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United Nations Human Rights Committee, Views on Communication No 2728/2016, Ioane Teitiota v. New Zealand, October 24, 2019

CEDIE

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Climate Refugees – United Nations Human Rights Committee – Kiribati – New Zealand – Climate Change – Small Island Developing States – Sea Level Rise

The decision of the Human Rights Committee has caused a great stir: it has been described as “historic” by the many authors who have already commented on it, proclaiming a new era for the so-called “climate refugees”. How can it be explained when the Committee ruled in favour of New Zealand, in spite of the main person concerned? In order to understand this craze, it is important to look at where we have come from – namely, a virtual absence of protection. It is at least as crucial to know what can be concretely expected from such a decision. The lack of clear criteria makes it very uncertain what potential effects it will have in practice. However, there is reason for optimism: acknowledging the responsibility of States in this area is in itself a significant step forward, symbolically and beyond.

Marie Courtoy

A. Facts and Ruling

Ioane Teitiota is a resident of Tarawa Island in the Republic of Kiribati. There, climate change is not an abstract phenomenon: the islanders are feeling the consequences day after day, starting with those linked to sea level rise.^[1] Faced with deteriorating living conditions, he and his wife left their home country to travel to New Zealand.

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They remained there after their permit expired and their three children were born there.

After being apprehended, Ioane Teitiota^[2] applies for refugee status and/or protected person status. The application for international protection in New Zealand consists of three stages: (1) refugee status, which refers to the [Convention relating to the Status of Refugees](#) (hereinafter “the Geneva Convention”), (2) protected person status under the [Convention against Torture](#) (hereinafter “CAT”), and (3) protected person status under the [International Covenant on Civil and Political Rights](#) (hereinafter “ICCPR”). He believes that he can benefit from one of these statuses “on the basis of changes to his environment in Kiribati caused by sea-level-rise associated with climate change”^[3].

In support of his request, Ioane Teitiota invokes the unstable and precarious situation in Tarawa due to the sea level rise resulting from global warming. Coastal erosion makes flooding more frequent. Salt water infiltration is destroying crops, and agriculture is one of the main employment sectors on the island. Drinking water is becoming increasingly scarce, not only because of salt water contamination, but also because of overpopulation. Finally, inhabitable areas are eroding, creating a housing crisis and causing social tensions that sometimes lead to violent disputes.

1. Decisions taken by the New Zealand authorities

The Refugee and Protection Officer (hereinafter “the Officer”) declined Ioane Teitiota’s application. Ioane Teitiota appealed the decision to the [Immigration and Protection Tribunal](#) (hereinafter “the Tribunal”) which, after a long reasoning, upheld the Officer’s refusal. While the Tribunal found Ioane Teitiota fully credible, the circumstances did not, in its view, justify the granting of one of the statuses.

Refugee status is thus denied to the applicant for two reasons. Firstly, according to the Tribunal, he did not run a real risk of persecution if he was returned to Kiribati, since it had not been shown that there was a chance that he would suffer serious physical harm as a result of the land disputes, nor that it was impossible for him to grow food or obtain drinking water, nor more generally that the environmental conditions would be such as to jeopardize his right to live with dignity. Secondly, he couldn’t demonstrate a link between the possible persecution and any of the grounds of the Geneva Convention, since the facts he alleged were equally prevalent among all Kiribati residents and he did not point to any wrongful inaction on the part of the Government in this regard.

As to the status of protected person, the Tribunal set aside the application of CAT^[4] and considered only the ICCPR in its Article 6, namely the right not to be arbitrarily deprived of one’s life. The Tribunal found that the claimant c’ or omission on the part of the Kiribati Government that would ir *Ajouter aux favoris* ary

deprivation of life and that there was currently no sufficient degree of risk to his life. He therefore concluded that protected person status cannot be granted to him.

Ioane Teitiota then exhausted all possible remedies in New Zealand, appealing to the courts in which the decision can only be challenged on points of law: the [High Court](#), the [Court of Appeal](#) and the [Supreme Court](#). Its various questions^[5] ultimately tend to raise a single fundamental question: should those fleeing the effects of climate change be granted refugee status, regardless of the fact that an entire group is subject to these in the same way, insofar as greenhouse gas emissions are the product of human action? The three Courts nevertheless rejected all of the objections raised by Ioane Teitiota, upholding the Tribunal's arguments.

In the words of the Supreme Court, however, an important caveat^[6] must be added: "That said, we note that both the Tribunal and the High Court, emphasised their decisions did not mean that environmental degradation resulting from climate change or other natural disasters could never create a pathway into the Refugee Convention or protected person jurisdiction. Our decision in this case should not be taken as ruling out that possibility in an appropriate case."^[7]

2. Decision of the United Nations Human Rights Committee

Ioane Teitiota eventually turned to the United Nations Human Rights Committee (hereinafter "the Committee"), claiming that New Zealand had violated his right to life under Article 6 of the ICCPR. It is indeed only under that Covenant that the Committee has jurisdiction, not under the Geneva Convention: its decision cannot therefore prejudice the relevance of the reasoning of New Zealand courts with regard to refugee status.

The Committee usually begins by examining the admissibility of the communication. This first test has been passed: the Committee considers that "the author's claims relating to conditions on Tarawa at the time of his removal do not concern a hypothetical future harm, but a real predicament"^[8] and concludes that, from the point of view of admissibility, the risk of a violation of the right to life had been sufficiently demonstrated.

Much to Ioane Teitiota's dismay, on the merits, the Committee is however in line with the position of the New Zealand courts. It considers that the violence linked to the land disputes does not go as far as creating a situation of generalized conflict nor does it concern the applicant more particularly than any other inhabitant of Kiribati. The Committee is also of the view that there is no evidence that the supply of fresh water was inaccessible, insufficient or unhealthy and that there were no opportunities for subsistence, whether through employment or financial

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Committee considers that it cannot be established that the decisions taken during the judicial proceedings were clearly arbitrary or erroneous.

The Committee then stated that it was not in a position to assert that the applicant's rights under Article 6 of the ICCPR had been violated, while specifying that this was "[w]ithout prejudice to the continuing responsibility of the State party to take into account in future deportation cases the situation at the time in the Republic of Kiribati and new and updated data on the effects of climate change and rising sea-levels thereupon"[\[9\]](#).

B. Discussion

Despite a disappointing outcome for the main interested party[\[10\]](#), the news seems to be unanimous: "[landmark decision](#)", "[wake-up call](#)", "[global precedent](#)", "[significant opening](#)"... There is no shortage of qualifiers to welcome the Committee's decision. How can we understand this craze for a decision that appears to be smooth on the surface? What should we conclude from it... and hope for?

Both the New Zealand courts and the Committee recognized the possibility of granting protection status to persons fleeing the effects of climate change. Consequently, what does the Committee do that is so revolutionary? In addition to the shift to the international level, the Committee's decision cleverly moves away from domestic decisions. A closer look reveals that the scope is not the same: the Committee is much more generous than the restrictive situations in which the New Zealand authorities admit the possibility of international protection.

Beware, however, of the semantics, which is important from a legal point of view: the Committee cannot recognize the existence of "climate refugees", since it is not competent to judge compliance with the Geneva Convention but only with the ICCPR. It can therefore only decide on the compatibility of New Zealand's decision – i.e. to return of Ioane Teitiota to his country of origin – with the right to life guaranteed in Article 6 of the ICCPR. This refers to the status of "protected person" under New Zealand law.

1. Rather restrictive internal decisions

It is necessary first to look at the reasoning followed by the New Zealand authorities before understanding how it differed from the Committee's approach.

- Two claims: asylum and human rights

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It must be noted that most of the reasoning in the decisions is devoted to the question of recognition of refugee status. This is not surprising: the questions of law posed by the applicant to the courts that have followed the Tribunal (the High Court, the Court of Appeal and the Supreme Court) have dealt only with this aspect of the application, although the latter have sometimes expressed themselves more generally.

While the reasoning leading to the denial of refugee status is difficult to challenge in law^[11], the New Zealand courts have not, however, chosen the most protective path. The Court of Appeal is the most radical, considering that “Mr Teitiota’s claim for recognition as a refugee is fundamentally misconceived. It attempts to stand the Convention on its head.”^[12] The Tribunal^[13] and the High Court^[14], followed by the Supreme Court^[15], consider that the Geneva Convention may sometimes be adequate in this regard. However, they understand it in an extremely restrictive manner:

“Environmental issues sometimes lead to armed conflict. There may be ensuing violence towards or direct repression of an entire section of a population. Humanitarian relief can become politicised, particularly in situations where some group inside a disadvantaged country is the target of direct discrimination.”^[16]

This is a far cry from recognizing action by States simply because they have contributed to climate change through the emission of greenhouse gases. However, this idea is not absurd: while it raises specific questions of proof, it does not raise questions of principle.^[17] Similarly, the link to one of the Convention’s grounds is often quickly swept aside, deemed to be non-existent even before a thorough examination. The so-called indiscriminate character, however, sometimes – often ? – hides what might be termed a social group, namely a group that shares the characteristic of living in the same region or even of being vulnerable because it has less income.^[18] Despite the apparent openness of their decisions, the Tribunal and the High Court do not in the end show themselves to be truly progressive.

From the perspective of **protected person status**, the issue in this case is whether removal to the country of origin would infringe the applicant’s right to life. The only jurisdiction to examine this issue is the Tribunal, which considers that no act or omission on the part of the Kiribati Government suggests that there is a risk of arbitrary deprivation of life and that the risk of harm to the applicant’s life is not imminent within the meaning of the Optional Protocol to the ICCPR^[19].

- Lack of accountability: humanitarian grounds and referral to legislators

It is interesting to note that, while denying any responsibility that would be imposed on it under any of the international conventions, the High Court has nevertheless left open the possibility: humanitarian concerns, and the residence permit *Ajouter aux favoris* on

that basis.^[20] That possibility had also been used by New Zealand authorities in another case before the Tribunal, in which the family from Tuvalu had been denied refugee status but had, in a separate decision, been allowed to stay because of family ties in New Zealand.^[21] But what was the difference? It is quite simple: the decision is purely **discretionary**. New Zealand does not commit itself by acting in this way, as it does not acknowledge that it is bound by an international obligation.

In the end, the position of the New Zealand courts is very cautious, not to say conservative. Whether it is for the Geneva Convention or the ICCPR, the High Court is passing the ball back to the **legislators**:

“On a broad level, were they to succeed and be 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. It is not for the High Court of New Zealand to alter the scope of the Refugee Convention in that regard. Rather that is the task, if they so choose, of the legislatures of sovereign states.”^[22]

2. From exceptions (of granting) to the rule (of examination)

It is by placing the Committee's decision in the context that preceded it that one can understand how it offers a glimmer of hope. It marks a victory on the symbolic level, but not only: it also opens the way to concrete obligations. However, the challenge is still far from being met, and implementation remains the big question.

- A symbolic victory

As a matter of principle, the Committee's decision establishes that it is prohibited to return persons to a country where the effects of climate change are such as to threaten their lives or expose them to cruel, inhuman or degrading treatment. This had never been recognized and, as [Jane McAdam](#) points out, it has taken 25 years of jurisprudence to arrive at this point.

In its decision, the Committee states indeed 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*”^[23]. It nevertheless considers that “the timeframe of 10 to 15 years, as suggested by the author, could allow for intervening acts by the Republic of Kiribati, *with the assistance of the international community*, to take affirmative measures to protect and, whe

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population”^[24], before concluding that he is not in a position to find a violation of the right to life.

In an area hitherto kept outside the law, States therefore now find themselves subject to three obligations: they must act to reduce climate change, they must support those States that are more subject to the effects of climate change and/or economically weaker – the two often go hand in hand –, failing which they will be obliged to take care of the inhabitants of these States with regard to the obligation of *non-refoulement*. Underlyingly, the Committee thus recognizes the international dimension of climate change and its human rights implications.

- Concrete obligations

In international law, the question will always be the same: how is the Committee going to ensure the implementation of these so-called “obligations”? In other words, is it possible to expect more than just words?

To answer this question, it is necessary to return to the very role of this body. The Committee is a group of experts set up by the Member States of the United Nations to monitor the implementation of the ICCPR. While its decisions are not binding as such, no one could deny the authority attached to them, since violating them would amount to infringing the ICCPR.^[25] Expectations, however, have to be measured: whether one regrets it or not, the basic principle of international law remains the sovereignty of States. States are subject only to the obligations to which they have consented and the functioning of international systems ultimately depends on their good will.

In the present case, what the Committee is establishing with its decision – with an effectiveness that we will have to wait and see – is an obligation for the State to seriously consider such complaints. Let us recall that, until recently, the idea that the principle of *non-refoulement* could apply to persons who have fled the effects of climate change might still seem far-fetched. With this new decision, States must now duly motivate their refusal in the light of the actual situation suffered by the applicant for international protection, bearing in mind that they may have an obligation to receive him or her if what has been done to reduce the effects of climate change and help those already suffering the full consequences of it is not sufficient. The incentive available to the Committee to induce States to comply is clear: individuals now know that recourse to the Committee is likely to bear fruit.

The Committee’s willingness to make the appeal to itself available for this type of cases can be seen very clearly at the admissibility stage. [Benedikt Behlert](#) highlights the lightening of the burden of proof in comparison with the 1996 decision in [Bordes and Others v. France](#)^[26]. In that case, in which French nationals residing in Tahiti accused France of violating their right to life by conducting underground nuclear tests in the South Pacific, the Committee had considered that the fact th

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degradation of the geological structure of the atoll concerned was “highly controversial even in concerned scientific circles” and had therefore declared their claim inadmissible. This had led [Sarah Joseph and Melissa Castan](#) to express scepticism regarding the admissibility of future climate change cases, considering “that any future complaint by a person regarding the impact of global warming on his or her human rights might face difficulties in proving precise causation”. Today, the Committee demonstrates its determination to open this path when it states “that the author sufficiently demonstrated, for the purpose of admissibility, that due to the impact of climate change and associated sea level rise on the habitability of the Republic of Kiribati and on the security situation in the islands, he faced as a result of the State party’s decision to remove him to the Republic of Kiribati a real risk of impairment to his right to life under Article 6 of the Covenant”[\[27\]](#).

- An unreasonable burden of proof?

However, the picture is not without its shadows. While the Committee accepts in principle that the obligation of *non-refoulement* may apply to persons for whom the effects of climate change threaten their right to life or to be free from cruel, inhuman or degrading treatment, it does not specify when this would be the case or, in the words of [Jane McAdam](#), “where the tipping point lay”.

The only clarification it gives in this case is that we will not have to wait until the islands are submerged to consider that living conditions are incompatible with the right to live with dignity... That does not shed much light. The risk, therefore, is that the threshold required will be so high that it will render the decision meaningless.

Herein lies the concern of the two dissenting opinions. In the first dissenting opinion, Vasilka Sancin finds that the Committee was wrong to consider that there was no problem of access to drinking water. While the Committee bases its assessment on the National Adaptation Programme of Action, she refers to expert reports that highlight the lack of implementation of these policies. She then concludes that, in these circumstances, the burden of proof should rest on the State and not on the claimant. More generally, and more incisively, the second dissenting opinion written by Duncan Laki Muhumuza criticizes the Committee for placing an unreasonable burden of proof on the author’s shoulders. According to him, “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”[\[28\]](#). He reminds us of the essential point that 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”[\[29\]](#).

Indeed, the determination of the threshold will determine the effectiveness of the protection. The decision may have paved the way, but the contours are unclear, so the path remains to be traced.

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3. Conclusion

The step is big, but the road is long... The concrete effects of the decision remain to be seen and the day when people fleeing an environment made uninhabitable by climate change will be able to claim a subjective right to be protected from this fact is still a long way off. However, we should not deprive ourselves of optimism: this decision is a huge step forward. It is the recognition at the international level of a responsibility that rests with States for those who have been forgotten until now. Beyond a symbolic reversal of perspective, the turnaround is very concrete, since States are no longer left to their own appreciation in this matter. No one doubted that the Committee would henceforth be called upon in similar cases, and States would then have to justify themselves. A sword of Damocles now hangs over their heads.

C. Suggested Reading

To read the case: United Nations Human Rights Committee, Views on Communication No. 2728/2016, [Ioane Teitiota v. New Zealand](#), 24 October 2019.

Case law:

NZSC, [Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment](#), 20 July 2015, No. 107.

NZCA, [Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment](#), 8 May 2014, No. 173.

NZHC, [Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment](#), 26 November 2013, No. 3125.

NZIPT, [AF \(Kiribati\)](#), 25 June 2013, No. 800413.

Doctrine:

CARLIER (J.-Y.), SAROLEA (S.), *Droit des étrangers*, Brussels, Larcier, 2016.

For a summary of New Zealand case law on “climate refugees”: BUCHANAN (K.), [“New Zealand: ‘Climate Change Refugee’ Case Overview”](#), *The Law Library of Congress*, 2015.

Press articles:

BEHLERT (B.), [“A significant opening. On the HRC’s groundbreaking first ruling in the case of a ‘climate refugee’”](#), *Völkerrechtsblog*, 30 January 2020.

MALAFOSSE (C.), ZIPOLI (D.), [“‘Climate refugees’: a historic decision of the UN Human Rights Committee?”](#), *The Conversation*, 11 February 2020

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MCADAM (J.), "[Climate refugees cannot be forced back home](#)", *The Sydney Morning Herald*, 20 January 2020.

To cite this contribution: COURTOY (M.), "An historic decision for 'climate refugees'? Putting it into perspective", *Cahiers de l'EDEM*, February 2020.

[1] This earned the Pacific Islands the nickname "canary in the mine". See, for a recent example, the [intervention of Kate Schuetze](#), Pacific researcher at Amnesty International, on the commented views: "The Pacific Islands are the canary in the coal mine for climate induced migrants".

[2] His wife and children did not apply until later. The appeals lodged by Ioane Teitiota will likewise concern him alone, including the communication before the United Nations Human Rights Committee commented on here.

[3] NZIPT, *AF (Kiribati)*, 25 June 2013, No. 800413, pt. 2.

[4] Apart from the fact that the Tribunal did not find how the claimant would be in danger of being subjected to any form of torture within the meaning of CAT, the claimant himself had not made use of it. For the same reasons, the judge also failed to examine the compatibility of the decision with Article 7 of the ICCPR on the prohibition of torture and cruel, inhuman or degrading treatment or punishment.

[5] To be precise, three of the six questions were based on this idea. Two other questions were irrelevant – they referred to children's rights when the appeals had been lodged by Ioane Teitiota alone. A final question sought to challenge the Tribunal's assertion that the food and water supply was adequate.

[6] Which could be described as obiter dicta. Thanks to Dr. Rodrigo Céspedes for this suggestion.

[7] NZSC, *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment*, 20 July 2015, No. 7/2015, pt. 13.

[8] United Nations Human Rights Committee, Views on Communication No. 2728/2016, *Ioane Teitiota v. New Zealand*, 24 October 2019, pt. 8.5.

[9] *Ibid.*, pt. 9.14.

[10] [Questioned by ABC](#), Ioane Teitiota indeed testifies: "Forgive my ignorance, but to be frank, I'm quite disappointed with the outcome of my case".

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[11] Professor Gentian Zyberi, Director of the Norwegian Centre for Human Rights and a member of the Human Rights Committee, explained in an interview in preparation for an [article](#): “It is very difficult to form an opinion contrary to the decision of the New Zealand courts. In the light of the facts and the law, the judgement is not wrong, arbitrary or in violation of Mr. Teitiota’s fundamental rights.”

[12] NZCA, *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment*, 8 May 2014, No. 173, pt. 40.

[13] NZIPT, *AF (Kiribati)*, 25 June 2013, No. 800413, pt. 55-59 and 64-65.

[14] NZHC, *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment*, 26 November 2013, No. 3125, pt. 27.

[15] NZSC, *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment*, 20 July 2015, No. 7/2015, pt. 13.

[16] NZHC, *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment*, 26 November 2013, No. 3125, pt. 27. The High Court summarizes the developments of the Tribunal (NZIPT, *AF (Kiribati)*, 25 June 2013, No. 800413, pt. 58-59).

[17] J.-Y. CARLIER, S. SAROLEA, *Droit des étrangers*, Brussels, Larcier, 2016, p. 441.

[18] J.-Y. CARLIER, S. SAROLEA, *Droit des étrangers*, Brussels, Larcier, 2016, p. 441.

[19] The Optional Protocol to the ICCPR allows for the submission of individual communications to the Committee, which Ioane Teitiota did in this case.

[20] NZHC, *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment*, 26 November 2013, No. 3125, pt. 42-44.

[21] NZIPT, *AC (Tuvalu)*, 4 June 2014, No. 800517-520; [NZIPT, *AD \(Tuvalu\)*, 4 June 2014, No. 501370-371.](#)

[22] NZHC, *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment*, 26 November 2013, No. 3125, pt. 51.

[23] United Nations Human Rights Committee, Views on Communication No. 2728/2016, *Ioane Teitiota v. New Zealand*, 24 October 2019, pt. 9.11 (emphasis added).

[24] *Ibid.*, pt. 9.12 (emphasis added).

[25] For a more detailed discussion of the scope of the decisions of the United Nations Human Rights Committee, see O. DELAS, M. THOUVENOT, V. BERGERON-BOUTIN, “Quelques considérations entourant la portée des décisions du Comité des droits de l’Homme”, *Revue québécoise de droit international*, Vol. 30/2, 2017, p. 111.

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[26] United Nations Human Rights Committee, Admissibility of Communication No. 645/1995, *Bordes and Others v. France*, 22 July 1996.

[27] United Nations Human Rights Committee, Views on Communication No. 2728/2016, *Ioane Teitiota v. New Zealand*, 24 October 2019, pt. 8.6.

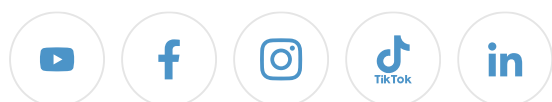
[28] United Nations Human Rights Committee, Views on Communication No. 2728/2016, *Ioane Teitiota v. New Zealand*, 24 October 2019, Annex 2, pt. 6.

[29] *Ibid.*, pt. 5.

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