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Ioane Teitiota v New Zealand: A landmark ruling for climate refugees?

Katrien Steenmans,* Aaron Cooper**

Introduction

Climate change is having, and further is expected to have, many far-reaching and hugely detrimental impacts, including on health, livelihoods, food securities, and sea level rise.¹ The most detrimental impacts of climate change (will) afflict those who have contributed least, including Small Island Developing States (SIDS). SIDS are identified as particularly vulnerable to climate change; for example, SIDS' livelihoods are expected to be eliminated as a result of changes to ecosystems, significant proportions of SIDS lands are expected to become inhabitable and submerged in sea, and SIDS may experience changes to their freshwater supplies as a result of seawater contaminating fresh water sources.²

With such expectations of disappearing habitable land and fundamental changes to quality of life in SIDS, there has been an increased focus on climate change related displacement in academic literature,³ litigation,⁴ and policy-making⁵ as part of wider discussions on and recognition of the link between climate change and human rights (not just in relation to SIDS but also more widely).⁶ Recently, Ioane Teitiota aimed to become the first climate refugee. His case, *Ioane Teitiota v New Zealand*,⁷ is the focus of this article.

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¹ Myles Allen and others, 'Summary for Policymakers' in Valérie Masson-Delmotte and others (eds), *Global Warming of 1.5°C. An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* (IPCC 2018).

² *ibid* 9; Ilan Kelman and Jennifer J West, 'Climate Change and Small Island Developing States: A Critical Review' (2009) 5(1) *Ecological and Environmental Anthropology* 1, 3-5; Jan Petzold and Beate M W Ratter, 'Climate Change Adaptation under a Social Capital Approach – An Analytical Framework for Small Islands' (2015) 112 *Ocean & Coastal Management* 36, 36.

³ Angela Williams, 'Turning the Tide: Recognizing Climate Change Refugees in International Law' (2008) 30(4) *Law & Policy* 502; Sumudu Atapattu, 'A New Category of Refugees? "Climate Refugees" and a Gaping Hole in International Law' in Simon Behrman and Avidan Kent (eds), *'Climate Refugees': Beyond the Legal Impasse* (Routledge 2018).

⁴ Elisa de Wit, Sonali Seneviratne and Huw Calford, 'Climate Change Litigation Update' (*Norton Rose Fulbright*, February 2020) <www.nortonrosefulbright.com/en/knowledge/publications/7d58ae66/climate-change-litigation-update> accessed 8 June 2020; United Nations Environment Programme, *The Status of Climate Change Litigation – a Global Review* (United Nations Environment Programme 2017) 25 and 32.

⁵ The Global Compact on Refugees recognises that 'climate and environmental degradation and natural disasters increasingly interact with the drivers of refugee movements' – United Nations General Assembly, *Report of the United Nations High Commissioner for Refugees: Global Compact on Refugees* (2018) A/73/12 (Part II) ch 1, B, para 8.

⁶ For example, a search on the UN Environment Web Intelligence database (<https://unep.ecoresearch.net>) of the use of the terms 'climate change' and 'human rights' together over the past ten years shows an increase in use. See also: United Nations Human Rights Special Procedures, 'Safe Climate: A Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (2019) A/74/161 ch III.

⁷ *Ioane Teitiota v New Zealand*, CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 7 January 2020.

The ruling of *Teitiota v New Zealand* by the United Nations Human Rights Committee (HRC) has been hailed as ‘landmark’.⁸ This paper briefly sets out why and its possible impacts of it on wider climate refugee issues. For this purpose, the next section summarises the case and its ruling. The following section then reviews the possible effects the case may have on the debate in climate change and human rights law intersections, in particular on: debates on the term ‘climate refugee’, and the call for universal legal instruments for climate migrants. The final section concludes.

The decision in *Ioane Teitiota v New Zealand*

The claim was brought by Ioane Teitiota, a national of the Republic of Kiribati. Kiribati is a SIDS located in the central Pacific Ocean that has received much attention in the literature as a result of its geography, population pressures, and limited infrastructure, which are exacerbating the impacts of climate change.⁹ Teitiota claimed that effects of climate change and sea level rise, including that fresh water had become scarce because of saltwater contamination and overcrowding on Tarawa, forced him to migrate from the island of Tarawa in Kiribati to New Zealand. Teitiota therefore sought asylum in New Zealand, but was refused by the Immigration and Protection Tribunal.¹⁰ The Court of Appeal¹¹ and Supreme Court¹² denied Teitiota’s appeals on the same matter.¹³ Teitiota therefore brought a case against the government of New Zealand at the HRC claiming that New Zealand violated his right to life under the International Covenant on Civil and Political Rights (ICCPR 1966).¹⁴ Article 6(1) of the Covenant provides that: ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life’, with no derogation permitted.¹⁵ The other sub-articles are concerned with how, inter alia, the death penalty, genocide, and capital punishment are affected by Article 6(1) and thus not relevant to the case.

⁸ Amnesty International, ‘UN Landmark Case for People Displaced by Climate Change’ (20 January 2020) <www.amnesty.org/en/latest/news/2020/01/un-landmark-case-for-people-displaced-by-climate-change> accessed 10 June 2020; Kate Lyons, ‘Climate Refugees Can’t be Returned Home, Says Landmark UN Human Rights Ruling’ *The Guardian* (20 January 2020) <www.theguardian.com/world/2020/jan/20/climate-refugees-cant-be-returned-home-says-landmark-un-human-rights-ruling> accessed 18 May 2020; Adaena Sinclair-Blakemore, ‘Teitiota v New Zealand: A Step Forward in the Protection of Climate Refugees under International Human Rights Law?’ *Oxford Human Rights Hub* (28 January 2020) <<https://ohrh.law.ox.ac.uk/teitiota-v-new-zealand-a-step-forward-in-the-protection-of-climate-refugees-under-international-human-rights-law>> accessed 18 May 2020.

⁹ World Health Organization and United Nations Framework Convention on Climate Change, ‘Climate and Health Country Profile 2017: Kiribati’ (2018) <<https://apps.who.int/iris/rest/bitstreams/1097480/retrieve>> accessed 10 June 2020; John P Cauchi, Ignacio Correa-Velez and Hilary Bambrick, ‘Climate Change, Food Security and Health in Kiribati: A Narrative Review of the Literature’ (2019) 12 *Global Health Action* 1, 7.

¹⁰ *AF (Kiribati)* [2013] NZIPT 800413.

¹¹ *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* [2014] NZCA 173.

¹² *Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107.

¹³ For an analysis of these decisions, see: Ben Boer, ‘Climate Change and Human Rights in the Asia-Pacific: A Fragmented Approach’ in Ottavio Quirico and Moulou Boumghar, *Climate Change and Human Rights: An International and Comparative Law Perspective* (Routledge 2016) ch 14; Hélène Ragheboom, *The International Legal Status and Protection of Environmentally-displaced Persons: A European Perspective* (Brill Nijhoff 2017) 98-290; Matthew Scott, *Climate Change, Disasters, and the Refugee Convention* (Cambridge University Press 2020) ch 3.

¹⁴ International Covenant on Civil and Political Rights (New York City, 16 December 1966; in force 23 March 1976).

¹⁵ Article 4(1) of the ICCPR allows derogations ‘[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed’, but Article 4(2) states that no derogation is permitted from Article 6.

The Committee published its ruling on 7 January 2020 that Teitiota's rights under Article 6(1) of the Covenant were not violated. The HRC concluded that there was no violation of Article 6 of the ICCPR because:

1. There was no arbitrariness or error in the New Zealand authorities' assessment of a real, personal, and reasonably foreseeable risk of a threat to Teitiota's right to life as a result of violent acts resulting from overcrowding or private land disputes in Kiribati;¹⁶
2. Teitiota provided insufficient information to indicate a reasonably foreseeable threat of a health risk as a result from an inaccessible, insufficient or unsafe supply of fresh water that would impair his right to enjoy a life with dignity or cause his unnatural or premature death;¹⁷
3. Teitiota provided insufficient information to indicate a reasonably foreseeable risk that he would be exposed to a situation of indigence, deprivation of food, and extreme precarity that would threaten his right to life;¹⁸ and
4. Although the Committee accepted that sea level rise is likely to render Kiribati uninhabitable, it found the timeframe of 10 to 15 years (as noted in Teitiota's comments submitted in 2016):¹⁹

could allow for intervening acts by the Republic of Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population. The Committee notes that the State party's authorities thoroughly examined this issue and found that the Republic of Kiribati was taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms.²⁰

Despite the HRC not recognising Teitiota as a climate refugee, *Ioane Teitiota v New Zealand* has nonetheless been hailed as a 'landmark' ruling,²¹ because the HRC recognised that climate change effects could give rise to violations of the right to life. The landmark statement is:

The Committee is of 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, thereby triggering the *non-refoulement* obligations of sending states. Furthermore, given 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.²²

Thus, the HRC recognised that there is scope for climate change effects to violate Article 6 (and 7)²³ of the ICCPR and allow possible future refugee claims. This is in contrast to cases previously brought in which individuals were seeking asylum as a result of environmental harm and climate, which had been unsuccessful. For example, in *RTT Case No. N96/10806*²⁴ the Tribunal stated that 'the environmental problem of the rise in the sea level around Tuvalu is

¹⁶ *Ioane Teitiota v New Zealand*, para 9.7

¹⁷ *ibid* para 9.8.

¹⁸ *ibid* para 9.9

¹⁹ *ibid* para 9.10.

²⁰ *ibid* para 9.12.

²¹ See n 8.

²² *Ioane Teitiota v New Zealand*, para 9.11.

²³ Even though Article 7 was mentioned in this paragraph, it was not a key consideration in this ruling.

²⁴ *RRT Case No N96/10806* [1996] RRTA 3195 (7 November 1996).

not [Refugee] Convention related'.²⁵ This latter case was based on the 1951 Refugee Convention,²⁶ so it is important to note that the ICCPR, rather than the Convention, was the focus in *Ioane Teitiota v New Zealand*.

There were two dissenting opinions of Committee members Vasilka Sancin and Duncan Laki Muhumuza. In Sancin's opinion, New Zealand had not provided sufficient evidence of Teitiota and his children's access to safe drinking water in Kiribati, because 'safe drinking water' had (in his opinion) been wrongly equated with 'potable water'. Muhumuza dissented because New Zealand, in his opinion, placed an unreasonable burden of proof on Teitiota to establish a real risk and danger of arbitrary deprivation of life and considered the conditions of life presented by Teitiota 'significantly grave and pose a real threat to his life under Article 6(1)' of the ICCPR.²⁷ Muhumuza is overall very critical of the HRC's position and states that:

New Zealand's action is more like forcing a drowning person back into a sinking vessel, with the "justification" that after all there are other voyagers on board. Even as Kiribati does what it takes to address the conditions; for as long as they remain dire, the life and dignity of persons remains at risk.²⁸

Muhumuza even states that to protect the right to life, should not 'wait for deaths to be very frequent and considerable' for the risk threshold to be met, but the fact that Teitiota's child had already suffered significant health hazards as a result of environmental conditions should be sufficient.²⁹

Analysis

Before discussing the ways in which the ruling may impact some of the key discussions in the literature, two issues are covered in relation to the ruling: (1) acknowledgement by the HRC that climate change effects may provide scope for climate refugees is not completely surprising, and (2) critique of the 10-15 years being sufficient time for intervening actions.

First, the link between the right to life and change effects by the Committee should not be completely surprising, as it has previously stated that a broad approach should be taken to the right to life under Article 6 of the ICCPR;³⁰ '[t]he expression "inherent right to life" cannot properly be understood in a restrictive manner and the protection of this right requires that States adopt positive measures'.³¹ There is thus scope for climate change effects to be included under the right as acknowledged by the HRC in their ruling. Moreover, General Comment No. 36,³² a document providing guidance for interpreting the ICCPR, notes 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. Obligations of States parties

²⁵ *ibid.* See Scott (n 13) ch 3 for a detailed discussion of this case and others.

²⁶ Convention Relating to the Status of Refugees Rights (Geneva, 28 July 1951; in force 22 April 1954).

²⁷ ICCPR, Annex 2, Individual opinion of Committee member Duncan Laki Muhumuza (dissenting), para 1.

²⁸ *ibid* para 6.

²⁹ *ibid* para 5.

³⁰ *Ioane Teitiota v New Zealand*, para 9.4.

³¹ Bertrand G Ramcharan, 'The Concept and Dimensions of the Right to Life' in Bertrand G Ramcharan (ed), *The Right to Life in International Law* (Martinus Nijhoff Publishers 1985) 5.

³² Human Rights Committee, General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life (30 October 2018) CCPR/C/GC/36.

under international environmental law should thus inform the contents of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law. Implementation of the obligation to respect and ensure the right, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors.³³

General Comment No. 36 therefore again evidences previous recognition that climate change effects can be covered by Article 6 of the ICCPR. Instead, it is the HRC acknowledged link between climate change effects, the right to life, and refugees that is possibly ‘game-changing’,³⁴ particularly as it is generally accepted that the international legal definition of ‘refugee’ does not cover ‘climate refugee’.³⁵

The 1951 Refugee Convention and 1967 Protocol³⁶ define a refugee as those who have a:

well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country.³⁷

Climate migrants are thus not considered under this definition because (1) they are not persecuted, (2) climate change is not one of the reasons accepted, and (3) climate displacement can be internal rather than to another country (though it was to another country in this case). Under international refugee law, the obligation not to extradite, deport or otherwise transfer under Article 6 of the ICCPR may be broader and require protection of aliens not entitled to refugee status. This means that asylum seekers claiming real risk of violation of their right to life in their state of origin should have access to refugee procedures.³⁸

The question warranting further investigation is what changed for there to be explicit acknowledgement of the possibility of seeking asylum as a result of climate change effects? Particular questions may include: Why has the possibility been recognised now? Has the increased media focus triggered this shift? For example, was the shift triggered as a result of individuals like Greta Thunberg and declarations of a climate crisis causing climate change issues to gain traction? This would then be similar to how other areas of law experienced changes in law, such as European Union waste law, where changes to it gained public support as a result of, for example, David Attenborough’s *Planet Earth II* and the Chinese ban on the

³³ *ibid* para 62.

³⁴ Yvonne Su, ‘UN Ruling Could be a Game-changer for Climate Refugees and Climate Action’ *The Conversation* (28 January 2020) <<https://theconversation.com/un-ruling-could-be-a-game-changer-for-climate-refugees-and-climate-action-130532>> accessed 10 June 2020.

³⁵ Jane McAdam, ‘Swimming Against the Tide: Why a Climate Change Displacement Treat is Not the Answer’ (2011) 23(1) *International Journal of Refugee Law* 2, 6; UNSW, ‘Seven Reasons the UN Refugee Convention Should Not Include “Climate Refugees”’ (7 June 2017) <www.kaldorcentre.unsw.edu.au/publication/seven-reasons-un-refugee-convention-should-not-include-climate-refugees> accessed 10 June 2020; Atapattu (n 3).

³⁶ Protocol Relating to the Status of Refugees (New York, 31 January 1967; in force 4 October 1967).

³⁷ Refugee Convention, art 1(A)(2) as a result of art 1(1) of the Protocol.

³⁸ *Ioane Teitiota v New Zealand*, para 9.3.

import of certain plastic wastes.³⁹ Or is it as a result of the increased urgency emphasised by the scientific community? Answers to these questions may help understand how the concept of a climate refugee in international law may transition from a non-binding possibility to a binding reality.

Second, the HRC in its ruling noted that there is still time for affirmative action on climate change and that Kiribatian authorities are taking adaptive measures.⁴⁰ According to recent research by Cauchi and others, however, climate change interventions have had ‘little success’ to date in Kiribati.⁴¹ Adopting further adaptation and mitigation actions would be costly (though not taking action is often estimated to be more costly).⁴² Furthermore, the very nature of climate change means that Kiribati cannot mitigate climate change on its own. Climate change is a *wicked* and *collective action* problem, meaning that there is no single, simple, one-off solution,⁴³ which no country can solve on its own. Kiribati had the third lowest fossil carbon dioxide (CO₂) emissions in 2017⁴⁴ and has one of the lowest carbon dioxide (CO₂) emissions per capita – for example, Kiribati emits less than 0.6 metric tonnes of CO₂ per capita compared to Qatar’s 43.9 metric tonnes of CO₂ per capita, United States of America’s 16.5 metric tonnes of CO₂ per capita, and United Kingdom’s 6.5 metric tonnes of CO₂ per capita.⁴⁵ So, even though there are ways Kiribati can lower its emissions, it is likely to be insignificant in ‘solving’ climate change⁴⁶ and it will still be at the frontline of sea level rise and other climate change effects as a result of emissions by other countries.

³⁹ Sid Hayns-Worthington, ‘The Attenborough Effect: Searches for Plastic Recycling Rocket after Blue Planet II’ (*Resource*, 5 January 2018) <<https://resource.co/article/attenborough-effect-searches-plastic-recycling-rocket-after-blue-planet-ii-12334>> accessed 10 June 2020; Laura Parker and Kennedy Elliott, ‘Plastic Recycling is Broken. Here’s How to Fix It’ (*National Geographic*, 20 June 2018) <<https://news.nationalgeographic.com/2018/06/china-plastic-recycling-ban-solutions-science-environment/>>; Katrien Steenmans, ‘Extended Producer Responsibility: An Assessment of Recent Amendments to the European Union Waste Framework Directive’ (2019) 15(2) *Law, Environment and Development Journal* 108, 108.

⁴⁰ See text to n 20. See also *Ioane Teitiota v New Zealand*, para 9.12.

⁴¹ Cauchi, Correa-Velez and Bambrick (n 9) 7.

⁴² Joeri Rogelj, David McCollum, Andy Reisinger, Malte Meinshausen and Keywan Riahi, ‘Probabilistic Cost Estimates for Climate Change Mitigation’ (2013) 493 *Nature* 79; Carolyn Kousky, ‘Informing Climate Adaptation: A Review of the Economic Costs of Natural Disasters’ (2014) 46 *Energy Economics* 576.

⁴³ In relation to climate change as a wicked problem, see for example: Brian W Head, ‘Wicked Problems in Public Policy’ (2008) 3(2) *Public Policy* 101; Simin Davoudi, Jenny Crawford and Abid Mehmood, *Planning for Climate Change: Strategies for Mitigation and Adaptation for Spatial Planners* (Earthscan/James & James 2009); Frank P Incropera, *Climate Change: A Wicked Problem* (Cambridge University Press 2016). In relation to climate change as a collective action problem, see for example: Paul G Harris, ‘Collective Action on Climate Change: The Logic of Regime Failure’ (2007) 47 *Natural Resources Journal* 195; Elinor Ostrom, ‘A Multi-scale Approach to Coping with Climate Change and Other Collective Action Problems’ (2010) 1 *Solutions* 27; Elinor Ostrom, ‘Polycentric Systems for Coping with Collective Action and Global Environmental Change’ (2010) 20(4) *Global Environmental Change* 550.

⁴⁴ Marilena Muntean, Diego Guizzardi, Edwin Schaaf, Monica Crippa, Efsio Solazzo, Jos Olivier and Elisabetta Vignati, *Fossil CO₂ Emissions of all World Countries* (JRC Science for Policy Report, European Commission 2018).

⁴⁵ Based on 2014 data. The World Bank, ‘CO₂ Emissions (Metric Tons per Capita’ (28 May 2020) <https://data.worldbank.org/indicator/EN.ATM.CO2E.PC?end=2014&most_recent_value_desc=true&start=1960> accessed 4 June 2020.

⁴⁶ Steven R Brechin, ‘Climate Change Mitigation and the Collective Action Problem: Exploring Differences in Greenhouse Gas Contributions’ (2016) 31(S1) *Sociological Forum* 846; Philip Rossetti, ‘Primer: No Country Can Fix Climate Change on Its Own’ (*American Action Forum*, 20 May 2019) <www.americanactionforum.org/insight/primer-us-cant-fix-climate-change-on-its-own> accessed 9 June 2020; Angel Hsu, ‘National Governments Can’t Solve Climate Change Alone: Cities, Regions and Businesses are also Crucial Players’ (*Scientific American*, 13 October 2019) <<https://blogs.scientificamerican.com/observations/national-governments-cant-solve-climate-change-alone>> accessed 9 June 2020.

Although 10 to 15 years may seem a significant amount of time, as discussed in the previous paragraph, there are not many measures that Kiribatian authorities can implement beyond adaptation actions in the context of climate change that will have a noticeable effect. Moreover, almost five years have passed since Teitiota submitted evidence, so the timeframe is now closer to five to ten years, which leaves even less time for climate action to have an impact. As lands are expected to be submerged in sea,⁴⁷ it is recognised both by policy-makers and researchers that climate displacement and migration are inevitable.⁴⁸ Allgood and McNamara, for example, in their research on local perspectives on climate displacement in Kiribati found that displacement is expected to be more international than internal:

Of the people that considered migration, most agreed that moving to another country would be most beneficial, over moving to another island in Kiribati or a nearby village. The majority of respondents emphasized that *migration would be a distressing but necessary aspect of their future*.⁴⁹

This thus echoes Muhumuza's dissenting opinion;⁵⁰ at what stage is the situation sufficiently grave that a threat to life is recognised – does disaster have to be less than five years away?

In the sub-sections below two of the (non-exhaustive) ways in which the ruling may feed into wider discussions in different areas of human rights and climate change law intersections are discussed. These only scope some of the issues that warrant unpacking and investigation in further research and are not intended to be detailed discussions of these issues.

Climate refugee v (forced) migrant v displaced individual v ... ?

Gaps remain within climate change and environmental law regimes. Whether those displaced should be labelled as *climate refugees* or *(forced) climate migrants* is a contentious issue in the literature and policy-making.⁵¹ In this case, Teitiota was applying for 'refugee' status in New Zealand. The Immigration and Protection Tribunal that initially denied asylum did emphasise in their decision that their denial 'did not mean that environmental degradation from climate change or other natural disasters could never create a pathway into the Refugee Convention or protected person jurisdiction'.⁵² The HRC did acknowledge scope, but ultimately also did not recognise Teitiota as a climate refugee. Therefore, overall the use of refugee in the case has not definitively changed current discourse on the term climate refugee.

The ruling also did not address the issues surrounding the contentious term. First, refugees remain a politically charged topic.⁵³ Second, the ruling has not made a definition for 'climate

⁴⁷ See n 2.

⁴⁸ McAdam (n 35) 8.

⁴⁹ Lacey Allgood and Karen E McNamara, 'Climate-induced Migration: Exploring Local Perspectives in Kiribati' (2017) 38 Singapore Journal of Tropical Geography 370, 381 (emphasis added).

⁵⁰ See text to n 27 - 29.

⁵¹ International Organization for Migration, 'Migration and Climate Change' (2008) IOM Migration Research Series No. 31, 13-15 <www.ipcc.ch/apps/nj-lite/srex/nj-lite_download.php?id=5866> accessed 2 June 2020; Romain Felli, 'Managing Climate Insecurity by Ensuring Continuous Capital Accumulation: "Climate Refugees" and "Climate Migrants"' (2013) 18(3) New Political Economy 337; Dina Ionesco, 'Let's Talk About Climate Migrants, Not Climate Refugees' (6 June 2019) <www.un.org/sustainabledevelopment/blog/2019/06/lets-talk-about-climate-migrants-not-climate-refugees> accessed 10 June 2020.

⁵² *Teitiota* (n 12).

⁵³ Roland Bleiker and others, 'The Visual Dehumanisation of Refugees' (2013) 48(4) Australian Journal of Political Science 398; Julie Matthews, 'Refugee Policy: A Highly Charged Political Issue' (2013) 32(2) Social Alternatives 3.

refugee’ more likely – though it is not agreed that it would be helpful or conducive to have such a definition as it would have to apply to ‘any of the diverse climate vulnerable populations around the world’.⁵⁴ Third, there are those that do not want to be seen as climate refugees, but instead as skilled migrants.⁵⁵ Finally, the label climate refugee simplifies the solution; it is not a ‘solution’ to climate change effects to move people as ignores numerous other issues.⁵⁶

Universal legal instrument for climate migrants

There is some debate on how climate migrants should be protected. Some scholars have argued for an international legal instrument to protect climate refugees.⁵⁷ McAdam, however, states that currently a new treaty would not ‘without wide ratification and implementation, “solve” the humanitarian issue’,⁵⁸ particularly a universal treaty because localised and regional responses are likely to be more appropriate to address different geographical, demographical, cultural and political circumstances.⁵⁹ Other difficulties that would also need to be overcome include that a treaty would need to differentiate between those displaced because they need to be protected from climate change effects and those who are ‘victims of “mere” economic or environmental hardship’.⁶⁰ The issue of causation between displacement and climate change effects would also need to be addressed to ensure individuals are not using climate change effects a disguise for other possible motivation to move.⁶¹

By acknowledging that there may be scope for recognising climate refugees, this further supports arguments against another instrument as it demonstrates that there is a possible alternative avenue available. Though this case centred on a national of one of the most vulnerable countries⁶² and one of the dissenting opinions questioned at what point a sufficient threat to life would be recognised,⁶³ so it does not completely remove or negate arguments for an instrument. The time it would take to negotiate such an instrument may arguably still favour waiting for these other avenues to be realised.

Conclusions

Climate change is already having a major impact on a wide range of human rights. Unless affirmative action is taken, there will be grave consequences. The protection of the

⁵⁴ Carol Farbotko and Heather Lazrus, ‘The First Climate Refugees? Contesting Global Narratives of Climate Change in Tuvalu’ (2012) 22 *Global Environmental Change* 382, 384.

⁵⁵ ABC News, ‘Pacific Islanders Reject “Climate Refugee” Status, Want to “Migrate with Dignity”, SIDS Conference Hears’ (5 September 2014) <www.abc.net.au/news/2014-09-05/pacific-islanders-reject-calls-for-27climate-refugee27-status/5723078> accessed 10 June 2020; Farbotko and Lazrus (n 54) 383 and 388.

⁵⁶ Farbotko and Lazrus (n 54) 383 and 388.

⁵⁷ Frank Biermann and Ingrid Boas, ‘Protecting Climate Refugees: The Case for a Global Protocol’ (2008) 50(6) *Environment: Science and Policy for Sustainable Development* 8; Mike Hulme, Frank Biermann and Ingrid Boas, ‘Climate Refugees: Cause for a New Agreement’ (2008) 50(6) *Environment* 50; Williams (n 57); Bonnie Docherty and Tyler Giannini, ‘Confronting a Rising Tide: a Proposal for a Convention on Climate Change Refugees’ (2009) 22 *Harvard Environmental Law Review*; Rana Balesh, ‘Submerging Islands: Tuvalu and Kiribati as Case Studies Illustrating the Need for a Climate Refugee Treaty’ (2015) 5 *Environmental and Earth Law Journal* 78.

⁵⁸ McAdam (n 35) 4.

⁵⁹ *ibid* 4.

⁶⁰ *ibid* 13. See also: Dennis Wesselbaum, ‘The Influence of Climate on Migration’ (2019) 52(3) *The Australian Economic Review* 363; Dennis Wesselbaum, ‘Revisiting the Climate Driver and Inhibitor Mechanisms of International Migration’ [2020] *Climate and Development* 1.

⁶¹ McAdam (n 35) 13.

⁶² See text to n 2 and 9.

⁶³ See text to n 27 - 29.

environment within the framework of human rights, and vice versa, must therefore be recognised not only in principle, but also in practice. *Ioane Teitiota v New Zealand* is one of many recent developments to recognise that climate change poses a threat to human rights⁶⁴ and the intersections between human rights law and climate change law.⁶⁵ The case is both timely – perhaps even behind with the rapidly deteriorating situation and detrimental effects as a result of climate change – and progressive. It is significant that the HRC recognised that there is scope for seeking asylum as a result of climate change effects, but it is important to remember that it is currently only a possibility, rather than a reality. It has also not significantly informed some of the existing debates on, inter alia, the definition of climate refugees and the need for an international legal instrument on climate refugees. This disparity between existing issues and response is a recurring theme within law as a result of climate change– other examples include the development of geoengineering technologies to mitigate climate change is outpacing regulation. Overall, climate change is outpacing the development of the law.

Throughout this article, the policies behind climate refugees have not been thoroughly investigated. There is scope for an argument for ‘climate refugees’ (or migrants) to be the focus of a designated legal instrument, such as a possible additional protocol to the United Nations Framework Convention on Climate Change,⁶⁶ as it neither features nor fits currently within the frameworks of international and environmental law. Recognising climate refugees should, however, not be seen as a ‘solution’ to climate change – international policy on climate refugees ‘tend to commodify people, reducing their relocation to reemployment plans’⁶⁷ and also that people themselves do not necessarily themselves want to be described as climate refugees (which was briefly mentioned). There are thus many environmental and climate justice dimensions that need to be explored and were not addressed by this case.

⁶⁴ Derek Bell, ‘Does Anthropogenic Climate Change Violate Human Rights’ (2011) 14(2) *Critical Review of International Social and Political Philosophy* 99.

⁶⁵ For example, John H Knox, ‘Climate Change and Human Rights Law’ (2009) 50(1) *Virginia Journal of International Law* 163; John H Knox, ‘Linking Human Rights and Climate Change at the United Nations’ (2009) 33 *Harvard Environmental Law Review* 477; Stephen Humphreys (ed), *Human Rights and Climate Change* (Cambridge University Press 2010).

⁶⁶ United Nations Framework Convention on Climate Change (UNFCCC) (9 May 1992) 1771 UNTS 107.

⁶⁷ Becky Alexis-Martin, ‘Climate Crisis: Migration Cannot be the Only Option for People Living on “Drowning” Islands’ *The Conversation* (3 July 2019) <<https://theconversation.com/climate-crisis-migration-cannot-be-the-only-option-for-people-living-on-drowning-islands-117122>> accessed 8 June 2020.