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CURRENT DEVELOPMENTS

Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of *Non-refoulement*

By Jane McAdam *

I. Introduction

For the past twenty years, domestic courts and tribunals have been called upon periodically to consider whether the state is precluded from deporting people to places where they face risks arising from the impacts of climate change.[1] In the popular imagination, these cases have concerned so-called "climate refugees." In legal terms, they have considered whether the principle of *non-refoulement* (nonremoval) under both refugee law and human rights law extends to those whose lives or living conditions would be severely impacted on account of the adverse effects of climate change or disasters.

To date, all the claims have failed for various reasons, among them that the harm feared did not amount to "persecution" under refugee law; there was no differential impact on the individual concerned; or the evidence did not *yet* substantiate the claim. But in late 2019, the United Nations Human Rights Committee accepted, in principle, that it is unlawful for states to send people to places where the impacts of climate change expose them to life-threatening risks or a risk of cruel, inhuman, or degrading treatment.[2]

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[1] *See e.g.*, AF (Kiribati) [2013] NZIPT 800413 (N.Z.); Teitiota v. The Chief Executive of the Ministry of Business Innovation and Employment [2013] NZHC 3125 (N.Z.) [hereinafter *Teitiota* HC]; Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment [2014] NZCA 173 (N.Z.) [hereinafter *Teitiota* CA]; Teitiota v. The Chief Executive of the Ministry of Business Innovation and Employment [2015] NZSC 107 (N.Z.) [hereinafter *Teitiota* SC]; AF (Tuvalu) [2015] NZIPT 800859 (N.Z.); AD (Tuvalu) [2014] NZIPT 501370 (N.Z.); AC (Tuvalu) [2014] NZIPT 800517–520 (N.Z.); and earlier cases cited in Jane McAdam, *The Emerging New Zealand Jurisprudence on Climate Change, Disasters and Displacement*, 3 Migration Stud. 131, 139 n. 2 (2015); Matthew Scott, *Finding Agency in Adversity: Applying the Refugee Convention in the Context of Disasters and Climate Change*, 35 Refugee Surv. Q. 26, 27 nn. 6–7 (2016) [hereinafter Scott, *Finding Agency*]; Matthew Scott, Climate Change, Disasters and the Refugee Convention, at ch. 3 (2020) [hereinafter Scott, Climate Change]. As both McAdam and Scott note, over an even longer period of time, decision makers have examined cases concerning nonremoval to the impacts of disasters or prolonged drought.

[2] Human Rights Comm., Teitiota v. New Zealand, UN Doc. CCPR/C/127/D/2728/2016 (Oct. 24, 2019) [hereinafter Teitiota HRC]. Although the Committee's "views," which will be referred to in this

The particular case concerned Mr. Ioane Teitiota from the small island state of Kiribati in the South Pacific. He had sought protection in New Zealand on the basis that life at home was becoming increasingly precarious as a result of insufficient fresh water, overcrowding, inundation, erosion, and land disputes, owing to the effects of climate change and sea-level rise. Claiming to be the world's first "climate change refugee,"[3] his case received global attention in 2015 when, after a series of unsuccessful appeals in New Zealand's courts, he was deported to Kiribati and he lodged a complaint against New Zealand with the Human Rights Committee.

On the one hand, the Committee's decision was a landmark determination. It was the first time that a quasi-judicial body stated that "without robust national and international efforts," the effects of climate change may expose people to life-threatening risks or cruel, inhuman, or degrading treatment, "thereby triggering the *non-refoulement* obligations of sending states."[4] Furthermore, states have a "continuing responsibility" in future cases to take into account "new and updated data on the effects of climate change and rising sea levels."[5] This not only means that "as climate impacts worsen, future similar claims might well succeed,"[6] but that potentially, even now, a different individual, in another part of the world, might already have a valid protection claim.

On the other hand, the Committee's decision was "not a legal revolution."[7] The underlying legal principles were already very well-established,[8] and legal scholars and texts had long pointed to the capacity of the principle of *non-refoulement* under human rights law to protect people in this context.[9] Furthermore, on the facts, the Committee found that there had been

article as a "decision," are not legally binding on states, they are grounded in international legal obligations that do bind states.

[3] Kenneth R. Weiss, *The Making of a Climate Refugee*, For. Pol'y (Jan. 28, 2015), *at* https://foreignpolicy.com/2015/01/28/the-making-of-a-climate-refugee-kiribati-tarawa-teitiota.

[4] Teitiota HRC, *supra* note 2, para. 9.11.

[5] *Id.*, para. 9.14.

[6] Miriam Cullen, *The UN Human Rights Committee's Recent Decision on Climate Displacement*, Asylum Insight (Feb. 2020), *at* https://www.asyluminsight.com/c-miriam-cullen?rq=cullen#.XlcOITIzaOU.

[7] *Id.*

[8] 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, para. 30, UN Doc. CCPR/C/GC/36 (Oct. 30, 2018) [hereinafter General Comment No. 36] (referring also to Human Rights Committee, Kindler v. Canada, paras. 13.1–13.2, UN Doc. CCPR/C/48/D/470/1991 (Nov. 11, 1993)): "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." *Id.*, para. 31 notes that: "The obligation not to extradite, deport or otherwise transfer pursuant to article 6 of the Covenant may be broader than the scope of the principle of *non refoulement* under international refugee law, since it may also require the protection of aliens not entitled to refugee status."

[9] *See, e.g.*, International Law Association Res. 6/2018, Annex, Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise (Aug. 2018) [hereinafter Sydney Declaration]; Jane McAdam, Bruce Burson, Walter Kälin & Sanjula Weerasinghe, *International Law and Sea-Level Rise: Forced Migration and Human Rights* (Fridtjof Nansen Institute & Kaldor Centre for International Refugee Law, FNI Report No. 1, 2016); Walter Kälin & Nina Schrepfer, Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches, at 10, UNHCR PPLA/2012/01 (2012); Jane McAdam, Climate Change, Forced Migration, and International Law (2012); Nansen Initiative on Disaster-Induced Cross-Border Displacement, *Protection for Persons Moving Across Borders in the Context of Disasters: A Guide to Effective Practices for RCM Member Countries*, 12 n. 15 (Nov. 2016), *available at* https://disasterdisplacement.org/wp-content/uploads/2016/11/PROTECTION-FOR-PERSONS-MOVING-IN-THE-CONTEXT-OF-DISASTERS.pdf [hereinafter RCM Guide]. In 2018, states themselves reaffirmed their obligations under human rights law not to return people to situations of irreparable harm, in a document that recognized risks linked to climate change, disasters, and environmental degradation. GA Res. 73/195,

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no violation of Mr. Teitiota's rights: New Zealand had properly provided him with an independent, impartial, and "individualized assessment of his need for protection," and had considered all the evidence when evaluating the risks posed to him on return to Kiribati.[10]

The decision's significance lies, first, in the Committee's explicit recognition that the impacts of climate change may themselves be a bar to deportation, and, secondly, in its highly authoritative nature, which will be influential on future jurisprudence—and potentially also policymaking.[11] As one commentator put it: "It opens the door for further use of the human rights system to exert pressure on the international community to address issues of climate change effectively."[12]

II. Background

In 2007, Mr. Teitiota and his wife moved to New Zealand from Kiribati on three-year work permits. He worked in greenhouses and farms; she was employed in a nursing home in Auckland. They had three children while living in New Zealand, but they were legally ineligible for citizenship.[13] When the couple realized that they had inadvertently overstayed their visas, they sought help from a lawyer. However, they failed to keep in proper contact with him and important deadlines passed. In 2011, Mr. Teitiota was stopped for a traffic incident and apprehended when it was realized that he had overstayed his visa. By the time he engaged another lawyer, it was too late to apply for a visa extension or permission to remain on humanitarian grounds. At this point, his new lawyer considered all possible options.[14]

As journalist Kenneth Weiss explained, all Mr. Teitiota wanted was a visa extension, but what he got "was an attorney who decided to present Teitiota as a casualty of climate change—and to set out to change international law." As such, he became "an unlikely international celebrity, a stand-in for the thousands of people in Kiribati—as well as millions more worldwide—expected to be forced from their homes due to rising seas and other disruptions on a warming planet."[15]

Thus, in May 2012, Mr. Teitiota applied for recognition as a refugee or "protected person" in New Zealand.[16] A government official rejected his claim that

Global Compact for Safe, Orderly and Regular Migration, obj. 21, para. 37 (Dec. 19, 2018) [hereinafter Migration Compact]. Note, too, a decision by the Austrian Constitutional Court affirming "the applicability, in principle, of the prohibition of inhuman treatment to such returns." Kälin & Schrepfer, *supra* note 9, at 36, *see* n. 147 for details.

[10] Teitiota HRC, *supra* note 2, para. 9.13 ("including the prevailing conditions in Kiribati, the foreseen risks to the author and the other inhabitants of the islands, the time left for the Kiribati authorities and the international community to intervene and the efforts already underway to address the very serious situation of the islands") As Kälin & Schrepfer, *supra* note 9, at 35, explain, "it is not the behavior of the state of destination that is being adjudicated but that of the state whose authorities order the expulsion or deportation. Thus, it is the sending state that acts inhumanely and violates its obligations if and when, despite being aware of the danger, it sets a key element in the chain of events leading to torture, ill-treatment or death."

[11] Cullen, *supra* note 6, has suggested that its significance may be more political than legal.

[12] Benedikt Behlert, "*A Significant Opening*," VölkerrechtsBlog (Jan. 30, 2020), *at* https://voelkerrechtsblog.org/a-significant-opening; Teitiota SC, supra note 1, paras. 4–7.

[13] Under the Citizenship Act 1977 (N.Z.), s. 6(1)(b), children born in New Zealand after January 1, 2006 are not eligible for citizenship unless a parent is a New Zealand citizen or is entitled to reside indefinitely in New Zealand, the Cook Islands, Niue, or Tokelau. *Teitiota* SC, *supra* note 1, para. 4, n. 4.

[14] Weiss, *supra* note 3.

[15] *Id.*

[16] This was pursuant to the Immigration Act 2009 (N.Z.), ss. 129–31 which expressly refers to the Convention Relating to the Status of Refugees, July 28, 1951, 189 UNTS 137 [hereinafter Refugee Convention]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 UNTS

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August.[17] He appealed to the Immigration and Protection Tribunal, which also denied the claim (in June 2013).[18] His application for leave to appeal further was denied by the New Zealand High Court in November 2013, the New Zealand Court of Appeal in May 2014, and finally by the New Zealand Supreme Court in July 2015.[19] Mr. Teitiota was detained and issued with a deportation order on September 15, 2015. He lodged a complaint with the United Nations Human Rights Committee the same day, arguing that New Zealand would violate his right to life if it removed him. He also requested suspensive effect, to prevent his deportation prior to the Committee's substantive findings, which was denied.[20] He was removed to Kiribati on September 23, 2015, and his family followed shortly thereafter.[21]

The heart of Mr. Teitiota's complaint to the Human Rights Committee was that "the effects of climate change and sea level rise forced him to migrate" from Kiribati to New Zealand. He argued that the situation at home had become "increasingly unstable and precarious due to sea level rise caused by global warming." He said that fresh water supplies were scarce because of saltwater contamination, there was overcrowding, and the erosion of habitable land had resulted in "a housing crisis and land disputes that have caused numerous fatalities." In sum, Kiribati had become "an untenable and violent environment" for him and his family.[22]

III. The Broader Context of Climate Change and Displacement

Since 2017, more people have been displaced within their own countries by sudden-onset disasters than by conflict—sixty-one percent compared to thirty-nine percent.[23] These numbers are likely to rise as climate change increases the frequency and/or intensity of natural hazards.[24] At the same time, the slower-onset impacts of climate change (such as sea level rise, erosion, and desertification) have led to displacement and/or migration as people are unable to sustain their livelihoods or live in safe conditions.[25] People may also move on account of a combination of sudden- and slow-onset events.[26] In terms of cross-border displacement, there is not yet sufficient data to give a reliable estimate of numbers, but "[i]t is

85 [hereinafter CAT]; and International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 [hereinafter ICCPR].

[17] Teitiota HRC, *supra* note 2, para. 4.2.

[18] *AF (Kiribati)*, *supra* note 1. For analysis, see McAdam, *supra* note 1; Scott, *Finding Agency*, *supra* note 1.

[19] *Teitiota* HC, *supra* note 1; *Teitiota* CA, *supra* note 1; *Teitiota* SC, *supra* note 1.

[20] Teitiota HRC, *supra* note 2, para. 1.2.

[21] *Id.*, para. 4.4.

[22] *Id.*, para. 2.1.

[23] Internal Displacement Monitoring Centre (IDMC), *GRID 2019: Global Report on Internal Displacement*, 1 (2019), *at* https://www.internal-displacement.org/global-report/grid2019; IDMC, *GRID 2018: Global Report on Internal Displacement*, 6–7 (2018), *at* https://www.internal-displacement.org/global-report/grid2018. There is no systematic data on cross-border displacement in this context, but there is evidence that most people remain in countries within the same geographical region. IDMC, *GRID 2017: Global Report on Internal Displacement*, 53 (2017), *at* https://www.internal-displacement.org/global-report/grid2017.

[24] Daniel G. Huber & Jay Gulledge, *Extreme Weather and Climate Change: Understanding the Link and Managing the Risk*, Ctr. Climate & Energy Solutions, 2 (Dec. 2011), *available at* https://www.c2es.org/site/assets/uploads/2011/12/white-paper-extreme-weather-climate-change-understanding-link-managing-risk.pdf.

[25] *See, e.g.*, Sanjula Weerasinghe, In Harm's Way: International Protection in the Context of Nexus Dynamics Between Conflict or Violence and Disaster or Climate Change, UNHCR, PPLA/2018/05 (2018).

[26] McAdam, Burson, Kälin & Weerasinghe, *supra* note 9, at 21.

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clear . . . that many [internally displaced persons] fail to find safety and security in their own country, leading to significant numbers of cross-border movements within and beyond the region."[27]

At present, international legal instruments do not directly address the movement of people who cross borders in response to, or in anticipation of, climate change-related harms.[28] It will generally be difficult for such people to be recognized as refugees under the Refugee Convention unless they can show that they have a well-founded fear of being persecuted for reasons of their race, religion, nationality, political opinion, or membership of a particular social group.[29] The Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise, adopted by the International Law Association in 2018, explains that while

> the underlying disaster or climate change process will not constitute "persecution" *per se*, it may provide a context in which forms of harm that do engage existing international protection regimes may arise—for instance, where the disaster causes a breakdown of law and order or is used by a government as pretext for persecutory acts against certain parts of the population.[30]

Refugee law should therefore not be dismissed automatically.[31] As Scott has rightly observed, decision makers need to be aware of "the deeply social nature of disasters, within which existing patterns of discrimination and marginalisation are exacerbated,"[32] which may "reinforce or bolster claims for refugee status under the Refugee Convention."[33] Furthermore, the drivers of displacement are typically multi-causal, which means that disasters, conflict, and persecution are often intertwined.[34]

Human rights law offers more scope for protection. Under international human rights law, states are prohibited from removing people, inter alia, to places where they face a real risk of being arbitrarily deprived of life, or subjected to torture or other cruel, inhuman, or degrading

[27] *GRID 2019*, *supra* note 23, at 41 (footnote omitted).

[28] Note that the Kampala Convention includes an obligation to "take measures to protect and assist persons who have been *internally displaced* due to natural or human made disasters, including climate change." African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, Art. 5(4), Oct. 23, 2009, 52 ILM 400 (2013) (emphasis added).

[29] *AF (Kiribati)*, *supra* note 1, para. 56; *Teitiota* HC, *supra* note 1, para. 54; *Teitiota* CA, *supra* note 1, para. 19.

[30] Sydney Declaration, *supra* note 9 (footnotes omitted). See also *AF (Kiribati)*, *supra* note 1, para. 64. In such cases, the broader regional refugee definitions may apply. Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa of 10 September 1969, Art. 1(2), Sept. 10, 1969, 1001 UNTS 45; Cartagena Declaration on Refugees, OAS Doc. OEA/Ser.L/V/II.66/doc.10 rev. 1, 190–93 conclusion III(3) (1984). See further for analysis of whether the regional refugee treaties provide protection, Tamara Wood, Protection and Disasters in the Horn of Africa: Norms and Practice for Addressing Cross-Border Displacement in Disaster Contexts (2013); David J. Cantor, Law, Policy, and Practice Concerning the Humanitarian Protection of Aliens on a Temporary Basis in the Context of Disasters 23–31 (2015); McAdam, Burson, Kälin & Weerasinghe, *supra* note 9, paras. 85–91.

[31] *AF (Kiribati)*, *supra* note 1, paras. 55–70; *AC (Tuvalu)*, *supra* note 1, paras. 84–86, 97.

[32] Scott, *Finding Agency*, *supra* note 1, 27; Scott, Climate Change, *supra* note 1, ch. 7 in particular. The United Nations Office of Disaster Disk Reduction's (UNDRR) definition of "disaster' reflects this approach, see UNDRR, *Disaster*, *at* https://www.undrr.org/terminology/disaster.

[33] Weerasinghe, *supra* note 25, at 10.

[34] *Id.*

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treatment or punishment.[35] There are regional parallels, perhaps most notably in the European Convention on Human Rights,[36] which has spawned a vast jurisprudence in this area. In the European Court of Human Rights, no nonremoval claim has succeeded on the basis of a risk to life alone; all have been decided on the basis that the feared harm constitutes inhuman or degrading treatment.[37] Successful cases before the Human Rights Committee have also concerned Article 7 (inhuman and degrading treatment), either alone or in conjunction with Article 6 (right to life), apart from claims based on nonreturn to the death penalty, which have succeeded on the basis of Article 6 alone.[38] This makes the *Teitiota* decision an outlier—but also an especially detailed contribution to the jurisprudence on the right to life in these circumstances.[39]

IV. The Committee's Decision

Mr. Teitiota claimed that by removing him to Kiribati, New Zealand would violate his right to life because sea-level rise in Kiribati had resulted in: "(a) the scarcity of habitable space, which has in turn caused violent land disputes that endanger the author's life; and (b) environmental degradation, including saltwater contamination of the freshwater supply."[40]

The Committee noted that both the state party and the New Zealand Immigration and Protection Tribunal had found Mr. Teitiota to be "entirely credible, and accepted the evidence he presented," and both the Tribunal and the courts "allowed for the possibility that the effects of climate change or other natural disasters could provide a basis for protection."[41] However, the evidence "did not establish that he faced a risk of an imminent, or likely, risk of arbitrary deprivation of life upon return to Kiribati."[42]

[35] ICCPR, *supra* note 16, Arts. 6–7; Human Rights Comm., General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), para. 9 (Mar. 10, 1992); Human Rights Committee, General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Mar. 29, 2004, UN Doc. CCPR/C21/Rev.1/Add.13, para. 12; CAT, *supra* note 16, Art. 3; Convention on the Rights of the Child, Arts. 6, 37(a), Nov. 20, 1989, 1577 UNTS 3; Committee on the Rights of the Child, General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, para. 27, UN Doc. CRC/GC/2005/6 (Sept. 1, 2005); Global Compact for Migration, *supra* note 9, obj. 21, para. 37. *See further* Guy S. Goodwin-Gill & Jane McAdam, The Refugee in International Law, ch. 6 (3d ed. 2007); Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of* Non-Refoulement*: Opinion*, *in* Refugee Protection in International Law: UNHCR's Global Consultations on International Protection 87 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003).

[36] European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3, Nov. 4, 1950, ETS No. 5, 213 UNTS 221 [hereinafter ECHR]); *see also* Charter of Fundamental Rights of the European Union, Art. 19(2), Oct. 26, 2012, 2012 OJ (C 326) 391; African Charter on Human and Peoples' Rights, Art. 5, June 17, 1981, 21 ILM 58 (1982); Arab Charter on Human Rights, Art. I, May 22, 2004, *reprinted in* 893 Int'l Hum. Rts. Rep. (2005).

[37] Article 2 claims are generally raised in conjunction with Article 3, and if the latter provision is found to have been violated, then the Article 2 claim generally falls away. *See, e.g.*, D v. United Kingdom, 24 EHRR 423 (1997); Bader v. Sweden, 2005-XI Eur. Ct. H.R 75; In N.A. v. Finland, App. No. 25244/18, HUDOC (Nov. 14, 2019), *at* https://hudoc.echr.coe.int/eng?i=001-198465 the provisions were considered together.

[38] Human Rights Comm., Judge v. Canada, para. 10.10, UN Doc. CCPR/C/78/D/829/1998 (Aug. 5, 2002); noted with approval in Human Rights Comm., Kwok Yin Fong v. Australia, para. 9.4, UN Doc. CCPR/C/97/D/1442/2005 (Oct. 23, 2009).

[39] Mr. Teitiota did not raise the ICCPR Article 7 claim. Teitiota HRC, *supra* note 2, para. 1.1.

[40] *Id.*, para. 3.

[41] *Id.*, para. 9.6; *see also id.*, para. 2.7.

[42] *Id.*, para. 9.6.

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The Committee emphasized that the right to life includes "the right of individuals to enjoy a life with dignity,"[43] which encompasses economic and social protections that enable a certain standard of living. This echoes findings by regional courts that the right to life enshrines a duty "of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it."[44] The European Court of Human Rights has similarly held that removing people to situations of very serious destitution or dire humanitarian conditions may constitute inhuman or degrading treatment.[45]

However, the threshold is very high. With respect to the lack of potable water in Kiribati, the Committee stated that Mr. Teitiota would have had to show that "the supply of fresh water [was] *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."[46] With respect to difficulties in growing crops, he would have had to show that there was "a real and reasonably foreseeable risk" that he would be "exposed to a situation of *indigence, deprivation of food, and extreme precarity* that could threaten his right to life, including his right to a life with dignity,"[47] for his removal to be precluded.

While this very high threshold might have been appropriate had only one of the above elements been present, it is arguably too high when a range of rights are impacted. Instead, a cumulative assessment is more appropriate.[48] In refugee law, a person may have a well-founded fear of being persecuted on account of one very serious risk, or on the basis of multiple, less severe risks that, when assessed cumulatively, amount to persecution.[49] As the UN High Commissioner for Refugees' (UNHCR) guidelines on determining refugee status explain:

> an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect

[43] *Id.*, para. 9.4.

[44] Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, para. 162 (June 17, 2005) (referring to Case of the "Juvenile Reeducation Institute" v. Paraguay, Preliminary Objections, Merits, Reparations and Costs, Judgment (ser. C) No. 112, para. 159 (Sept. 2, 2004)).

[45] *See*, *e.g.*, M.S.S. v. Belgium and Greece, 2011-I Eur. Ct. H.R. 255, para. 249; Sufi and Elmi v. United Kingdom, 54 EHRR 9 (2012). These cases are discussed further below.

[46] Teitiota HRC, *supra* note 2, para. 9.8 (emphasis added). *But cf. id.* Individual Opinion of Committee Member Duncan Laki Muhumuza (dissenting), para. 5: "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."

[47] Teitiota HRC, *supra* note 2, para. 9.9 (emphasis added).

[48] *See further* McAdam, Burson, Kälin & Weerasinghe, *supra* note 9, para. 93; McAdam, *supra* note 9, ch. 3. Other Human Rights Committee cases on socioeconomic deprivation have focused on the applicant's particular vulnerability, but in doing so appear to have assessed the conditions in a cumulative manner, with far less articulation of specific thresholds for specific rights whose violation is alleged. *See, e.g.*, Human Rights Comm., R.A.A. and Z.M. v. Denmark, para. 7.8, UN Doc. CCPR/C/118/D/2608/2015 (Oct. 28, 2016); Human Rights Comm., Y.A.A. and F.H.M. v. Denmark, para. 7.9, UN Doc. CCPR/C/119/D/2681/2015 (Mar. 10, 2017).

[49] Scott, Climate Change, *supra* note 1, at 109, however, argues that it would be better to take a holistic approach that focuses on harm "as a condition of existence, as distinct from an isolated act or accumulation of measures."

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on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on "cumulative grounds."[50]

This approach has been followed in the human rights *non-refoulement* jurisprudence as well.[51]

The Committee's decision focused almost exclusively on Article 6 of the International Covenant on Civil and Political Rights (ICCPR)—the right to life—since this was the only ground Mr. Teitiota raised before the Committee.[52] The Tribunal in New Zealand had briefly addressed Article 7—cruel, inhuman, or degrading treatment—since both Articles 6 and 7 of the ICCPR are reflected in the relevant section of New Zealand's Immigration Act.[53] Within that domestic statutory framework, such ill-treatment was interpreted as requiring a positive act or omission that "transcend[ed] failure of the state's general economic policies to provide for an adequate standard of living."[54] It was held that a state's general incapacity to respond to a disaster or the impacts of climate change would be insufficient to constitute such "treatment,"[55] and a claim on this basis would instead be considered under New Zealand's separate humanitarian appeal provisions (based on compelling or compassionate circumstances).[56]

It would have been interesting to see how the Human Rights Committee might have approached an Article 7 claim, especially since its jurisprudence does not expressly limit cruel, inhuman, or degrading treatment to positive acts or omissions.[57] What it did say was

[50] 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, para. 53, HCR/1P/4/ENG/REV. 4 (1979, reissued 2019). Furthermore, "sometimes a small incident may be 'the last straw'; and although no single incident may be sufficient, all the incidents related by the applicant taken together, could make his fear 'well-founded.'" *Id.*, para. 201.

[51] *See, e.g.*, *Sufi and Elmi*, *supra* note 45, paras. 291–92; *M.S.S.*, *supra* note 45. In 2016, the eleven member countries of the Regional Conference of Migration (Belize, Canada, Costa Rica, El Salvador, the Dominican Republic, Guatemala, Honduras, Mexico, Nicaragua, Panama and the United States of America) acknowledged that human rights-based *non-refoulement* obligations "could perhaps apply, *mutatis mutandis*, to [disaster] situations, especially if the cumulative conditions in those countries amounted a threat to life or cruel, inhuman or degrading treatment. RCM Guide, *supra* note 9, at 12 n. 15.

[52] Teitiota HRC, *supra* note 2, para. 1.1.

[53] See *AF (Kiribati)*, *supra* note 1, paras. 94–95.

[54] BG (Fiji) [2012] NZIPT 800091, para. 148 (N.Z.). By contrast, if a state withheld post-disaster assistance on a discriminatory basis, for example, this could potentially constitute ill-"treatment" of the affected population. *AC (Tuvalu)*, *supra* note 1, para. 84. Note that the European Court of Human Rights regards the relevant "treatment" as the state's act of removing the individual. *See, e.g.*, *D v. United Kingdom*, *supra* note 37; *Sufi and Elmi*, *supra* note 45.

[55] Although as the Tribunal noted, this "should not be understood as meaning that cruel treatment for the purposes of section 131 of the Act could never arise in the context of natural disasters." *AC (Tuvalu)*, *supra* note 1, para. 83.

[56] *AF (Kiribati)*, *supra* note 1, para. 94. The scope of Article 7 was considered in more detail in a case concerning a family from Tuvalu who resisted removal on the grounds of climate change-related harms. There, the Tribunal stated that "complicated issues arise for consideration," including "whether the harm feared is of sufficient seriousness or severity to fall within the scope of Article 7 of the ICCPR." *AC (Tuvalu)*, *supra* note 1, para. 68. *See further id.* discussion at paras. 76–98, 99–114.

[57] "Treatment" is not defined; the Committee has noted only that it is unnecessary "to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied." *See* Human Rights Comm., General Comment No. 20, *supra* note 35, para. 4. The question is whether the state can ameliorate the risk by providing protection; by analogy, where the danger emanates from private actors, can the receiving state obviate it by providing appropriate protection? HLR v. France, 26 EHRR 29, para. 40 (1997).

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> that . . . a real risk of irreparable harm such as that contemplated by articles 6 and 7 . . . must be personal, . . . cannot derive merely from the general conditions in the receiving State, except in the most extreme cases, and . . . there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists.[58]

Just as for the Article 6 claim, a key consideration for Article 7 would likely have been what capacity Kiribati had to respond to the alleged harms, including by availing itself of any available international assistance.[59] The distinct Article 7 question, however, would have been whether the conditions in Kiribati could be said to amount to cruel, inhuman, or degrading treatment—which may have prompted a slightly different analysis from the right to life claim.[60] This is important, given the Committee's express recognition 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."[61] Might the Committee have moved toward the European line of reasoning,[62] finding that the act of removal itself, as "a crucial element in the chain of events," could amount to inhuman or degrading treatment were it to result in a person's "most basic human rights [being] seriously violated"?[63]

A final point to note is that all the cases concerning Mr. Teitiota, from the Tribunal through to the Human Rights Committee, were brought by him alone, and not on behalf of his wife and children as well. Had his children been included, some further interesting

[58] Teitiota HRC, *supra* note 2, para. 9.3 (referring to General Comment No. 36, *supra* note 8, para. 30; Human Rights Comm., B.D.K. v. Canada, para. 7.3, UN Doc. CCPR/C/125/D/3041/2017 (June 6, 2019); Human Rights Comm., K v. Denmark, para. 7.3, UN Doc. CCPR/C/114/D/2393/2014 (Sept. 11, 2015)). In commenting on Mr. Teitiota's fear of violent land disputes, the Committee observed that "a general situation of violence is only of sufficient intensity to create a real risk of irreparable harm under articles 6 or 7 of the Covenant in the most extreme cases, where there is a real risk of harm simply by virtue of an individual being exposed to such violence on return, or where the individual in question is in a particularly vulnerable situation." Teitiota HRC, *supra* note 2, para. 9.7 (footnotes omitted).

[59] *See* General Comment No. 20, *supra* note 35, para. 2; ILC, Protection of Persons in the Event of Disasters, Draft Articles and Commentary, in Rep. on the Work of Its Sixty Eighth Session, ch. IV, Draft Arts. 9–11, UN Doc. A/71/10 (2016). The New Zealand Tribunal stated that "it is simply not within the power" of a state "to mitigate the underlying environmental drivers of [climate change-related] hazards," and "equat[ing] such inability with a failure of state protection goes too far . . . plac[ing] an impossible burden on a state." *AC (Tuvalu)*, *supra* note 1, para. 75.

[60] European courts have acknowledged that return to situations of serious destitution or dire humanitarian conditions may amount to cruel, inhuman, or degrading treatment in some cases. *See, e.g.*, *M.S.S.*, *supra* note 45, para. 249; *Sufi and Elmi*, *supra* note 45; Case C-562/13, Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v. Abdida, 2014 EUR-Lex CELEX LEXIS 2453, para. 50 (Dec. 18, 2014). In *N v Secretary of State for the Home Department* [2004] 1 WLR 1182, the English Court of Appeal suggested that "a claim to be protected from the harsh effects of a want of resources," *id.*, para. 38, "is only justified where the humanitarian appeal of the case is so powerful that it could not in reason be resisted by the authorities of a civilised State," *id.*, para. 40. The European jurisprudence is fraught and different tests have been applied. For analysis, see Cathryn Costello, *The Search for the Outer Edges of* Non-refoulement *in Europe: Exceptionality and Flagrant Breaches*, *in* HUMAN RIGHTS AND THE REFUGEE DEFINITION: COMPARATIVE LEGAL PRACTICE AND THEORY 180, 194–97 (Bruce Burson & David J. Cantor eds., 2016); CATHRYN COSTELLO, THE HUMAN RIGHTS OF MIGRANTS AND REFUGEES IN EUROPEAN LAW 185–90 (2016).

[61] Teitiota HRC, *supra* note 2, para. 9.11.

[62] See note 54 *supra* and corresponding text.

[63] WALTER KÄLIN & JÖRG KÜNZLI, THE LAW OF INTERNATIONAL HUMAN RIGHTS PROTECTION 533 (2d ed. 2019). Thank you to Walter Kälin for suggesting this framing.

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questions could have been explored,[64] including whether, in assessing their rights, a longer timeframe for analysis could be entertained.[65] A petition pending before the Committee on the Rights of the Child, lodged in 2019 by Greta Thunberg and fifteen other minors, may result in a detailed consideration of states' obligations toward children under international human rights law and international environmental law, including to:

> (i) prevent foreseeable domestic and extraterritorial human rights violations resulting from climate change; (ii) cooperate internationally in the face of the global climate emergency; (iii) apply the precautionary principle to protect life in the face of uncertainty, and (iv) ensure intergenerational justice for children and posterity.[66]

These considerations will necessarily have relevance to the displacement context as well.

V. When Does Harm Have to Manifest?

In the *Teitiota* decision, the Human Rights Committee accepted 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."[67] However, on the facts of the case, the Committee concluded that Mr. Teitiota did not face "a real, personal and reasonably foreseeable risk of a threat to his right to life."[68]

What is "reasonably foreseeable" will depend on context and evidence. It cannot be confined to a particular period of time, although the more temporally distant the risk, the more

[64] This was intimated by one of the Human Rights Committee members at a seminar in February 2020. By contrast, see *AC (Tuvalu)*, *supra* note 1 and *AD (Tuvalu)*, *supra* note 1 for specific consideration of the children's rights.

[65] See text at note 71 *infra* and discussion in Adrienne Anderson, Michelle Foster, Hélène Lambert & Jane McAdam, *A Well-Founded Fear of Being Persecuted . . . But When?*, 42 Sydney L. Rev. 155 (2020). Note, too, UNHCR, Guidelines on International Protection: Child Asylum Claims Under Article 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, para. 36, HCR/GIP/09/08 (Dec. 22, 2009) (emphasis added), which requires that "it is important to assess the consequences of such acts for each child concerned, *now and in the future*."

[66] Communication to the Committee on the Rights of the Child, Sacchi v. Argentina, para. 14 (Sept. 23, 2019), *available at* https://childrenvsclimatecrisis.org/wp-content/uploads/2019/09/2019.09.23-CRC-communication-Sacchi-et-al-v.-Argentina-et-al.pdf. On the latter, see Edith Brown Weiss, *Intergenerational Equity*, *in* A Global Pact for the Environment: Legal Foundations 51 (Yann Aguila & Jorge E. Viñuales eds., 2019); Sumudu Atapattu, *Intergenerational Equity and Children's Rights: The Role of Sustainable Development and Justice*, *in* Children's Rights and Sustainable Development: Interpreting the UNCRC for Future Generations 167 (Claire Fenton-Glynn ed., 2019).

[67] Teitiota HRC, *supra* note 2, para. 9.4 (referring to General Comment No. 36, *supra* note 8, para. 62).

[68] *Id.*, para. 9.4; *see also id.*, paras. 9.7–9.9 (where it is framed slightly differently). *See further* Human Rights Comm., Toussaint v. Canada, para. 11.3, UN Doc. CCPR/C/123/D/2348/2014 (July 24, 2018); Human Rights Comm., Cáceres v. Paraguay, para. 7.5, UN Doc. CCPR/C/126/D/2751/2016 (Sept. 20, 2019). The "real, personal and reasonably foreseeable risk" test has been applied by the Committee Against Torture (e.g., Comm. Against Torture, Aemei v. Switzerland, para. 9.5, UN Doc. CAT/C/18/D/34/1995 (May 29, 1997); Comm. Against Torture, AR v. Netherlands, paras. 7.3, 7.6, UN Doc. CAT/C/31/D/203/2002 (Nov. 21, 2003)). It is based on the jurisprudence of the European Court of Human Rights in relation to Article 3 of the ECHR. *See* Soering v. United Kingdom 161 Eur. Ct. H. R. (ser. A) paras. 86, 90, 92, 98, 104, 111 (1989). "Foreseeable" is discussed at *id.*, paras. 86, 90, 92. The Human Rights Committee has not always applied this test, at times requiring that a risk be both "necessary and foreseeable." Human Rights Comm., ARJ v. Australia, para. 6.8, UN Doc. CCPR/C/60/D/692/1996 (Aug. 11, 1997) (which imposes an additional hurdle). See discussion in Adrienne Anderson, Michelle Foster, Hélène Lambert & Jane McAdam, *Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection*, 68 Int'l & Comp. L. Q. 111, 135–39 (2019).

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probative the evidence will need to be to show that the applicant is individually at risk.[69] The Federal Court of Australia has observed that the "reasonably foreseeable future" is "something of an ambulatory period of time," but what is "reasonable" is to be assessed "on the basis of probative material, without extending into guesswork." As such, it is "intended to preclude predictions of the future that are so far removed in point of time from the life of the person concerned at the time the person is returned to her or his country of nationality as to bear insufficient connection to the reality of what that person may experience."[70]

In the refugee context, decision makers have at times been willing to look far into the future —for example, a decade, when considering a young child's protection needs,[71] and several years, when considering a man's risk of being called up for reserve military service.[72] However, it has been suggested that fifty years into the future is too distant.[73] Presumably, this is because mitigating factors might reduce or even remove the risk of harm.[74]

In Mr. Teitiota's case, the Human Rights Committee accepted that sea-level rise was "likely to render the Republic of Kiribati uninhabitable," potentially within ten to fifteen years.[75] However, it endorsed the New Zealand tribunal and courts' reasoning that risks this far into the future were too speculative to give rise to a protection need now, since this timeframe could allow Kiribati, assisted by the international community, "to take affirmative measures to protect and, where necessary, relocate its population."[76] A relevant consideration was also the fact that the government of Kiribati was actively "taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms."[77] At the present time, there was insufficient evidence to show that Mr. Teitiota would "be unable to grow food or access potable water" or would "face life-threatening environmental conditions," or that "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."[78]

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

[69] Anderson, Foster, Lambert & McAdam, *supra* note 65. The authors note by way of analogy that in situations of generalized violence, the Court of Justice of the European Union has stated that "the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection." Case C-465/07, Elgafaji v. Staatssecretaris van Justitie, 2009 ECR I-00921, para. 39.

[70] CPE15 v. Minister for Immigration and Border Protection [2017] FCA 591, para. 60 (Austl.). This and the next few cases are discussed in Anderson, Foster, Lambert & McAdam, *supra* note 65.

[71] 1703914 (Refugee) [2018] AATA 3088, para. 75 (June 8, 2018) (Austl.). The case concerned the potential risk to an Ethiopian child (who was a toddler at the time of the decision) of being subjected to corporal punishment at school.

[72] 1001683 [2010] RRTA 506, para. 75 (June 23, 2010) (Austl.). The Israeli applicant was in his forties and could be called up for service until age fifty-one (even though this was uncommon).

[73] Mok v. Minister for Immigration, Local Government & Ethnic Affairs (No. 1) (1993) 47 FCR 1, para. 96 (Austl.); *see also* Minister for Immigration, Local Government & Ethnic Affairs v. Mok (1994) 55 FCR 375 (Austl.).

[74] *1703914 (Refugee)*, *supra* note 71, para. 75; *see also* 1319201 [2014] RRTA 835, para. 33 (Dec. 2, 2014) (Austl.); 1314106 [2014] RRTA 796, para. 30 (Nov. 13, 2014) (Austl.).

[75] Teitiota HRC, *supra* note 2, para. 9.12.

[76] *Id.*, para. 9.12. *See also AF (Kiribati)*, *supra* note 1, para. 89; *AC (Tuvalu)*, *supra* note 1, paras. 58, 102, 109.

[77] Teitiota HRC, *supra* note 2, para. 9.12.

[78] *Id.*, para. 9.6.

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strongly in favor of particular outcomes.[79] The United Nations' expert scientific climate change body, the Intergovernmental Panel on Climate Change, has stated that "[l]ow-lying areas are at risk from sea-level rise,"[80] and it is "virtually certain that global mean sea-level rise will continue for many centuries beyond 2100."[81] It has also stated that:

> In urban areas climate change is projected to increase risks for people, assets, economies and ecosystems, including risks from heat stress, storms and extreme precipitation, inland and coastal flooding, landslides, air pollution, drought, water scarcity, sea level rise and storm surges (very high confidence). These risks are amplified for those lacking essential infrastructure and services or living in exposed areas.[82]

In refugee law, protection may be warranted even where there is only a ten percent chance of harm, provided that the risk to the individual is plausible.[83] This is because "[i]f the evidence is strong, an event or occurrence can be foreseeable even if it is not likely to manifest in the short term."[84] The scientific predictions above go well beyond a ten percent risk.

However—and here is the bind—the science *also* supports the Committee's "wait and see" approach, given the equally authoritative projections that "[i]nnovation and investments in environmentally sound infrastructure and technologies can reduce GHG [greenhouse gas] emissions and enhance resilience to climate change"[85] and "[t]ransformations in economic, social, technological and political decisions and actions can enhance adaptation and promote sustainable development."[86] Even so, "mitigation and adaptation measures remain uncertain, and they do not detract from the current trajectory of adverse climate change impacts."[87] Drawing by analogy from refugee cases, it has been argued that the focus should not be on the "*certainty* of harm, but whether there is a real *risk* of it. A mere possibility of intervention or *potential* mitigating developments may not be sufficient to reduce an existing real risk (albeit one that will manifest in the distant future)."[88]

Thus, an unsatisfying, but perhaps inevitable, limitation of the Human Rights Committee's decision is its failure to provide guidance as to where the tipping point lies. On the one hand, it would have been inappropriate for the Committee to set a definitive timeframe: some individuals may face greater risks than others at an earlier point in time because of their particular circumstances.[89] Each case must be considered on its own merits, taking into

[79] This paragraph draws on Anderson, Foster, Lambert & McAdam, *supra* note 68, at 133–35.

[80] CLIMATE CHANGE 2014: SYNTHESIS REPORT 13 (Core Writing Team, Rajendra K. Pachauri & Leo Meyer eds., 2014) [hereinafter Pachauri & Meyer].

[81] *Id.* at 16.

[82] *Id.* at 15.

[83] Chan v. Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379, 389 (Dawson, J.) (Austl.), *citing* INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); Refugee Appeal No. 71404/99 [1999] NZRSAA 292, paras. 26–27 (N.Z.).

[84] Anderson, Foster, Lambert & McAdam, *supra* note 68, at 138.

[85] Pachauri & Meyer, *supra* note 80, at 26 (emphasis omitted).

[86] *Id.* at 20 (emphasis omitted).

[87] Anderson, Foster, Lambert & McAdam, *supra* note 65 (footnote omitted).

[88] *Id.* (footnote omitted).

[89] "The assessment of the intensity, severity, and nature of future harm, based on its foreseeability in light of the individual's circumstances, is the crucial factor." Anderson, Foster, Lambert & McAdam, *supra* note 68, at 135, referring to MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGE FROM DEPRIVATION 192–93 (2007).

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account "the situation at the time . . . and new and updated data on the effects of climate change and rising sea-levels thereupon."[90]

On the other hand, people who are at risk should not have to wait until their lives are imminently threatened: they should receive protection earlier.[91] As one Committee member noted (in a dissenting view), it would "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."[92] Indeed, the majority opinion makes clear that conditions "may become incompatible with the right to life with dignity before the risk is realized"—in other words, territory does not need to be submerged or people about to die before the right is violated.[93] This is why the thresholds set by the Committee for *each* element of Mr. Teitiota's claim seem far too high.

A final remark on timing seems warranted here, given references to "imminence" in the decision and the propensity for this to be misunderstood. Neither refugee nor human rights law requires individuals to show that they face an imminent risk of harm if removed. Imminence is relevant only to establishing admissibility requirements as a "victim" of a violation.[94] While this *is* reflected in the *Teitiota* decision, the Committee may unwittingly have generated some confusion in its observation that the New Zealand Tribunal "considered that the evidence the author provided did not establish that he faced a risk of an imminent, or likely, risk of arbitrary deprivation of life upon return to Kiribati,"[95] and that in its own examination of the case, "the imminence of any anticipated harm in the receiving state influences the assessment of the real risk faced by the individual."[96] Imminence is not the appropriate test when it comes to the lawfulness of removal. Rather, "the substantive question turns on the likelihood of harm resulting from such removal, and arguably not on precisely how soon after removal it may manifest. To conflate these two fundamentally different contexts and issues, especially without explanation as to the justification for doing so, is highly problematic."[97]

[90] Teitiota HRC, *supra* note 2, para. 9.14.

[91] Regrettably, a notion of imminence has started to infiltrate decision making in this area. Anderson, Foster, Lambert & McAdam, *supra* note 68; Anderson, Foster, Lambert & McAdam, *supra* note 65. Arguably, the Human Rights Committee has entrenched this further by transplanting its procedural consideration of imminence (namely, whether someone meets admissibility requirements as a "victim" of a violation (Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 [hereinafter ICCPR Op. Prot. I]) to the substantive consideration of the claim (namely, whether or not there is a "real risk" of harm).

[92] Teitiota HRC, *supra* note 2, at Annex 2, para. 5, Individual Opinion of Muhumuza (dissenting), referring also to the main Committee, *id.*, para. 9.4.

[93] *See id.*, para. 9.11; *id.*, Annex 2, para. 5 (dissent).

[94] Under ICCPR Op. Prot. I, *supra* note 91. *See, e.g.*, Human Rights Comm., E.W. v Netherlands, UN Doc. CCPR/C/47/D/429/1990 (Apr. 29, 1993); Human Rights Comm., Aalbersberg v. Netherlands, UN Doc. CCPR/C/87/D/1440/2005 (July 12, 2006); discussion in Anderson, Foster, Lambert & McAdam, *supra* note 68, at 125–28.

[95] Teitiota HRC, *supra* note 2, para. 9.6. *See, e.g.*, Adaena Sinclair-Blakemore, Teitiota v. New Zealand*: A Step Forward in the Protection of Climate Refugees Under International Human Rights Law?*, OXFORD HUM. RTS. HUB (Jan. 28, 2020), *at* https://ohrh.law.ox.ac.uk/teitiota-v-new-zealand-a-step-forward-in-the-protection-of-climate-refugees-under-international-human-rights-law.

[96] Teitiota HRC, *supra* note 2, para. 8.5.

[97] Anderson, Foster, Lambert & McAdam, *supra* note 68, at 127 (footnote omitted).

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VI. The *Teitiota* Case in the Context of Other Global Developments

The Human Rights Committee's decision is part of an increasingly rich tapestry of cases, guidance, and frameworks that address displacement in the context of climate change and disasters. Indeed, the eight-year period during which Mr. Teitiota's case was considered coincided with unprecedented global and regional standard-setting on this issue.[98] In 2012, the Nansen Initiative on Disaster-Induced Cross-Border Displacement was launched by the governments of Switzerland and Norway, culminating in the 2015 Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, endorsed by 109 states. The Protection Agenda outlined the normative gaps in addressing displacement, migration, and planned relocation, and identified effective practices that states could incorporate into their own laws and policies, including by integrating mobility into disaster risk reduction and climate change adaptation plans.[99]

Considered language on disasters, climate change, and human mobility was subsequently secured in a series of international instruments across a range of policy areas. These included the Sendai Framework for Disaster Risk Reduction 2015–2030,[100] the 2030 Agenda for Sustainable Development,[101] the 2015 Paris Outcome on climate change[102] (including the establishment of the Task Force on Displacement within the Warsaw International Mechanism for Loss and Damage),[103] the Agenda for Humanity (annexed to the UN secretary-general's report for the 2016 World Humanitarian Summit),[104] the 2016 New York Declaration for Refugees and Migrants,[105] the 2018 Global Compact on

[98] For a detailed mapping of relevant global instruments and policy processes, see IOM, Mapping Human Mobility (Migration, Displacement and Planned Relocation) and Climate Change in International Processes, Policies and Legal Frameworks, UN Framework Convention on Climate Change (UNFCCC) Task Force on Displacement, at 8 (Aug. 2018), *available at* https://unfccc.int/sites/default/files/resource/WIM%20TFD%20II.2%20Output.pdf. *See also* Jane McAdam, *From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement*, 39 UNSW L.J. 1518 (2016); Walter Kälin, *The Global Compact on Migration: A Ray of Hope for Disaster-Displaced Persons*, 30 Int'l J. Refugee L. 664 (2018). For regional developments, see note 116 and accompanying text.

[99] Nansen Initiative on Disaster-Induced Cross-Border Displacement, Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, Vols. 1 & 2 (2015) [hereinafter Protection Agenda]. States were encouraged to give "favourable consideration" to incorporating its insights "into national policies and practices." UN Secretary-General, In Safety and Dignity: Addressing Large Movements of Refugees and Migrants (Report of the Secretary-General), para. 119, UN Doc. A/70/59 (Apr. 21, 2016).

[100] GA Res. 69/283, Sendai Framework for Disaster Risk Reduction 2015–2030 (June 23, 2015). Note, also, the Cancún Adaptation Framework, which noted the importance of "[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation." UNFCCC, Decision 1/CP.16, The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, *in* Report of the Conference of Parties on Its Sixteenth Session, Held in Cancun from 29 November to 10 December 2010, UN Doc. FCCC/CP/2010/7/Add.1, para. 14(f) (Mar. 15, 2011).

[101] GA Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Oct. 21, 2015).

[102] UNFCCC, Decision 1/CP.21, Adoption of the Paris Agreement, *in* Report of the Conference of the Parties on Its Twenty-First Session, Held in Paris from 30 November to 13 December 2015, UN Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016).

[103] *Id.*, para. 49; *see also id.*, para. 50. In 2018, the Task Force's mandate was extended for five years.

[104] UN Secretary-General, One Humanity: Shared Responsibility: Report of the Secretary-General for the World Humanitarian Summit, Annex viii, UN Doc. A/70/709 (Feb. 2, 2016).

[105] GA Res. 71/1, New York Declaration for Refugees and Migrants, paras. 1, 18, 43, 50 (Sept. 19, 2016).

Refugees,[106] and—perhaps most significantly—the 2018 Global Compact for Safe, Orderly and Regular Migration.[107]

The Migration Compact represents states' most detailed political commitments to date on climate change-related mobility.[108] It was considered a "breakthrough" because of its "comprehensive inclusion of disaster- and climate change-related migration" and "sophisticated understanding of the disaster–migration nexus."[109] Its reporting and follow-up requirements also "provide unique opportunities for sustained dialogue and work."[110] Drawing on the Protection Agenda, the Migration Compact identifies the need to: (1) improve information-sharing between governments to better understand how and why people move in this context, while ensuring respect for the human rights of all migrants; (2) develop adaptation and resilience strategies, which may include migration; (3) factor in the potential for displacement when devising disaster preparedness strategies; (4) ensure that people exposed to disasters, climate change and environmental degradation have access to humanitarian assistance and full respect for their rights, and promote sustainable outcomes that increase resilience and self-reliance; and (5) develop coherent approaches to address the challenges of migration movements in this context.[111] In it, states also commit to "upholding the prohibition of collective expulsion and of returning migrants when there is a real and foreseeable risk of death, torture and other cruel, inhuman and degrading treatment or punishment, or other irreparable harm, in accordance with [their] obligations under international human rights law."[112]

In addition, the Migration Compact encourages states to create more flexible migration programs,[113] including "humanitarian visas, private sponsorships, access to education for children, and temporary work permits" for those compelled to leave on account of "sudden-onset natural disasters and other precarious situations,"[114] and "planned relocation and visa options" for those compelled to leave on account of "slow-onset natural disasters, the adverse effects of climate change, and environmental degradation."[115]

[106] Weaker language is included in the Global Compact on Refugees. *See* Rep. of the United Nations High Commissioner for Refugees: Part II Global Compact on Refugees, paras. 8, 12, 63, UN Doc. A/73/12 (Part II) (Sept. 13, 2018); although see Volker Türk & Madeline Garlick, *Addressing Displacement in the Context of Disasters and the Adverse Effects of Climate Change: Elements and Opportunities in the Global Compact on Refugees*, 31 INT'L J. REFUGEE L. 389 (2019).

[107] Migration Compact, *supra* note 9, obj. 2, para. 18(h)–(l); obj. 5, para. 21(g)–(h) (Jan. 11, 2019).

[108] One hundred fifty-two states voted in favor of the Migration Compact, twelve abstained, and five voted against.

[109] Kälin, *supra* note 98, at 665.

[110] *Id.* at 667.

[111] *See* Migration Compact, *supra* note 9, obj. 2, para. 18(h)–(l).

[112] *Id.*, obj. 21, para. 37.

[113] *See also* Protection Agenda, *supra* note 99, Vol. 1, paras. 87–93, 119–20. For a range of good practices, see *id.*, Vol. 2, 40–52; Jane McAdam, *Australia's Chance to Turn with the Tide*, POL'Y F. (May 15, 2019), *at* https://www.policyforum.net/australias-chance-to-turn-with-the-tide.

[114] Migration Compact, *supra* note 9, obj. 5, para. 21(g); *see also* Protection Agenda, *supra* note 97, Vol. 1, paras. 46–47, 114–15.

[115] Migration Compact, *supra* note 9, obj. 5, para. 21(h); *see also* Protection Agenda, *supra* note 97, Vol. 1, paras. 94–98, 121–22; BROOKINGS, GEORGETOWN UNIVERSITY & UNHCR, GUIDANCE ON PROTECTING PEOPLE FROM DISASTERS AND ENVIRONMENTAL CHANGE THROUGH PLANNED RELOCATION (OCT. 7, 2015); GEORGETOWN UNIVERSITY, UNHCR & IOM, A TOOLBOX: PLANNING RELOCATIONS TO PROTECT PEOPLE FROM DISASTERS AND ENVIRONMENTAL CHANGE (2017); REPUBLIC OF FIJI, PLANNED RELOCATION GUIDELINES: A FRAMEWORK TO UNDERTAKE CLIMATE CHANGE RELATED RELOCATION (2018); GOVERNMENT OF VANUATU, NATIONAL POLICY ON CLIMATE CHANGE AND DISASTER-INDUCED DISPLACEMENT (2018).

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Through the frameworks outlined above, as well as parallel developments at the regional[116] and national levels,[117] the issue has not only become one of "concerted international attention,"[118] but has created greater accountability for action across a diverse range of policy areas. That said, there have also been some backward steps in the same period: during the so-called "refugee crisis" of 2015–16, both Sweden and Finland suspended or removed provisions from their national laws that enabled people to claim protection for environmental reasons.[119]

On the international law front, there has been some further progress. In 2019, the International Law Commission (ILC) established a study group on "Sea-Level Rise in International Law" to examine, inter alia, issues relating to "the protection of persons affected by sea-level rise," including international legal principles "applicable to the evacuation, relocation and migration abroad of persons caused by the adverse effects of sea-level rise," and principles relevant to "the protection of the human rights of persons displaced internally or that migrate due to the adverse effects of sea-level rise."[120]

This builds on the work of the International Law Association (ILA) which has been examining these and related matters since 2012.[121] In particular, the Sydney Declaration of

[116] For a very detailed overview of international and regional tools and guidance, see UNHCR, Mapping of Existing International and Regional Guidance and Tools on Averting, Minimizing, Addressing and Facilitating Durable Solutions to Displacement Related to the Adverse Impacts of Climate Change, UNFCCC Task Force on Displacement (Aug. 2018), *available at* https://unfccc.int/sites/default/files/resource/WIM%20TFD%20II.4%20Output.pdf; *see also* Matthew Scott, *Migration/Refugee Law (2018)*, *in* Y.B. Int'l Disaster L.: 2018, at 462, 468–72 (Giulio Bartolini, Dug Cubie, Marlies Hesselman & Jacqueline Peel eds., 2020). Most recently, the eight member states of the Intergovernmental Authority on Development (Djibouti, Ethiopia, Eritrea, Kenya, Somalia, the Sudan, South Sudan, and Uganda) endorsed the Protocol on Free Movement of Persons in the IGAD Region, which contains express provisions for those displaced by disasters and the adverse impacts of climate change. *See* IGAD, *Communiqué of the Sectoral Ministerial Meeting on the Protocol on Free Movement of Persons in the IGAD Region, 26 February 2020 Khartoum, Republic of Sudan* (Feb. 26, 2020), *available at* https://www.igad.int/attachments/article/2373/Communique%20on%20Endorsement%20of%20the%20Protocol%20of%20Free%20Movement%20of%20Persons.pdf.

[117] *See e.g.*, Republic of Fiji, *supra* note 115; Republic of Fiji, Displacement Guidelines in the Context of Climate Change and Disasters (2019), *available at* https://www.pacificclimatechange.net/document/displacement-guidelines-context-climate-change-and-disasters; Government of Vanuatu, *supra* note 115; Tasneem Siddiqui, Mohammad Towheedul Islam & Zohra Akhter, *National Strategy on the Management of Disaster and Climate Induced Internal Displacement* (Sept. 13, 2015), *available at* https://www.preventionweb.net/files/46732_nsmdciidfinalversion21sept2015withc.pdf. *See further, e.g.*, IOM, *supra* note 98.

[118] Scott, *supra* note 116, at 462.

[119] The Swedish Aliens Act (2005:716), ch. 4, s. 2, provided protection to people fleeing environmental disasters, but it (along with other aspects of asylum law) was suspended in July 2016 for a three-year period, subsequently extended (in June 2019) until July 2021. *(Lag 2016:752) om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige)*; *Förlängning av lagen om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige* (Proposition 2018/19: 128) (Swed.). The Finnish Aliens Act also provided for protection on account of environmental catastrophes (§ 88, repealed 2016), and for temporary protection in cases of mass displacement linked to an environmental disaster (§ 109). Although the literature states that the provisions have not been used successfully, a new project by Matthew Scott (personal correspondence in March 2020) suggests that they have certainly been invoked by applicants. *See also* Hélène Ragheboom, The International Legal Status and Protection of Environmentally-Displaced Persons: A European Perspective 352–53 (2017) (and sources there); Emily Hush, *Developing a European Model of International Protection for Environmentally-Displaced Persons: Lessons from Finland and Sweden*, Columbia J. Eur. L.: Prelim. Ref. Blog (Sept. 7, 2017), *at* http://cjel.law.columbia.edu/preliminary-reference/2017/developing-a-european-model-of-international-protection-for-environmentally-displaced-persons-lessons-from-finland-and-sweden.

[120] ILC Rep. on the Work of Its Seventieth Session, Annex B, 329, UN Doc. A/73/10 (2018).

[121] The International Law Association Committee on International Law and Sea Level Rise has a two-part mandate: "(1) to study the possible impacts of sea level rise and the implications under international law of the partial and complete inundation of state territory, or depopulation thereof, in particular of small island and low-lying

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Principles on the Protection of Persons Displaced in the Context of Sea Level Rise,[122] adopted by the International Law Association in August 2018, "provide[s] guidance to States in averting, mitigating, and addressing displacement occurring in the context of sea level rise, based on and derived from relevant international legal provisions, principles, and frameworks."[123] The nine principles partially codify and partially progressively develop these legal norms. Principle 9 is of particular relevance to the *Teitiota* case:

1. States should admit persons displaced across borders in the context of disasters linked to sea level rise if they are personally and seriously at risk of, or already affected by, a disaster, or if their State of origin is unable to protect and assist them due to the disaster (even if temporarily). States should ensure that they have adequate laws and policies in place to facilitate this protection.

2. States of refuge should not return persons to territories where they face a serious risk to their life or safety or serious hardship, in particular due to the fact that they cannot access necessary humanitarian assistance or protection. In all cases, States must observe the prohibition on forcible return to situations of persecution or other forms of serious harm, as provided for by applicable international law.[124]

VII. Conclusion

Cases such as Mr. Teitiota's enable the boundaries of existing law to be tested. They help to highlight legal gaps and uncertainties and stimulate the development of jurisprudence. They may also raise public awareness and exert political pressure on states to act.[125] That said, test cases need to be selected carefully: in uncharted territory, it is unclear what decision makers might do, and the scope of the law could be as readily closed down as opened up.[126]

From a jurisprudential perspective, the *Teitiota* case has helpfully clarified the application of the principle of *non-refoulement* in the context of climate change-related harms, creating a clear line of authority from the national to the international level. However, from a public relations perspective, the case has unfortunately entrenched some problematic frames and misunderstandings,[127] not least because Mr. Teitiota's lawyers themselves pushed a well-

states; and (2) to develop proposals for the progressive development of international law in relation to the possible loss of all or of parts of state territory and maritime zones due to sea level rise, including the impacts on statehood, nationality, and human rights." *See* International Law Association, International Law and Sea Level Rise: Report, pt. 1, 1 (2018).

[122] Sydney Declaration, *supra* note 9.

[123] *Id.*, princ. 1.

[124] *Id.*, princ. 9.

[125] Matthew Scott, *A Role for Strategic Litigation*, 49 Forced Migration Rev. 47, 47–48 (2015).

[126] *See further* McAdam, *supra* note 98, at 1539–40. There are also policy reasons why courts may take a narrow approach. As the New Zealand High Court stated in *Teitiota* HC, *supra* note 1, para. 51, had the applicant's arguments been accepted and "adopted in other jurisdictions, at a stroke, millions of people who are facing medium-term economic deprivation, or the immediate consequences of natural disasters or warfare, or indeed presumptive hardships caused by climate change, would be entitled to protection under the Refugee Convention or under the ICCPR."

[127] Indeed, it was even wrongly explained by the Office of the United Nations High Commissioner for Human Rights (OHCHR): OHCHR, Historic UN Human Rights Case Opens Door to Climate Change Asylum Claims (Jan. 21, 2020) *at* https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25482&LangID=E.

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worn but inaccurate trope—the "climate refugee." Unsurprisingly, the media seized upon this motif from the start, notwithstanding the fact that the New Zealand Tribunal, which was aware of the nuance and complexity of the issues, had explained very clearly why the Refugee Convention was inapplicable in this case.[128] Indeed, the "climate refugee" theme remained prominent in some media reporting of the Human Rights Committee's findings, even though they were not based on refugee law at all.[129]

The Human Rights Committee's strong statement of legal principle about the scope of *non-refoulement* in the context of climate change is significant, even if its practical application so far has proven elusive. This should be the cue for states to contemplate wider structural reforms that would enable people to move in advance of harm—by harnessing migration as a form of adaptation—and allow them to apply for protection if they are at risk of being displaced.[130] Doing so would not only accord with the commitments states have already made under a range of international and regional frameworks, but would also align with their own interests in creating more planned, manageable, and regulated processes for movement.

[128] Even so, it recognized that "no hard and fast rules or presumptions of non-applicability exist. Care must be taken to examine the particular features of the case." *AF (Kiribati)*, *supra* note 1, para. 64.

[129] *See, e.g.*, Jane McAdam, *Climate Refugees Cannot Be Forced Back Home*, SYDNEY MORNING HERALD (Jan. 20, 2020), *at* https://www.smh.com.au/environment/climate-change/climate-refugees-cannot-be-forced-back-home-20200119-p53sp4.html; Evan Wasuka, *Landmark Decision from UN Human Rights Committee Paves Way for Climate Refugees*, ABC NEWS (Jan. 21, 2020), *at* https://www.abc.net.au/news/2020-01-21/un-human-rights-ruling-worlds-first-climate-refugee-kiribati/11887070; Mélissa Godin, *Climate Refugees Cannot Be Forced Home, U.N. Panel Says in Landmark Ruling*, TIME (Jan. 20, 2020), *at* https://time.com/5768347/climate-refugees-un-ioane-teitiota.

[130] The Human Rights Committee has stated that states parties to the ICCPR "must . . . allow all asylum seekers claiming a real risk of a violation of their right to life in the State of origin access to refugee or other individualized or group status determination procedures that could offer them protection against *refoulement*." General Comment No. 36, *supra* note 8, para. 31.

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