ZOOM IN

The question:

Human Rights Committee's decision on the case *Ieoane Teitiota* v *New Zealand*: Landmark or will-o'-the-wisp for climate refugees?

Introduced by Gabriella Citroni[*]

On 24 October 2019, the United Nations Human Rights Committee (HRC) issued its Views on the case *Ieoane Teitiota v New Zealand*,[1] concerning the complaint of an individual seeking asylum from the effects of climate change. Mr Ieoane Teitiota, a national of Kiribati, applied for refugee status in New Zealand, but his claim was rejected and he was returned to the island of Tarawa, in Kiribati. Mr Teitiota alleged that his removal from New Zealand exposed him to a violation of his right to life, because of the deteriorated environment, including saltwater contamination of the freshwater supply, due to the sea level rise caused by climate change (according to the data provided and accepted by the HRC, Kiribati is expected to disappear as a country within the next 10 to 15 years)[2] which has resulted in the scarcity of habitable space and violent land disputes.[3]

The HRC decision has been hailed as 'historic',[4] 'ground-breaking'[5]

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[1] Human Rights Committee (HRC), Case *Ieoane Teitiota* v *New Zealand*, Communication No 2728/2016 Views of 24 October 2019.

[2] ibid paras 2.4, 7.2, 9.10 and 9.12.

[3] ibid paras 2.1-2.6.

[4] Office of the High Commissioner for Human Rights, 'Historic UN Human Rights Case Opens Door to Climate Change Asylum Claims' (21 January 2020) available at <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25482&LangID=E>; and M WU, 'The Historic Case of Teitiota: Climate-Induced Asylum and Its Future' Opinio Juris (2020) available at <https://opiniojuris.org/2020/10/12/the-historic-case-of-teitiota-climate-induced-asylum-and-its-future/>.

[5] L Shuetze, 'A Groundbreaking Ruling on Climate Refugees Puts the World on Notice' The Spinoff (2020) available at <https://thespinoff.co.nz/society/23-01-2020/a-groundbreaking-ruling-on-climate-refugees-puts-the-world-on-notice/>.

and a as 'landmark',[6] in that it would pave the way to the recognition of climate refugees pursuant to States' international *non-refoulement* obligations under international human rights law. With such an enthusiastic and broad reception, one may assume that the HRC found the respondent State responsible for the breach of its obligations under the International Covenant on Civil and Political Rights (ICCPR) and, in particular, of Article 6 (right to life). However, this was not the case. Why is the HRC ruling regarded as so relevant then?

The HRC findings are remarkable in that, on the one hand, they do indeed recognize the category of climate refugees – albeit avoiding the debate on the need to expand the definition of refugee pursuant to the 1951 Convention relating to the Status of Refugees – and their plight. On the other hand, the ruling of the HRC confirms that human rights bodies can be a forum to litigate issues related to climate change and environmental matters. This is proved also by a growing number of applications and judgments before regional human rights courts and Treaty Bodies.[7] However, there is no consensus on the desirability to have climate – and in particular, climate refugees' – issues litigated before human rights mechanisms.[8]

[6] Among others, E Wasuka, 'Landmark Decision from UN Human Rights Committee Paves the Way for Climate Refugees' ABC News (21 January 2020) available at <www.abc.net.au/news/2020-01-21/un-human-rights-ruling-worlds-first-climate-refugee-kiribati/11887070>; K Lyons, 'Climate Refugees Can't Be Returned Home, Says Landmark UN Human Rights Ruling' *The Guardian* (2020) available at <www.theguardian.com/world/2020/jan/20/climate-refugees-cant-be-returned-home-says-landmark-un-human-rights-ruling>; and Amnesty International, '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/>.

[7] See, among others, HRC, Case *Portillo Cáceres and others v Paraguay*, Comm No 2751/2016 (25 July 2019); Inter-American Court of Human Rights, *Indigenous Communities of the Lhaka Honhat Association (Our Land) v Argentina* Series C No 400 (6 February 2020); African Commission on Human and Peoples Rights, *Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria* (27 May 2002); and European Court of Human Rights, *Budayeva v Russia* App no (ECtHR, 20 March 2008). On one of the most recent pending applications see, among others, P Clark, G Liston, I Kalpouzos, 'Climate Change and the European Court of Human Rights: The Portuguese Youth Case' EJIL:Talk! (6 October 2020) available at <www.ejiltalk.org/climate-change-and-the-european-court-of-human-rights-the-portuguese-youth-case/>.

[8] See, among others, J Albers, 'Human Rights and Climate Change – Protecting the Right to Life of Individuals of Present and Future Generations' (2017) 28 Security and

The principle of *non-refoulement* is enshrined in both international refugee law and international human rights law.[9] However, the latter arguably offers broader protection and, when the person concerned would be at risk of being subjected to torture, or cruel, inhuman or degrading treatment or punishment, it operates as an absolute prohibition.[10] This, *per se*, gives an idea about why human rights mechanisms could be the chosen forum to litigate *non-refoulement* claims for climate refugees.[11]

As mentioned above, in the *Teitiota* case, the applicant did not allege a potential violation of the prohibition of torture and inhuman and degrading treatment (although the conditions of life in the island of Tarawa may indeed qualify as inhumane and raise concerns in that regard), but litigated the case under the perspective of the right to life. In its decision, the HRC explicitly admitted that climate change may lead to the displacement of individuals and trigger the obligation of *non-refoulement* by receiving States and it held that '[…] the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized'.[12]

However, the HRC left the burden of proof entirely on the applicant, setting an extremely high threshold, which, in the case of Mr Teitiota, it did not consider satisfied. These findings were not shared by all the members of the HRC. In her dissenting opinion, Ms Vasilka Sancin held that

Human Rights 113-144; R Pavoni, 'Environmental Jurisprudence of the European and Inter-American Court of Human Rights. Comparative Insights' in B Boer (ed), *Environmental Law Dimensions of Human Rights* (OUP 2015) 69-106; E Posner, 'Climate Change and International Human Rights Litigation: A Critical Appraisal' (2007) 155 U Pennsylvania L Rev 1925-1945; and A Boyle, M Anderson (eds), *Human Rights Approaches to Environmental Protection* (OUP 1996).

[9] V Chetail, *Are Refugee Rights Human Rights? An Unorthodox Questioning on the Relations between International Refugee Law and International Human Rights Law*, in R Rubio-Marin (ed), *Human Rights and Immigration* (OUP 2014) 19-72. In the same sense, see HRC, *Teitiota* (n 1) para 9.3.

[10] In this sense, see, among others, art 3 of the 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. See also V Chetail, *International Migration Law* (OUP 2015) 198.

[11] JH Sendut, 'Climate Change as a Trigger of Non-refoulement Obligations in International Human Rights Law' EJIL: Talk! (6 February 2020) available at <www.ejiltalk.org/climate-change-as-a-trigger-of-non-refoulement-obligations-under-international-human-rights-law/>.

[12] HRC, *Teitiota* (n 1) para 9.11.

'[…] In these circumstances, it is my opinion that it falls on the State Party, not the author, to demonstrate that the author and his family would in fact enjoy access to safe drinking (or even potable) water in Kiribati, to comply with its positive duty to protect life from risks arising from known natural hazards'.[13] Along the same lines, in his dissenting opinion, Mr Duncan Laki Muhumuza considered the burden of proof imposed on the applicant too high and unattainable and remarked that '[…] It would indeed be counterintuitive to the protection of life, to wait for deaths to be very frequent and considerable; in order to consider the threshold of risk as met'.[14]

These opinions suggest that there is ample room for future developments in the jurisprudence of the HRC and, potentially, other human rights courts and mechanisms.[15] This, coupled with the appalling data concerning the serious impact that oceanic climate change is expected to cause over human and ecological systems over the next century,[16] point in the direction of a rising tide. For sure of the seas, probably also of the complaints lodged by climate refugees.

In the face of rather restrictive policies and jurisprudence at the domestic level and the somewhat timid approach of the HRC, one may wonder whether the human rights approach to climate refugees is the most adequate to address the existing protection gap and, if so, which are the applicable standards and the loopholes.

[13] ibid dissenting opinion of Ms Vasilka Sancin para 5.

[14] ibid, dissenting opinion of Mr Duncan Laki Muhumuza para 5.

[15] I Borges, *Environmental Change, Forced Displacement and International Law: From Legal Protection Gaps to Protection Solutions* (Routledge 2018); E Delval, 'From the U.N. Human Rights Committee to European Courts: Which Protection for Climate-induced Displaced Persons under European Law?' EU Immigration and Asylum Law and Policy (8 April 2020) available at <http://eumigrationlawblog.eu/from-the-u-n-human-rights-committee-to-european-courts-which-protection-for-climate-induced-displaced-persons-under-european-law/>.

[16] See, among others, Intergovernmental Panel on Climate Change, 'Special Report: Global Warming of 1.5°C, Impacts of 1.5°C of Global Warming on Natural and Human Systems' (2018) available at <www.ipcc.ch/sr15>; International Law Association res 6/2018 (Annex) 'Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise' (August 2018); and GRID, 'Global Report on Internal Displacement 2020, Internal Displacement Monitoring Centre' (2020) available at <www.internal-displacement.org/database/displacement-data>.

One year has passed since the HRC pronounced itself on the *Teitiota* case and time is ripe for a stocktaking on its impact and potential ramifications. QIL posed the question to Professor Vernon Rive, on the one hand, and to Professor Simon Berhman and Professor Avidan Kent, on the other. Both contributions confirm that the HRC decision contributed to the debate on the subject of climate refugees and the corresponding States' human rights obligations in terms of *non-refoulement.* However, the authors diverge in their appreciation of the contents of the Views and the findings of the HRC, whilst both questioning – albeit for different reasons – the overall desirability of the litigation of the issue before international human rights mechanisms.

Professor Rive focuses on the potential effects on immigration policies of 'receiving' countries in the South Pacific (such as Australia and New Zealand) of the HRC decision and other similar rulings which emphasise (future, potential) *non-refoulement* obligations where temporary and labour migrants from low-lying climate-vulnerable States travel to countries such as New Zealand and then resist returning to their country of residence. He argues that decisions such as the one delivered by the HRC may even be counter-productive and do not constructively assist in developing a coordinated, planned response to the challenges of climate change that would be better dealt with through domestic labour migration schemes and broader policies, including emissions' reductions, and planned migration contingency arrangements. In his view, domestic responses should take precedence over international litigation initiatives and, if international community is interested in assisting climate refugees, then it should support the said domestic initiatives over international litigation.

Professors Berhman and Kent recognise the relevance of the principle of *non-refoulement* and human rights litigation in filling the protection gap for climate refugees. However, they also believe that the HRC decision is regrettable in finding no violation in the *Teitiota* case, and further that it highlights certain fundamental weaknesses in relying too heavily on a purely human rights approach to the protection gap.

Probably, only time will tell whether the HRC Views on the *Teitiota* case are a landmark or a will-o'-the-wisp for climate refugees. It is however indisputable that this decision placed firmly on the table the subject and the need to better spell out States' *non-refoulement* obligations, as well as their policies and responses (or lack thereof) vis-à-vis climate change. Bearing in mind the (unfortunately) rising tide, this is a welcome development.