have not yet been implemented. Indeed, the evidence put before the HRC was that at least one of their children had suffered a serious blood disorder resulting from contaminated drinking water, and this was not disputed by New Zealand or by the HRC in its decision. In spite of this the HRC majority strangely asserts there is no evidence that Teitiota and his family were exposed to unsafe drinking water.[18]

It seems that much of the disagreement between the majority and the dissenting views was factual and not necessarily legal: whether the water are drinkable or not, and whether it is possible to grow crops and sustain one's family in Kiribati. The HRC does not give any clear criteria for establishing a breach of Article 6 in the type of circumstances described on Kiribati, but the suggestion (as implied by the majority's decision) appears to be that drinking water must be not merely risky or somewhat dangerous, but actually undrinkable, and there must be a complete failure of crops rather than merely a decline. While one can accept that it would be practically impossible (and probably undesirable) to find breaches of the right to life for relatively trivial risks, this decision can be interpreted as meaning that there has to be a complete breakdown in the means of life to justify finding a violation of Article 6. Yet, in such circumstances, we would not be dealing with *threats* to the right to life – which is supposed to be covered – but actual and probably widespread loss of life. In short, when it comes to the effects of climate change, it appears that actual deaths will be needed to justify wider claims for protection under the current state of the law. Indeed, the HRC notes that the dangers faced by people currently being sent back to Kiribati – of lack of

17 Ibid. Annex 1, para 3

18 Ibid, para. 9.8

drinkable water, and economic crisis caused by climate change resulting in violence – are not hypothetical future harms 'but a real predicament'.[19]

One may further wonder whether the unique circumstances of sinking island nations should be included as conditions 'extreme' enough to justify the exception to the 'personal nature' requirement. One could argue that unlike other cases, the conditions in sinking island nations are unlikely to ever improve. There is no armed dispute which may end, or a dictatorship that may one day be replaced. The ocean will keep on rising and gradually take whatever is left, until eventually the necessary 'extreme conditions' threshold will, inevitably, be met. This point is related to the one made below – the HRC's determination that *not all is lost,* and adaptation measures *may* eventually save these islands. This point however, is somewhat unfair. It dooms the citizens of Kiribati to stay put and 'play their odds', hoping that a future is indeed written in their stars. Should they invest in a new house? A new business? Should they migrate inland, and then once again, further inland, grasping at the hope for a future despite deteriorating conditions? Can such a life be defined as 'life with dignity'?

Obstacle #2: The imminent nature of the claim

The HRC addressed the claim according to which the Republic of Kiribati would become uninhabitable within 10 to 15 years. The Tribunal accepted that 'the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the *non-refoulement* obligations of sending states.'[20] The HRC nevertheless asserted that the dire conditions presented by Teitiota are mere predictions, which may not materialise if 'robust national and international efforts' are put in place. The HRC did not challenge in this respect New Zealand's claim that the Republic of Kiribati indeed undertakes a variety of adaptation measures.[21]

This last determination is interesting. It seems that the right to life could be invoked only where all hopes are gone, when it is clear that the nation island's future is doomed. While

19 Ibid, para. 8.7.

20 Ibid, para. 9.11.

21 Ibid, para. 9.12.

the HRC does recognise that slow-onset events may threaten individuals' right to life, it seems that a remedy will be given only at a very late stage. This stands counter to the nature of climate-induced displacement - a long and gradual process, where most will attempt migration where conditions are hard, even if not necessarily impossible, as in the conditions faced by Teitiota and his family.

Another interesting issue is the potential reviewability of the HRC's determination. 10-15 years may be a long period of time, but the more important question is not when the islands will become inhabitable, but rather at what point *it will be clear* that islands will become inhabitable, and when no plans or efforts are expected to alter this outcome. It is therefore possible that the HRC will find itself evaluating the efforts to save Kiribati periodically, every several years, and much sooner than 10-15 years from now. In other words, it is very likely that the Teitiota saga is far from over.

A Significant Step Forward for Protection of Climate Refugees?

In spite of the HRC's negative decision in respect of the Teitiota family's claim, many commentators have focussed on what they see as a major positive development in the HRC's decision: its acknowledgement that the principle of *non-refoulement* could be extended to cover serious harm caused by the effects of climate change.[22] This principle has its origins in international refugee law, although it has developed into customary law through its interaction with wider human rights norms.[23] While we acknowledge that any extension of legal principles which could be engaged to provide protection to climate refugees is welcome, we also believe that the step taken by the HRC is minimal. Moreover, its decision reinforces certain standards and perceptions that hinders the development of effective protection for climate refugees now and in the future. In what follows, we try to

22 See, for example, Amnesty International (n 3); Yvonne Su, 'UN ruling on climate refugees could be a gamechanger for climate action', 29 January 2020, https://www.climatechangenews.com/2020/01/29/un-ruling-climate-refugees-gamechanger-climate-action/.

23 It made its first appearance as Article 3 of the abortive 1933 Refugee Convention, and was enshrined in international law as Article 33 of the 1951 Refugee Convention. Since then it has been adopted throughout international human rights law, from Article 3 of the 1984 Convention Against Torture to judicial interpretation of states' positive obligations to ensure rights to life and to the prevention of torture e.g. *Soering v UK* [1989] 11 EHRR 439.

tease out some more fundamental problems with the existing refugee law/human rights framework that need to be overcome if effective protection mechanisms are to be developed for climate refugees.

The Refugee Label

One significant, and so far, unresolved debate amongst scholars and policy-makers has been about how people fleeing the effects of climate change should be defined. However, the weight of opinion tends to reject using the term 'refugee'. The HRC decision does not make any significant impact on this debate. However, two things are worth taking from the Teitiota case. First, it contradicts one often stated objection to the 'refugee' label in the climate change context: the people affected reject the label. The very fact that Teitiota sought refugee status all the way through the New Zealand justice system demonstrates that at least some of those affected do self-identify as such. Second, as already mentioned, the New Zealand Supreme Court allowed for the possibility that the effects of climate change could interact with other factors, such as armed conflict or discriminatory state practices to engage protection under international refugee law. This coupled with the HRC's opinion that *non-refoulement*, a principle derived from refugee law, could be applicable in a situation similar to that of Teitiota, suggests that the door should not be closed just yet on incorporating the effects of climate change within the refugee concept.

However, this will necessarily involve extending our understanding of violence beyond direct persecution to structural forms. It is a peculiarity of the refugee concept that it insists that protection should only be extended to those where an identifiable agent of violence is present. Yet the impacts of climate change create threats to life every bit as acute as those that emanate from an authoritarian government or terrorist groups, and nor is it the case that they will affect people without discrimination. To take the facts of Teitiota as an example, the impact of shrinking land resources and poor quality drinking water disproportionately hit people depending on their socio-economic resources. These in turn may lead to the types of interpersonal violence and life-threatening illnesses described by Teitiota in his submission.

We must also not forget that the principle of *non-refoulement* alone does not guarantee protection in the fullest extent; it merely prevents being sent back to a situation of extreme danger. It does not guarantee either residence in the receiving country, nor does it provide for most of the rights and liberties associated with living a life of dignity.[24] This gap is what allows states to engage in 'push-back' operations (thus obviating the condition of the putative refugee being returned from their territory) or to hold asylum seekers in detention or limited movement, suspended between, on the one hand, the state not being able to send them back to their country of origin due to the *non-refoulement* principle and, on the other hand, the host state refusing to grant residence.[25]

The limitations of *non-refoulement*, as it is currently understood, allowed the HRC finding no violation of the principle in Teitiota, in spite of the fact that the family was exposed to illness and the potential for violence. It is in the nature of climate change that its effects are likely to be foreseen, or to develop incrementally, long before they have the kind of dramatic effects commonly associated with *non-refoulement*. As such, protection must be conceived of as much more forward-looking than is currently the case. Indeed, in situations where persecution is a factor, refugee law recognises the concept of well-founded fear i.e. that the potential for the danger to materialise, even on the basis of a reasonable chance or possibility that it will occur is taken into account.[26] It is arguably only a matter of degree for this to be extended in the context of climate change.

Slow Onset/Sudden Events

This last point has important implications for the discussion on responses to slow onset versus sudden events linked to climate change. One argument for avoiding a global approach to mitigating and compensating affected populations as well as rejecting the

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24 When the draft of Article 33 was being discussed by the conference of plenipotentiaries in 1951 a declaration was sought and won by delegates that *non-refoulement* only applied to people already on a state's territory and not those seeking entry. This was specifically in relation to concerns expressed by states about mass arrivals of people seeking asylum, which in the context of climate refugees is likely to be a common occurrence. See, *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis* (CUP 1995), 334-335.

25 On the issue of detention see, for example, *A and Others v UK,* ECtHR, Application no. 3455/05, 19 February 2009.

26 See, for example, *INS v Cardoza-Fonseca* [1987] 480 US 421; *R v Sivakumaran* [1988] 1 AC 958.

refugee label is that these elide the distinctions between the two types of events. Yet, the Teitiota case perfectly illustrates that such a binary distinction is problematic. Kiribati, along with many other geographically similar places, is experiencing a combination of the two that are almost impossible to disentangle. Rising sea levels and more extreme weather events together account for increased sudden floods. At the same time the increased ingress of sea water into freshwater reserves and farmable land has longer term consequences such as the illnesses suffered by the Teitiota children, a more precarious economy and way of life, along with the potential for violent conflict and social breakdown. While crude one-size-fits-all solutions are unsuitable applications to any complex situation, in the case of climate change – an integrated, global problem if ever there was one – trying to deal with its aspects in too disjointed a way has its own problems. Moreover, migration patterns of any sort are usually the result of multiple factors. Thus, creating safe legal pathways of migration for people in facing both sudden and slow-onset climate change events is about recognising the common causes and the common needs of those who need to leave their homes to lead a safe dignified life elsewhere.

Human Rights as a Solution

The failure to see the ways in which slow-onset and sudden effects of climate change come together in unpredictable and harmful ways represents a further problem in trying to apply human rights norms, as they are currently interpreted. The conclusion of the HRC that the dangers faced by the Teitiota family did not yet reach the level of acuteness required for engaging the principle of *non-refoulement* linked to the right to life, is emblematic of a reactive approach within human rights law. In essence, the HRC decision can be summed up as: yes, conditions in Kiribati are bad, but come back when they are worse (or even, when it is too late). This is epitomised in the HRC's observation that the Kiribati government and others may be able to take measures to mitigate the effects of climate change over the next 10-15 years and that conditions have not yet reached a point acute enough for there to be a violation of the right to life as envisaged in the ICCPR.[27]

27 *Teitiota v. New Zealand,* para. 9.10

Any hope for the Teitiota family (and the people of island nations)?

As stated above, we believe that the Teitiota case did not take us (or the Teitiota family) very far. Nevertheless, we do not dismiss this case as unimportant. To begin with, the mere recognition that the impact of climate change may lead to a successful invocation of Art 6 ICCPR is encouraging. The nature of judicial decisions and evolving jurisprudence is such that determinations, even if minimal, could be used as a grounding for future, more ambitious decisions. For example, it is possible that future tribunals will use this determination as a justification for taking an additional step, and dismissing the (rather impossible) 'personal nature' requirement in the context of climate change.

Future tribunals may also accept in the future, that the circumstances in Kiribati have changed for the worse, and the likelihood that international and national adaptation efforts will succeed has been reduced. As stated above, there is no need to wait 10-15 years for such a determination: with sufficient scientific support, a *prediction* that the islands will become inhabitable, could be invoked much sooner than that. In political terms, however, such a determination could be the equivalent to the signing of a state's death certificate – a step that the HRC may be unwilling to make.

It may also be necessary to creatively link in human rights norms together with those derived from environmental law so as to provide a more forward-looking and comprehensive right to protection.[28] The responsibilities of states like New Zealand to provide a home to climate refugees should be seen as more than a duty to not send people back to face serious harm. A more positive duty on the part of richer more industrialised nations, derived from their past and current carbon emissions should be constructed. In environmental law this duty already informs efforts to prevent and mitigate the effects of climate change. Perhaps this can be extended further to a positive duty to provide a new home to people for whom migration is no longer optional but forced.

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28 We develop this point in detail in Avidan Kent & Simon Behrman, *Facilitating the Resettlement and Rights of Climate Refugees: An argument for developing existing principles and practices* (Routledge 2018), Chapter 3.

Whether such a step forward will be taken is dependent on the willingness of activists, lawyers and tribunals to make it. As it stands, the legal situation does not provide a solution to Teitiota and his family, or to the increasing numbers of people facing similar threats to a safe and dignified way of life.