

The Teitiota Case and the limitations of the human rights framework

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1. Introduction

The decision of the UN Human Rights Committee (HRC) in *Teitiota v New Zealand* has been widely hailed as heralding a major development in the jurisprudence on ‘climate refugees’.¹ Even more nuanced commentators have asserted that it represents a significant, if imperfect, step forward in patching together a regime of protection for the increasing numbers of people who are being displaced by the effects of climate change. No less a figure than Filippo Grandi, the current head of the UN High Commissioner for Refugees (UNHCR) described the HRC decision as meaning: ‘if you have an immediate threat to your life due to climate change, due to the climate emergency, and if you cross the border and go to another country, you should not be sent back because you would be at risk of your life, just like in a war or in a situation of persecution’.² Would that this was so, but in our view, not yet. Moreover, there is an obvious problem with these optimistic views of the HRC decision: in spite of quite substantial evidence of serious harm in which climate change is a major factor, the claim for protection failed.

In this article, we therefore question these evaluations and ask whether the HRC decision is a welcome incremental step forward, or

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¹ UN Human Rights Committee (HRC), *Ioane Teitiota v New Zealand* (advance un-edited version now available: 23 September 2020) UN Doc CCPR/C/127/D/2728/2016 (7 January 2020).

² L Baker, ‘World needs to prepare for “millions” of climate refugees – UN’, *Financial Post* (21 January 2020) available at <<https://financialpost.com/pmnm/business-pmn/world-needs-to-prepare-for-millions-of-climate-refugees-un>>.



whether it adds little to the already meagre human rights jurisprudence in regards to climate refugees.

We will give a brief precis of the background to this case, and of the issues that were raised at various points throughout the litigation. We will then highlight the key sticking points that prevented the claim for protection being successful. Finally, we will offer some critical analysis of the HRC decision, and suggest why the human rights paradigm, certainly as it is currently conceived, may present some insuperable barriers for climate refugees to seek protection within it.

2. *Background*

The facts of the case illustrate some of the ambiguities of identifying cause, nomenclature and protection needs, when it comes to the nexus of climate change, forced migration, and human rights.³ For several years in the 2000s the claimant Ioane Teitiota and his wife struggled with living on poor-quality land, frequently inundated by high tides and flooding. So, in 2007 they decided to leave their home in Tarawa, one of the islands in the low-lying Pacific island state of Kiribati, for New Zealand. They managed to get jobs and work visas in New Zealand, and scabbled together just enough money for their flights there. For several years, they toiled away at their jobs, had three children and settled into their new life. So far, so typical of what is commonly referred to as ‘economic migration’. The problem arose when their visas ran out, and they inadvertently failed to renew them in time. Teitiota and his family had reached a dead end as far as their legal status in New Zealand was concerned, and their deportation back to Kiribati was the logical outcome.

However, they engaged an enterprising activist/lawyer, Michael Kidd, who decided to frame an alternative claim as ‘climate refugees’. An asylum claim was lodged under Section 198 of the Immigration Act 2009. This allows for a right to remain in New Zealand, either as a refugee under

³ A very good detailed background to the case can be found in KR Weiss, ‘The Making of a Climate Refugee’ *Foreign Policy* (28 January 2015) available at <<https://foreignpolicy.com/2015/01/28/the-making-of-a-climate-refugee-kiribati-tarawa-teitiota/>>.



the terms of the 1951 Refugee Convention,⁴ to which New Zealand is a state party, or alternatively on the basis of complementary protection under various other human rights treaties, namely the 1984 Convention Against Torture (CAT),⁵ and the 1966 International Covenant on Civil and Political Rights (ICCPR).⁶ In no way should this be understood as a vexatious or crudely opportunist legal strategy. The evidence presented by Teitiota was based on his own testimony, plus that of an expert witness who has done extensive research on the effects of climate change in the region, and also the 2007 National Adaptation Programme of Action (NAPA) presented by the government of Kiribati to the United Nations Framework Convention on Climate Change (UNFCCC).⁷ From the initial Immigration and Protection Tribunal hearing all the way up to the HRC, every court found the evidence presented to be entirely credible. *Inter alia*, the evidence detailed coastal erosion, increased storm surges and flooding, contamination of relatively scarce sources of potable water that in turn has caused diseases especially amongst young children, loss of land on which to live and grow food that has in turn led to violent disputes between neighbours. Specifically, it was accepted that these deteriorating conditions of life on the islands has been caused, at least partly, by the effects of climate change, both sudden and slow-onset.⁸ So clearly there was substantial evidence for a threat to life on Kiribati as a result of the effects of climate change. Why, then, did the claim repeatedly fail at each legal stage?

3. *The New Zealand litigation: When a refugee is not a 'refugee'*

The question as to whether to refer to people like Teitiota as 'climate refugees' or 'climate migrants' or any number of alternative labels has been a topic of widespread debate. Indeed, we have written elsewhere

⁴ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

⁷ This evidence is presented in its most detailed form in *AF (Kiribati)* [2013] NZIPT 800413 (25 June 2013) paras 5-33.

⁸ *AF (Kiribati)* [2013] NZIPT 800413 (25 June 2013) para 39.



laying out a set of arguments in favour of ‘climate refugee’ as an appropriate and accurate descriptor.⁹ We do not propose to rehearse those points again in full here. Suffice to say, the Teitiota case, and the HRC decision, in our view, reinforce the argument for referring to ‘climate refugees’. The key point of the decision that has been championed by most commentators is that *non-refoulement* was found to be, in principle, applicable in cases where the effects of climate change created a real risk of harm. *Non-refoulement* is the child of refugee law.¹⁰ It expresses the idea that claimants have been forced to flee a source of danger, and is therefore not a matter of choice, of mere migration in the common usage of that word.

Confusion was sown in the New Zealand litigation by a discussion on the ‘sociological’ versus ‘legal’ conception of a refugee that appears in the initial Immigration and Protection Tribunal, and continues on through subsequent stages of the case.¹¹ Part of the confusion stems from an attempt by Teitiota’s lawyer to effectively ignore the distinction between the two. A convincing argument was made that the term ‘refugee’ has a much broader meaning than the legal one. However, it is unarguable, as the New Zealand courts pointed out, that in a legal context ‘it is the legal conception which applies, not the sociological one’.¹² It also detracts from a more substantive argument advanced on Teitiota’s behalf around the notion of persecution. This term, so central to the legal definition of a refugee, is left undefined in the 1951 Refugee Convention and other legal instruments of refugee law. Atle Grahl-Madsen, one of the founders of the academic discipline of refugee law, wrote many years ago: ‘The

⁹ A Kent, S Behrman, *Facilitating the Resettlement and Rights of Climate Refugees: An Argument for Developing Existing Principles and Practices* (Routledge 2018) ch 2.

¹⁰ A weak version of this principle first appears in art 3 of the Convention Relating to the International Status of Refugees (adopted 28 October 1933) 159 LNTS 200; it is then further elaborated in art 33 of the 1951 Refugee Convention (n 4). Subsequently, it was also included in art 3 of the 1984 Convention Against Torture (n 5) and developed as a positive obligation in respect of various human rights obligations eg *Soering v UK* App no 14038/88 (ECtHR, 7 July 1989). It is now widely considered to be customary principle of international law.

¹¹ First discussed at para 51 of the Immigration and Protection Tribunal judgment. The distinction is taken from A Suhkre ‘Environmental Degradation and Population Flows’ (1994) 47 J Intl Affairs 482.

¹² *AF (Kiribati)* [2013] NZIPT 800413 (25 June 2013) para 52.



term “persecution” has nowhere been defined and this was probably deliberate. It seems as if the drafters have wanted to introduce a flexible concept which might be applied to circumstances as they might arise’.¹³

The New Zealand courts follow what has become known as the Hathaway concept of persecution: a ‘sustained or systemic violation of basic human rights demonstrative of a failure of state protection’.¹⁴ On the face of it, there is no reason why this cannot include the situation of people like Teitiota; the effects of climate change are systemic in nature and sustained in their negative effects on individual and collective human rights. However, the New Zealand courts add to this, and indeed they do so in line with mainstream jurisprudence on the issue, that persecution also involves direct human agency.¹⁵ Teitiota’s lawyer answered this with a call to embrace an expanded concept of persecution that identifies ‘an indirect but worldwide human agency’ to take account of the collective global set of actions that have caused climate change.¹⁶ But beyond deploying a rather crude slippery slope argument,¹⁷ this specific argument is never addressed head on by any of the tribunals that heard this case. To be sure, accepting such a concept would significantly expand the jurisprudence on persecution, but it still begs the question as to why, in the context of a phenomenon such as climate change, such a development is illegitimate, especially if, as Grahl-Madsen argued, the drafters of the Convention intended it to have a flexible meaning. Indeed, the whole framework of climate change law is built upon the notion of collective agency and responsibilities for the effects of global warming.

So, on the basis of the existing jurisprudence, the claim for refugee status under the 1951 Refugee Convention was arguably a legal long shot. Sure enough, from the initial tribunal through appeals up to the Supreme Court, the judgments were unanimous that in the clear absence of any identifiable persecutor the claim failed.

¹³ A Grahl-Madsen, *The Status of Refugees in International Law*, vol 1 (AW Sijthoff 1966) 193.

¹⁴ J Hathaway, *The Law of Refugee Status* (Butterworths 1991) 101.

¹⁵ *AF (Kiribati)* [2013] NZIPT 800413 (25 June 2013) at para 54.

¹⁶ *Teitiota v Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125 (26 November 2013) at para 40.

¹⁷ *ibid* para 51.



Yet, for many, the New Zealand courts laid the basis for possibly expanding the scope of refugee law to encompass ‘climate refugees’ in the future. This claim hinges upon the fact that, as the Supreme Court noted:

‘both the Tribunal and the High Court, emphasised their decisions did not mean that environmental degradation resulting from climate change or other natural disasters could never create a pathway into the Refugee Convention or protected person jurisdiction. Our decision in this case should not be taken as ruling out that possibility in an appropriate case’.¹⁸

Yet there remains a fundamental ambiguity: what are the potential routes? The High Court gave a fairly clear answer to this question:

‘Environmental issues sometimes lead to armed conflict. There may be ensuing violence towards or direct repression of an entire section of the population. Humanitarian relief can become politicised, particularly in situations where some group inside a disadvantaged country is the target of direct discrimination’.¹⁹

If the suggested pathways then are simply that the impacts of climate change will lay the groundwork for the more classic causes of forced migration, such as war and persecution, then it is difficult to see how anything new is being added here. After all, arguably, environmental factors have long been at the root of armed conflict and other forms of violence, such as with the Marsh Arabs in Iraq in the early 1990s and more recently in Syria.²⁰ As far back as 1979 the UNHCR stated in its handbook for determining refugee status, that while the 1951 Refugee Convention excludes people who have fled natural disasters without a well-founded fear of persecution, such conditions may not ‘be altogether irrelevant to the process of determining refugee status, since all the circumstances need to

¹⁸ *Teitiota v Chief Executive of the Ministry of Business, Innovation, and Employment* [2015] NZSC 107 para 13.

¹⁹ *Teitiota v Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125 (26 November 2013) para 27.

²⁰ Human Rights Watch, ‘The Iraqi Government Assault on the Marsh Arabs’ (January 2003) 4 available at <www.hrw.org/legacy/backgrounders/mena/marsharabs1.pdf>; CP Crane et al, ‘Climate Change in the Fertile Crescent and Implications of the Recent Syrian Drought’ (2015) 112 *Proceedings of the National Academy of Sciences* 3241.



be taken into account for a proper understanding of the applicant's case'.²¹ So, there is little advance in simply stating that the effects of climate change may contribute to a potential claim for refugee status.

There is also an implicit and deeply perverse aspect to the reasoning of the New Zealand courts. According to their logic, if communities affected by climate change collectively and co-operatively seek to manage their situation and then claim for protection under either the ICPPR or the Refugee Convention, then they are likely to fail: no violence, no discrimination, no valid claim. If, on the other hand, they descend into violence and discrimination, then the doors *may* be opened to them. In short, the extra step, beyond the environmental threat, is that affected communities are expected to display the worst aspects of human behaviour towards one another in order to benefit from human rights protection. Of course, human rights have developed precisely out of the need to protect people from these types of behaviours, otherwise the need for them would not arise in the first place. But this is what makes the effects of climate change novel. We are not dealing with harm that has been intended; at worst, it has been recklessly caused. Moreover, the perpetrators are not so easy to identify, at least not on an individual basis. Also, the scientific knowledge that we have about the development of climate change allows us to pre-empt the dangers before they manifest themselves, and before they lead to serious breakdowns in social relations.

Little more than a week after the Supreme Court turned down Teitiota's appeal, he was deported back to Kiribati, followed soon after by his wife and children. As a last ditch attempt at finding redress, he then lodged a claim with the HRC. This body has jurisdiction only over alleged violations of the ICCPR, and not on claims for refugee status. The claim here, therefore, shifted to a focus on an alleged violation of the right to life under Article 6 of the ICCPR by New Zealand on the basis of the principle of *non-refoulement*, ie that they violated the positive obligation on states not to send people back to a place where their right to life would be threatened.

²¹ UN High Commissioner for Refugees (UNHCR), 'Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' (February 2019) UN Doc HCR/1P/4/ENG/REV.4. The Handbook is now in its fourth edition, but the wording cited here has remained unchanged since the original 1979 publication.



4. *The Human Rights Committee ruling: How much of an advance in the law does it represent?*

The evidence before the HRC was essentially the same as that which had been presented in the New Zealand courts, with the added element that since their return to Kiribati at least one of the Teitiota's children had developed an illness likely caused by contaminated water. Again, the HRC found the evidence presented of the dangers faced in Kiribati to be wholly reliable. And yet, once again, the claim failed. Despite this, many commentators have asserted that it does at least move the agenda forward when it comes to establishing legal protections for people fleeing the effects of climate change. For example, it has been argued that:

‘until recently, the idea that the principle of *non-refoulement* could apply to persons who have fled the effects of climate change might still seem far-fetched. With this new decision, States must now duly motivate their refusal in the light of the actual situation suffered by the applicant for international protection, bearing in mind that they may have an obligation to receive him or her if what has been done to reduce the effects of climate change and help those already suffering the full consequences of it is not sufficient’.²²

Similarly, Amnesty International hailed the HRC decision as setting ‘a global precedent’:

‘It says a state will be in breach of its human rights obligations if it returns someone to a country where – due to the climate crisis – their life is at risk, or in danger of cruel, inhuman or degrading treatment triggered’.²³

²² M Courtoy, ‘United Nations Human Rights Committee, Views on Communication No 2728/2016, Ioane Teitiota v. New Zealand, October 24, 2019: An Historic Decision for “Climate Refugees”? Putting It into Perspective’ (25 March 2020) available at <https://uclouvain.be/en/research-institutes/juri/cedie/news/united-nations-human-rights-committee-views-on-communication-no-2728-2016-ioane-teitiota-v-new-zealand-october-24-2019.html#_ftn18>.

²³ Amnesty International UK, ‘UN landmark climate refugee ruling sets global precedent’ (20 January 2020) available at <www.amnesty.org.uk/press-releases/un-landmark-climate-refugee-ruling-sets-global-precedent>.



Yet, already in 2018, the HRC in its General Comment No 36 clearly stated that environmental degradation can be brought within the scope of a violation of the right to life under Article 6 of the ICCPR.²⁴ Indeed, in the Teitiota case, the HRC highlighted this point. This reiteration is of course important on its own, enforcing the link between climate change and human rights even further. The bar, however, is set too high for reaching the necessary conditions to engage protection under the ICCPR. Or, put another way, a promise of protection is extended to potential climate refugees, but only in the most dire of circumstances.

The fact that the HRC have confirmed that ‘Pacific Island states do not need to be under water before triggering human rights obligations to protect the right to life’ is also hailed as an important step forward.²⁵ Yet, this was never going to be the case. To state an obvious point, assuming that nothing is done, most, if not all of the island’s inhabitants would have long since moved or be dead before that point is reached. The issue is not about what happens when the islands are already submerged or otherwise uninhabitable, but what is done when life becomes so difficult to sustain that it causes suffering and a loss of dignity.²⁶ The HRC had already stated some years back that the right to life is not restricted to mere existence, but encompasses a wider scope, ‘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’.²⁷ In short, as Miriam Cullen points out, a finding that it is a human rights violation to send someone back to where their life might be threatened is ‘not a legal revolution’ but rather engages the well-established principle of *non-refoulement*.²⁸

The UNHCR in its response to the HRC decision has said:

²⁴ HRC, ‘General Comment No 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life’ UN Doc CCPR/C/GC/36 (30 October 2018) para 62.

²⁵ Amnesty International UK (n 23).

²⁶ For a detailed discussion of the notion of ‘dignity’ in the context of the Teitiota case and the right to life, see S Atapattu, ‘Migrating with Dignity: Protecting the Rights of “Climate Refugees” with the *Non-refoulement* Principle’, in S Behrman, A Kent (eds), *Climate Refugees: Global, Local, and Critical Approaches* (CUP forthcoming).

²⁷ HRC, General Comment No 36 (n 24) para 3.

²⁸ M Cullen, ‘The Human Rights Committee’s Recent Decision on Climate Displacement’ Asylum Insight: Facts and Analysis’ (February 2020) available at <www.asyluminsight.com/c-miriam-cullen?rq=cullen#.X4AnX5NKhbV>.



‘UNHCR has consistently stressed that people fleeing adverse effects of climate change and the impact of sudden and slow-onset disasters may have valid claims for refugee status under the 1951 Refugee Convention or regional refugee frameworks. This includes but is not limited to situations where climate change and disasters are intertwined with conflict and violence. The Committee’s decision supports this interpretation of existing protection frameworks. It recognises that international refugee law is applicable in the context of climate change and disaster displacement’.²⁹

This is a somewhat odd statement, as the HRC was not ruling, and indeed had no jurisdiction to rule on refugee status. But, in any case, this statement adds practically nothing, as people fleeing most things, so long as they intersect with the grounds specified in the 1951 Refugee Convention, have never ipso facto been excluded.³⁰ This could include the effects of poverty, natural disasters, or anything else that is combined with persecution on grounds of race, nationality, religion, political opinion or membership of a social group.

5. *Problems with the human rights paradigm*

To return to the reasons for the failure of the claim before the HRC, there were essentially two problems. First, that the danger faced was not specific enough to Teitiota and his family; it was basically the same as that faced by all other inhabitants of Kiribati.³¹ The obligation to refrain from deportation arises only when the risk is personal to the claimant. 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 of irreparable harm exists’.³²

²⁹ UNHCR, ‘UN Human Rights Committee decision on climate change is a wake-up call, according to UNHCR’ (24 January 2020) available at <www.unhcr.org/news/briefing/2020/1/5e2ab8ae4/un-human-rights-committee-decision-climate-change-wake-up-call-according.html>.

³⁰ See, for example, UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection’ (February 2019) para 39.

³¹ HRC, General Comment No 36 (n 24) para 30.

³² HRC, *Ioane Teitiota v New Zealand* (n 1) para 9.3.



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.³³ 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 criterion 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. It is difficult to imagine a case where an individual or defined group within a geographic area will experience the effects of climate change in ways that go beyond general conditions. Indeed, there are likely to be only two types of situation where this will arise. First, where there is discrimination against a segment of the population, but this simply takes us back to already established refugee and human rights law. Second, there could be circumstances where relative poverty might lead to a widely disproportionate impact on the poor. This raises some interesting possibilities. However, in the circumstances of states such as Kiribati, in which the entire country is in peril, this will be of much less relevance. Thus, an insistence on demonstrating a greater risk of harm than the general population will create an insuperable barrier to many who currently face the sharp end of climate change such as low-lying Pacific island nations. As one of the dissenting experts on the committee, Duncan Laki Muhumuza put it: ‘New Zealand’s action is more like forcing a drowning person back into a sinking vessel, with the “justification” that after all, there are other voyagers on board’.³⁴

The caveat to the personal requirement is where general conditions are so extreme that they pose a serious risk to life. But as both dissenting opinions in the HRC argue, if the present conditions on Kiribati, including depleted sources of safe water and food, repeated flooding and destruction of land, homes and the ability to grow crops, and widespread disease amongst children due to contaminated water, are not sufficient to reach that bar, then what is? The ‘most extreme condition’ however, certainly opens a window that future claimants should not ignore. As the

³³ *ibid* paras 9.6, 9.7.

³⁴ *ibid*, Annex 2, para 6.



dissenting opinions demonstrate, the possibility of a more accommodating interpretation of this exception exists, and has some support within the HRC.

6. *How soon is soon?*

The second hurdle, and perhaps the lynchpin of the HRC's refusal to find in favour of Teitiota's claim is that the timescale for the islands of Kiribati to become uninhabitable is 10-15 years. For the HRC this is too far into the future to establish an imminent threat to life, for this period:

'could allow for intervening acts by the Republic of Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population. The Committee notes that the State party's authorities thoroughly examined this issue and found that the Republic of Kiribati was taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms'.³⁵

As Jane McAdam argues: 'This reasoning requires scrutiny. Mere speculation about hypothetical events far into the future is very different from situations where there is sound scientific evidence weighing strongly in favour of particular outcomes'.³⁶ Indeed, already five years ago a report on the Teitiota case in *Foreign Policy* laid out in greater detail the existing degraded conditions in Kiribati:

'Tarawa residents have been alarmed that 2,400 children fell ill and nine children died after picking up a rotavirus, likely from sewage-contaminated water. Aside from the widespread practice of outdoor defecation, pit latrines and flush toilets often leak into the freshwater lens, according to a 2012 presidential report on South Tarawa; all groundwater has tested positive for fecal coliform. Other infectious diseases are taking

³⁵ *ibid* para 9.12.

³⁶ J McAdam, 'Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of *non-refoulement*' (2020) 114 *AJIL* 718-719.



advantage of the crowding in this island nation's shantytowns. Tuberculosis is on the upswing. Leprosy is spreading'.³⁷

The report goes on to quote the then President of Kiribati, Anote Tong, saying that while the government had adaptation plans such as building sea defences, given the extreme vulnerability of what are essentially nothing more than sandy atolls, these would be relatively ineffective. As such, it was more realistic to plan for buying land elsewhere for future sources of agricultural production and evacuation.³⁸ The dissenting opinions of both Vasilka Sancin and Duncan Laki Muhumuza both emphasise the present dire conditions in Kiribati as the basis of their criticism of the majority of the Committee in refusing the claim.³⁹

However, even if we are to accept that the general conditions have not yet reached the extreme threshold for a successful Article 6 claim, there is a perverse element, similar to that identified above in respect of refugee claims, to some of the HRC's reasoning on the time frame; the absence of violence of the type that results from direct human agency hobbles the claim. In addition, emphasis is put on the fact that the government of Kiribati has made efforts to mitigate the effects of climate change, which in turn underpins why a timescale of 10-15 years allows for the *possibility* that Teitiota, and others like him will not experience a significant threat to life.⁴⁰ In essence, this suggests that if the governments of threatened states like Kiribati wish to ease their citizens' path to seeking protection elsewhere – a real possibility given the strains faced by these states with overcrowding on decreasing areas of land and a lack of resources to support them – then it might be better to do little or nothing in the way of mitigation and adaptation efforts.

UNHCR have argued that climate change 'could, as the Committee notes, trigger international obligations to protect'.⁴¹ The frequent reference to 'triggers' that might engage international protection mechanisms in the literature around climate refugees, often imply that climate change is not enough, that they must set off a further set of circumstances such as conflict or persecution in order to engage legal protection. Indeed, as

³⁷ Weiss (n 5).

³⁸ *ibid.*

³⁹ *Teitiota v New Zealand* (n 1) Annex 1 para 4; Annex 2 para 5.

⁴⁰ *ibid* para 9.6.

⁴¹ UNHCR (n 29).



we have seen, the jurisprudence in the Teitiota case reinforces this belief. It is possible to see in the HRC's decision a significant step forward in that it identifies the effects of climate change, in and of themselves, as creating the conditions in which protection may be granted on the basis of the *non-refoulement* principle. But the emphasis on conflict, of widespread violence suggests that still there must be something more than just drought, flooding etc. To the extent that those direct effects of climate change are acknowledged by the HRC, still the threshold is maintained at arguably a far too acute level to have a concrete application on their own. By this we mean that by the time the conditions are such that the threshold is met, it is more than likely that the extreme scarcity of potable water, of cultivable land, of general precarity, will have created conditions of violence and conflict anyway. In short, the reticence remains in allowing the direct effects of climate change *per se* to be grounds for engaging protection at the international level. As such, tribunals continually fall back on the long-established grounds for engaging human rights protections, rather than trying to develop them in any substantial way to encompass the specific and novel threats posed by climate change.

7. Conclusion

In closing it is important to present Teitiota's own response to the HRC's decision:

'Forgive my ignorance, but to be frank, I'm quite disappointed with the outcome of my case which has been recently released from the UN... It's still the same as before — I'm still worried about my family [because of] climate change ... the sea level rise, the drinking water is not good ... [and] I'm still yet to find a job until now. Personally, I think big countries like NZ should accept us and not ignore our plight because our islands are very low-lying and we are vulnerable even to the slightest bad weather or storm surge. I want to ask these big countries to please



take our case seriously because we need their help... The notable difference is that my children are more vulnerable here to the spread of diseases such as a virus infection like a flu or diarrhoea'.⁴²

While commentators all over were trumpeting the HRC decision as a 'landmark', a great 'step forward', the reality for Teitiota and many others in a similar situation to him and his family, is that they must spend many more years living in unsafe and deteriorating conditions. The various iterations of this case in New Zealand and at the HRC can be seen as a series of promises of protection in the future – maybe the effects of climate change *could* give rise to a refugee claim, perhaps at some point in the future conditions in Kiribati and elsewhere will get sufficiently worse that non-refoulement will be engaged. At some point, maybe, these promises will be redeemed, but in the meantime, large and increasing numbers of people like the Teitiota family are legally trapped with the already dire, and worsening, consequences of climate change.

⁴² E Wasuka, 'Landmark decision from UN Human Rights Committee paves way for climate refugees' *ABC News* (21 January 2020) available at <www.abc.net.au/news/2020-01-21/un-human-rights-ruling-worlds-first-climate-refugee-kiribati/11887070>.

