

When climate change and human rights meet: A brief comment on the UN Human Rights Committee's *Teitiota* decision

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'There are realities where extreme events surpass the ability to adapt and displacement and migration are the only avenues for survival.'

Mary Robinson

1. *Introduction*

Global warming has become a significant threat to human life. According to the Intergovernmental Panel on Climate Change (IPCC), the evidence of transformations in the climate system is now undisputable, with the atmosphere and the oceans warming, glaciers and polar ice caps melting, sea levels rising, and atmospheric greenhouse gas concentrations reaching unprecedented levels.¹ The 1997 Kyoto Protocol, adopted as a first step towards stabilizing the climate, has been ineffective in reducing the increased concentration of greenhouse gases in the atmosphere. On present trends, even if the 2015 Paris Agreement² is fully implemented,

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¹ IPCC, 'Climate Change 2013: The Physical Science Basis: Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change' (2013) 11.

² Despite its name, the Paris Agreement is widely regarded as a protocol to the 1992 UN Framework Convention on Climate Change (UNFCCC), with which it shares institutional arrangements. It was adopted by decision of the parties to the UNFCCC and only parties to the UNFCCC may become parties to the Paris Agreement. It entered into force on 4 November 2016. See D Bodansky, 'The Paris Climate Change Agreement: A



it may be difficult to keep the increase in global temperatures below 2 °C, let alone achieve the target of 1.5° C.³ Unless we succeed in reducing the rise in global average temperatures, the consequences for humanity will be very severe. The effects of climate change are already starting to impact on water supplies and agriculture.⁴ Inhabitants of small low-lying islands are amongst the individuals who will be particularly vulnerable to these phenomena.⁵ The impacts of sea-level rise on small-island States will be wide-ranging. Sea-level rise is likely to cause salt-water intrusion into already vulnerable groundwater sources, undermining water security, as well as salt-water intrusion into arable land, hindering the ability to grow food. It will exacerbate storm surges and coastal flooding during extreme weather events. Beach erosion and flooding of islands also pose a serious risk to homes and infrastructure, which are most often located close to the coastline due to the small size of many islands. The risk of inundation resulting in loss of territory and large-scale displacement is also a very real one. It comes therefore to no surprise that climate change is an increasingly important contributor to displacement and migration from countries unprepared to cope with such an exceptional threat.⁶

This threat has prompted the domestic tribunals of several states to consider whether national authorities are prevented from expelling people to places where they face serious risks arising from the impacts of climate change.⁷ In legal terms, the courts have to consider whether the principle of *non-refoulement* extends to those whose lives or living conditions would be seriously affected by the adverse impacts of climate change, including natural disasters. As is known, the international norm of *non-refoulement* captures the idea that an individual should not be sent to a country where s/he may face persecution or other serious human

New Hope?’ (2016) 110 AJIL 306; A Savaresi, ‘The Paris Agreement: A New Beginning?’ (2016) 34 J Energy and Natural Resources L 1.

³ Z Hausfather, ‘UNEP: 1.5C climate target “slipping out of reach”’ Carbon Brief <www.carbonbrief.org/unep-1-5c-climate-target-slipping-out-of-reach>.

⁴ National Geographic, ‘Effects of global warming’ <www.nationalgeographic.com/environment/global-warming/global-warming-effects/>.

⁵ IPCC, ‘AR5 Climate Change 2014: Impacts, Adaptation, and Vulnerability’ (2014) 1615.

⁶ IPCC, ‘Global Warming of 1.5°C’ (2018).

⁷ M Scott, *Climate Change, Disasters and the Refugee Convention* (CUP 2020) 32 ff.



rights violations.⁸ It is derived from several international treaties, including the 1951 Convention Relating to the Status of Refugees (the Refugee Convention).⁹ The United Nations Convention against Torture and the Convention on Enforced Disappearances contain express *non-refoulement* provisions.¹⁰ Moreover, regional human rights courts and United Nations Treaty Monitoring Bodies (UNTMBs) have expanded States' protection obligations beyond the 'refugee' category, to include (at least) people at risk of arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment. This is known as 'complementary protection'¹¹, because it complements the protection provided by the Refugee Convention. Given the widespread acceptance that the notion has received, *non-refoulement* is recognized as a principle of customary international law and may be 'ripe for recognition' as *jus cogens*.¹²

The issue of complementary protection was at the heart of the UN Human Rights Committee's (HRC) decision in the case *Teitiota v New Zealand*.¹³ At stake was the applicant's claim that New Zealand should not send him back to Kiribati, his country of origin, as the effects of climate change there put him at risk of being exposed to life-threatening events and indecent living conditions. Despite a disappointing outcome

⁸ E Lauterpacht, D Bethlehem, 'The Scope and Content of the Principle of Non-refoulement: Opinion', in E Feller, V Türk, F Nicholson (eds), *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection* (CUP 2003) 87; C Wouters, 'International Refugee and Human Rights Law: Partners in Ensuring International Protection and Asylum', in S Sheeran, N Rodley (eds) *Routledge Handbook of International Human Rights Law* (Routledge 2014) 231.

⁹ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 art 1A(2).

¹⁰ 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 art 3; Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 art 16.

¹¹ J McAdam, *Complementary Protection in International Refugee Law* (OUP 2007).

¹² C Costello, M Foster, 'Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test' (2016) 46 Netherlands YB Intl L 273.

¹³ Human Rights Committee (HRC), *Ioane Teitiota v New Zealand* UN Doc CCPR/C/127/D/2728/2016 (24 October 2019) [hereinafter HRC *Teitiota*].



for Mr Teitiota, the ruling has been hailed by commentators as a ‘landmark determination’¹⁴ and as a ‘historic case’.¹⁵ This article will provide a brief introduction to the facts and the case as discussed by the HRC, and then offer some comments on certain aspects of the decision, as well as a few suggestions on how the applicant could recalibrate his litigation strategy before UNTMBs.

2. *Factual background and final outcome*

Teitiota is yet another case within the wider context of the development of a string of judicial and quasi-judicial decisions that, mainly since the early 1990s, have provided some protection to environmental interests through the reinterpretation of ‘general’ human rights, ie human

¹⁴ 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 709. Amongst the many scholars providing analysis and criticism on the *Teitiota* decision are G Le Moli, ‘The Human Rights Committee, Environmental Protection and the Right to Life’ (2020) 69 ICLQ 735; V Rive, ‘Is an Enhanced Non-refoulement Regime under the ICCPR the Answer to Climate Change-related Human Mobility Challenges in the Pacific? Reflections on *Teitiota v New Zealand* in the Human Rights Committee’ (2020) 75 QIL-Questions Intl L 7; S Behrman, A Kent, ‘The *Teitiota* Case and the Limitations of the Human Rights Framework’ (2020) 75 QIL-Questions Intl L 25; A Maneggia, ‘Non-refoulement of Climate Change Migrants: Individual Human Rights Protection or ‘Responsibility to Protect’? The *Teitiota* Case Before the Human Rights Committee’ (2020) 14 *Diritti Umani e Diritto Internazionale* 635; L Imbert, ‘Premiers éclaircissements sur la protection internationale des «migrants climatiques»’, in *La Revue des droits de l’homme* <<http://journals.openedition.org/revdh/926>>; A Precht, ‘Die Auffassungen des UN-Menschenrechtsausschusses vom 24.10.2019 in der Sache *Teitiota/Neuseeland*, CCPR/C/127/D/2728/2016’ (2020) 58 *Archiv des Völkerrechts* 366; M Scott, ‘Migration/Refugee Law (2019)’ (2020) 2 YB Intl Disaster L (forthcoming). See also the blog posts by JH Sendut, ‘Climate Change as a Trigger of Non-Refoulement Obligations Under International Human Rights Law’ EJIL:Talk! (6 February 2020) <www.ejiltalk.org>; G Reeh, ‘Climate Change in the Human Rights Committee’ EJIL:Talk! (18 February 2020) <www.ejiltalk.org>; M Courtoy ‘An Historic Decision for ‘Climate Refugees’? Putting It into Perspective’ Cahiers de l’EDEM (25 March 2020) <<https://uclouvain.be/en/research-institutes/juri/cedie/>>; A Brambilla, M Castiglione, ‘Migranti ambientali e divieto di respingimento’ (14 February 2020) <www.questionegiustizia.it/articolo/migranti-ambientali-e-divieto-di-respingimento_14-02-2020.php>.

¹⁵ OHCHR Press Release, ‘Historic UN Human Rights case opens door to climate change asylum claims’ available at <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25482>.



rights that make no explicit reference to the environment, such as the right to life.¹⁶ In particular, the decision sets an important precedent for the understanding of environmental protection as an essential component of the right to life.¹⁷

The applicant is a citizen of the small-island State of Kiribati located in the central Pacific Ocean. For the great majority, the livelihood in Kiribati is at the subsistence level and heavily depends on natural resources. The situation is particularly dire in South Tarawa, the specific area of origin of Mr Teitiota.¹⁸ Over the last three decades the island has experienced a rapid population growth, uncontrolled urbanization and limited infrastructure development, particularly in relation to sanitation. All of these factors were exacerbated by the effects of both sudden-onset environmental events (storms) and slow-onset processes (sea-level rise).

In light of the hardship they had to endure, Mr Teitiota and his wife migrated to New Zealand in 2007 and remained there after their visa expired in October 2010. Although their three children were born in New Zealand, none were entitled to New Zealand citizenship. After being stopped following a traffic infraction, in May 2012 Mr Teitiota applied for refugee status under section 129 of the Immigration Act 2009¹⁹ and/or protected person status under section 131²⁰, claiming that he had been forced to leave Kiribati by the life-threatening effects of sea-level rise. According to Mr Teitiota the situation in Tarawa had become increasingly unstable and precarious. Fresh water had become scarce because of saltwater contamination and overcrowding, and attempts to combat sea-level rise had largely proven ineffective. Moreover, inhabitable land on Tarawa had eroded, resulting in a housing crisis and land

¹⁶ PM Dupuy, JE Viñuales, *International Environmental Law* (2nd edn, CUP 2018) 365–74.

¹⁷ Significantly, the Committee expressed the view that ‘without robust national and international efforts, 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’ HRC *Teitiota* (n 13) para 9.11.

¹⁸ IPCC (n 5) 1623.

¹⁹ Section 129 refers to the test for refugee status set out in the 1951 Refugee Convention. The full text of the act is available at <www.legislation.govt.nz/act/public/2009/0051/latest/whole.html#DLM1440804>.

²⁰ Section 131 offers complementary protection based on art 6 (right to life) of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).



disputes that caused numerous fatalities. Kiribati had thus become an untenable and violent environment for the applicant and his family.

In August 2012, a Refugee and Protection Officer rejected Mr Teitiota's claim and, in June 2013, New Zealand's Immigration and Protection Tribunal denied his appeal.²¹ Besides asserting that he was not a 'refugee' as defined by the 1951 Refugee Convention, the Tribunal concluded that no substantial grounds existed for believing that he or any of his family members would be in danger of a violation of their right to life as protected by the ICCPR. According to the tribunal, the applicant had failed to establish that there was a sufficient degree of risk to his life in Kiribati. His application for leave to appeal was later denied by the New Zealand High Court in 2013,²² the New Zealand Court of Appeal in 2014,²³ and finally by the New Zealand Supreme Court in 2015.²⁴ While all tribunals rejected the applicant's claims, the Supreme Court stressed that the lower courts' 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', arguably paving the way for possibly expanding the scope of refugee law to encompass 'climate refugees' in the future.²⁵

Having exhausted domestic remedies, in September 2015 Mr Teitiota filed a complaint before the HRC, claiming that, by deporting him to Kiribati, New Zealand had subjected him to a risk to his life in violation of Art. 6 of the ICCPR, and that New Zealand's authorities had not properly evaluated the risk inherent in his removal. He argued that there

²¹ *AF (Kiribati)* [2013] NZIPT 800413 (N.Z.).

²² *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC3125. In essence, the High Court found that the impacts of climate change on Kirabati did not qualify the appellant for refugee status because the applicant was not subjected to persecution as required for the 1951 Refugee Convention. In addition to finding a lack of serious harm or serious violation of human rights were the appellant to return to Kirabati, the court also expressed concern about expanding the scope of the Refugee Convention and opening the door to millions of people who face hardship due to climate change (para 51).

²³ *Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173.

²⁴ *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* [2015] NZSC 107.

²⁵ But see Behrman, Kent (n 14) 31, suggesting that the statement *per se* is rather vague and does not concretely contribute to an evolutive interpretation of the 1951 Refugee Convention.



were at least two concrete threats to his life in Kiribati. On one hand, sea level rise had resulted in the scarcity of habitable space, which had in turn caused violent land disputes that endangered his life. On the other, the country was affected by an irreversible process of environmental degradation, including saltwater contamination of the freshwater supply, which would again put his life at risk.²⁶

The Committee started its analysis by examining the admissibility of the complaint. It found the complaint to be admissible, maintaining that the applicant's claims 'relating to conditions on Tarawa at the time of his removal do not concern a hypothetical future harm, but a real predicament caused by a lack of potable water and employment possibilities, and a threat of serious violence caused by land disputes.'²⁷ Therefore, for the purposes of admissibility, the risk of a violation of the right to life had been sufficiently substantiated. Turning to the merits, the Committee noted that the domestic courts had 'allowed for the possibility that the effects of climate change or other natural disasters could provide a basis for protection' and had found Mr Teitiota and the evidence he presented as being 'entirely credible'.²⁸ And yet, it dismissed the communication explaining that it could only reverse a State's determination if it had been clearly arbitrary or amounted to a manifest error or a denial of justice. Finding that the applicant had not sufficiently substantiated his claims that he faced a real risk to his life if deported to Kiribati, the HRC maintained that it was 'not in a position to hold that the author's rights under article 6 of the Covenant were violated'.²⁹

3. *The existence of a 'real risk' as applied in Teitiota: Too high a threshold?*

While commentators hailed the *Teitiota* decision as 'ground-breaking' and as a 'landmark',³⁰ its outcome is in fact very much in line with

²⁶ HRC, *Teitiota* (n 13) para 3.

²⁷ *ibid* para 8.5.

²⁸ *ibid* para 9.6.

²⁹ *ibid* para 9.14.

³⁰ B Behlert, 'A Significant Opening. On the HRC's Groundbreaking First Ruling in the Case of a "Climate refugee"' Voelkerrechtsblog (30 January 2020) <<https://voelkerrechtsblog.org/articles/a-significant-opening/>>; Amnesty International,



the Committee's recent pronouncements on matters of *non-refoulement*. In its recent General Comment (GC) on the right to life,³¹ the Committee described the standard it would employ to assess the scope of state obligations on the matter. In order for the obligation of *non-refoulement* to kick in, there need to be 'substantial grounds for believing that a real risk exists' that an individual's right to life would be violated.³² The GC goes on stating that the risk 'must be *personal in nature* and cannot derive merely from the general conditions in the receiving State, except in the most extreme cases'³³. Based on this test, Mr Teitiota should have convinced the Committee that a) he would be personally affected by a serious individualized risk; or b) that the situation he would be confronted with would amount to an 'extreme case'. Given the difficulties in showing that his life specifically would be at risk back home,³⁴ Mr Teitiota had to provide evidence of a serious, generalised risk which would affect anyone living in Kiribati. In exemplifying the typology of 'extreme cases', the HRC stated that no personal risk would have to be proved if the individual at stake were to be deported 'to an extremely violent country in which he has never lived, has no social or family contacts and cannot speak the local language'³⁵. Hence, even assuming that Kiribati could be considered

'UN Landmark Case for People Displaced by Climate Change' (January 2020) available at <www.amnesty.org/en/latest/news/2020/01/un-landmark-case-for-people-displaced-by-climate-change/>.

³¹ HRC, 'General comment No 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life' (30 October 2018) UN Doc CCPR/C/GC/36.

³² *ibid* para 30.

³³ *ibid* (emphasis added). Indeed, already in its 2004 General Comment on General Legal Obligations Imposed on States Parties to the Covenant, the HRC considered that States parties have an obligation not to return to a 'real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant.' HRC, 'General comment No 31 (2004)' (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add. 1326 para 12. In its subsequent practice the Committee stressed that the risk must be personal and that the threshold for providing substantial grounds to establish that a real risk of irreparable harm exists was high, see *X v Denmark* Communication No 2007/2010 views adopted on 26 March 2014 para 9.2; *S.P.A. v Canada* Communication No 282/2005 views adopted on 7 November 2006 para 7.2.

³⁴ Behrman and Kent identify this criterion as one of the main problems 'climate refugees' may face in arguing their case, as climate change 'is precisely a phenomenon that affects communities in general, rather than specific individuals' (n 14) 35.

³⁵ HRC, General comment No 36 (n 31) para 30.



as ‘an extremely violent country’, additional elements which would exacerbate the vulnerability and helplessness of Mr Teitiota would have to be present. In their absence, the decision of the Committee to reject the applicant’s request cannot be said to represent a surprising outcome.

Yet how intense must the risk of harm be in order to trigger an obligation not to deport an individual to a country where he would be exposed to such a hazard? In surveying the evidence provided by Mr Teitiota the HRC identified four possible sources of harm that could place his life at risk in Kiribati: 1) a general situation of violence resulting from overcrowding and land disputes;³⁶ 2) a reduced supply of potable water, as fresh water lenses had been depleted due to saltwater contamination produced by sea level rise;³⁷ 3) a lack of means of subsistence, as the applicant’s crops had been destroyed due to salt deposits on the ground,³⁸ 4) risks associated with sudden-onset disasters related to climate change, ie intense flooding and breaches of sea walls.³⁹

With respect to the first hazard, the HRC observed that the applicant only referred ‘to sporadic incidents of violence between land claimants that have led to an unspecified number of casualties’ and that in his statement before the domestic authorities he had claimed ‘never to have been involved in such a land dispute’⁴⁰. Therefore, no real, personal and reasonably foreseeable risk of a threat to his right to life could be detected. Turning to water scarcity, the Committee noted the hardship that may be caused by water rationing, and yet the applicant had not provided sufficient information indicating that the supply of fresh water was inaccessible, insufficient or unsafe to the point of producing a reasonably foreseeable threat to his health or to impair his right to enjoy a life with dignity without experiencing an ‘unnatural or premature death’.⁴¹ Next, in assessing the alleged lack of means of subsistence the Committee remarked that – while more difficult – growing crops was not impossible on Kiribati, and that Mr Teitiota could look for alternative sources of employment or ask for financial assistance from the Republic of Kiribati. Therefore, New Zealand did not err in determining that there was no ‘real and

³⁶ HRC, *Teitiota* (n 13) para 9.7.

³⁷ *ibid* para 9.8.

³⁸ *ibid* para 9.9.

³⁹ *ibid* para 9.10.

⁴⁰ *ibid* para 9.7.

⁴¹ *ibid* para 9.8.

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'.⁴² Lastly, with regards to the threats posed by disastrous events, the Committee acknowledged that, without robust national and international efforts, the effects of climate change in certain 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 the states in which these individuals sought sanctuary.⁴³ It also accepted that the conditions of life in a country likely to be submerged by water may become incompatible with the right to life with dignity even before the risk is realized. However, given that it would take at least 10 to 15 years before this threat materializes, this timeframe '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'.⁴⁴

As observed by Professor McAdam, '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'.⁴⁵ Instead, a cumulative assessment would probably have been called for. By assessing each risk factor independently, the Committee has ignored the fact that their combined likelihood might indeed give origin to the 'real risk of irreparable harm' that would trigger a *non-refoulement* obligation by New Zealand.⁴⁶ This approach has been endorsed by the European Court of Human Rights,⁴⁷ and by State practice. In 2016 the Regional Conference on Migration (comprising 11 North- and Central-

⁴² *ibid* para 9.9.

⁴³ *ibid* para 9.11.

⁴⁴ *ibid* para 9.11.

⁴⁵ McAdam (n 14) 714.

⁴⁶ In support of this thesis, McAdam illustrates the standards developed in refugee law to prove the existence of a well-founded fear of persecution. The latter may be the result of one very serious risk, or of multiple, less severe risks that are assessed cumulatively, *ibid*.

⁴⁷ In the *Sufi and Elmi* case, for instance, the Court considered that the general conditions in two IDP camps in Somalia were sufficiently dire to amount to treatment reaching the threshold of art 3 of the Convention (prohibition of torture and inhuman or degrading treatment), thus preventing the responding state from deporting Mr Sufi to his country of origin. However, it must be stressed that, in the particular case, the specific vulnerability of the concerned applicant (who had a mental illness) was considered as an



American states) acknowledged that deportation to a disaster-affected country could be contrary to the hosting states' *non-refoulement* obligations under human rights law 'especially if the *cumulative conditions* in those countries amounted a threat to life or cruel, inhuman or degrading treatment'.⁴⁸

4. *Assessing alternative legal strategies*

While there is little merit in second-guessing the legal approach taken by Mr Teitiota's legal counsel, one wonders if putting additional emphasis on the extremely difficult living conditions in which he and his wife had *personally* experienced before leaving Kiribati – and to which the couple and their three children were to be returned – could have improved his chances of success. This approach would probably have resonated favourably with members of the Committee, as they seem ready to accept that severe cases of socio-economic deprivation might be relevant in the context of *non-refoulement* decisions. For instance, in *Jasin v Denmark* the HRC held that the responding state had failed to conduct an individualized assessment of the risks to which the author would have been exposed if returned to Italy, where she and her children had in the past coped with appalling living conditions, mainly caused by the sending State's inability to adequately cater for their basic needs.⁴⁹ The Committee attached significant weight to the author's own testimony with regard to the situation she would face in Italy, which included 'indigence and extreme precarity'.⁵⁰ While the specific circumstances of the *Jasin* case are *prima facie* significantly different from those in Teitiota, it is indicative

aggravating factor, see *Sufi and Elmi v United Kingdom*, App nos 8319/07 and 11449/07 (ECtHR, 28 June 2011) paras 192-3 and 303.

⁴⁸ *Guide to Effective Practices for RCM Member Countries - Protection for persons moving across borders in the context of disasters* (2016) 12, n 15 (emphasis added).

⁴⁹ HRC, *Jasin v Denmark* Communication No 2360/2014 Views of 23 July 2015 para 8.9.

⁵⁰ *ibid* para 8.8. On the case see B Çali, C Costello, S Cunningham, 'Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies' (2020) 21 *German L J* 355, 367.



that extremely poor living conditions originating from the absence of effective State action have played a decisive role in framing the Committee's *non-refoulement* decisions.

It also bears highlighting that the case concerned Mr Teitiota alone and was not presented on behalf of his children as well. Had New Zealand been a party to the 2011 Optional Protocol to the Convention on the Rights of the Child⁵¹ (CRC) (granting the Committee on the Rights of the Child the prerogative to receive individual communications)⁵² Mr Teitiota would probably have had greater prospects of success. It is commonly accepted that obligations under the CRC 'cast a wider and more tailored net than the generic *non-refoulement* obligations under (...) the ICCPR'⁵³, increasing the chances that children are granted stay in the country of destination. This more expansive scope is unsurprising given the long-standing recognition that children may experience harm in different ways to adults and that a child may suffer more acute harm than an adult, when subjected to the same conditions. In particular, the CRC Committee employs a broader and more flexible definition of harm. When children facing *non-refoulement* are involved, harm needs to be assessed on a case-by-case basis, while taking into consideration the best interest of the child.⁵⁴ According to the CRC Committee, the notion of 'harm' covers persecution, torture, gross violations of human rights, or other irreparable harm⁵⁵. The notion of 'other' irreparable harm is open-ended, and may include harm to the survival, development, or health (physical or mental) of the child. In particular, states should take into

⁵¹ United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

⁵² Optional Protocol to the Convention on the Rights of the Child on a communications procedure (adopted on 19 December 2011, entered into force on 14 April 2014).

⁵³ JM Pobjoy, *The Child in International Refugee Law* (CUP 2017) 186.

⁵⁴ CRC and CMW, Joint General Comment No 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 22 (2017) of the Committee on the Rights of the Child on the General Principles regarding the Human Rights of Children in the context of International Migration (16 November 2017) UN Doc CMW/C/GC/3- CRC/C/GC/22 paras 28 and 29.

⁵⁵ *ibid* para 45.



account ‘the particularly serious consequences for children of the insufficient provision of food or health services’.⁵⁶

The extent to which the right to life might give rise to *non-refoulement* obligations under the CRC remains largely to be tested,⁵⁷ but its scope appears to be broader than that of the right to life under the ICCPR. This is particularly true in respect of risks linked to the deprivation of social and economic rights.⁵⁸ A case could be made that conditions of living on Kiribati are (or could soon become) incompatible with the standards set out by the CRC. In sum, asylum seekers in states which are parties to the 2011 Optional Protocol might find resort to the CRC Committee more effective in preventing the deportation of children (and of their parents)⁵⁹ to countries of origin where they would face extremely poor living conditions.

5. Conclusion

In the *Teitiota* case the HRC made additional important observations. For instance, it clarified that the right to life also includes the right of individuals to enjoy a life with dignity and to be free from acts or omissions that would cause their unnatural or premature death.⁶⁰ Significantly, the Committee also affirmed 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’.⁶¹ And yet the decision of the HRC should not be overestimated. The situation in Kiribati is particularly serious and

⁵⁶ CRC, General Comment No 6 (2005): Treatment of Unaccompanied and Separated Children outside Their Country of Origin (1 September 2005) UN Doc CRC/GC/2005/6 para 27.

⁵⁷ C Bierwirth, ‘The Protection of Refugee and Asylum-Seeking Children, the Convention on the Rights of the Child and the Work of the Committee on the Rights of the Child’ (2005) 24 Refugee Survey Quarterly 98, 114.

⁵⁸ Pobjoy (n 54) 193.

⁵⁹ As is known, there is substantive national and international case law suggesting that the ‘best interest of the child’ principle can prevent the removal of a parent where the child has a right to remain, see Pobjoy (n 54) 213-218.

⁶⁰ HRC *Teitiota* (n 13) para 9.4. See also General Comment No 36 (n 31) para 3; and *Portillo Cáceres v Paraguay* (9 August 2019) UN Doc CCPR/C/126/D/2751/2016 para 7.3.

⁶¹ HRC *Teitiota* (n 13) para 9.4.

is the result of a combination of different factors, some of which are quite unique: the small size and conformation of the territory, the very significant rise in the number of inhabitants, the adverse consequences of climate change on the livelihoods of its population, and the negligible impact of government measures in addressing them. And yet not even these dire conditions convinced the HRC that a real risk to the life of Mr Teitiota existed, if he was sent back to his home country.

One is left with the impression that only a starvation-like scenario or situations characterized by extreme and indiscriminate violence would trigger an obligation of *non-refoulement* by a State party. However, as noted by one of the two dissenting Committee members, 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'.⁶² Indeed, the majority opinion makes clear that conditions 'may become incompatible with the right to life with dignity before the risk is realized', which suggests that one should not need to wait for high rates of mortality or generalised violence for the *non-refoulement* obligation to kick in.

The *Teitiota* case is only the first in a number of climate change-related applications that the HRC and other UNTMBs have to consider in the coming months.⁶³ The Committee itself will express its views on a complaint lodged in May 2019 by group of Torres Strait islanders against Australia, in relation to climate-induced rising seas, tidal surges, coastal erosion, and inundation of communities in the Torres Strait Islands in the north of Australia.⁶⁴ The islanders claim that Australia's failure to re-

⁶² *ibid*, Annex 2, Individual opinion of Committee member Duncan Laki Muhumuza (dissenting) para 5.

⁶³ It should be noted that in 2019 the UN International Law Commission (ILC) decided to include the topic 'sea-level rise in international law' in its programme of work, see ILC, 'Provisional summary record of the 3467th meeting' (1 July 2019) UN Doc A/CN.4/SR.3467, 3. The Commission also decided to establish an open-ended Study Group on the topic, to be co-chaired by five of its members. The issue of migration and human rights will be the object of special attention by the Study Group. See E Sommaro, 'Developments within the UN System (2019)' (2020) 2 YB Intl Disaster L (forthcoming).

⁶⁴ HRC, *Billy et al v Australia* Communication No 3624/2019. See Center for International Environmental Law, 'Human Rights Obligations of States in the Context of Climate Change - The Role of the Human Rights Committee' (2020) 3 <www.ciel.org/wp-content/uploads/2020/03/CCPR.pdf>.



duce emissions, combined with the absence of adequate climate adaptation measures, violates some of their fundamental human rights. Ultimately, they claim, climate change will forcibly displace them to mainland Australia, away from their land and sea, to which their culture is inextricably linked. They seek remedies for the violations of their rights to life (art. 6) and culture (art. 27) under the ICCPR, in connection with Australia's failure to effectively mitigate and adapt to climate change.⁶⁵

Also upcoming is the decision of the Committee on the Rights of the Child in *Chiara Sacchi et al v Argentina, Brazil, France, Germany and Turkey*.⁶⁶ The applicants, among which is the young activist Greta Thunberg, allege that the respondent states violated their rights under the CRC by making insufficient cuts to greenhouse gases and by failing to encourage the world's biggest emitters to curb carbon pollution. The children claim that climate change has led to violations of their rights to life, health, and the prioritization of the child's best interest, as well as the cultural rights of petitioners from indigenous communities. They ask the CRC Committee to declare that respondents violated their rights by perpetuating climate change, and to recommend actions for respondents to address climate change mitigation and adaptation.⁶⁷ These applications need to be viewed in the context of the surge in strategic litigation involving human rights arguments.⁶⁸ The outcome of these and other cases will be closely scrutinized by the legal counsels of individuals and NGOs that are currently engaged in human rights-based climate lawsuits before many national courts.

⁶⁵ Client Earth, 'Australian Government denies responsibility for climate-threatened Torres Strait' <www.clientearth.org/latest/latest-updates/news/australian-government-denies-responsibility-for-climate-threatened-torres-strait/>.

⁶⁶ The full text of the petition is available at <<http://climatecasechart.com/non-us-case/sacchi-et-al-v-argentina-et-al/>>.

⁶⁷ For more details on the application see <<https://childrenvsclimatecrisis.org/>>.

⁶⁸ A Savaresi, J Auz, 'Climate Change Litigation and Human Rights: Pushing the Boundaries' (2019) 9 *Climate L* 244; J Peel, HA Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 *Transnational Environmental L* 37.

