CLIMATE CHANGE MIGRATION AND THE VIEWS IN *TEITIOTA*

Abstract: This article considers the Views recently expressed by the UN Human Rights Committee in the Teitiota application, assessing them in the context of climate change migration litigation more generally. There are no adequate international organisations which have compulsory jurisdiction in this area; as a consequence, the Views expressed in Teitiota have no legal force. However, they show how a distinguished international body perceives the present 'lie of the land' in terms of the legal issues that presented before it and are likely a good indicator as to the types of issue around which climate change migration cases will crystallise now and in the near future, whether in administrative law cases directed against governments or administrative agencies, or in climate tort actions against, e.g., producers of fossil fuels, direct users of such fossil fuels, and companies that manufacture/market products whose use aggravates climate change.

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'[S]tandards solemnly declared, even if unobserved, live on to supply ammunition to those who thereafter demand observance.'

Arthur Schlesinger, Jr.[1]

Introduction

Climate change, 'the most consequential challenge of the twenty-first century',[2] has only come to the fore of public debate since the 1990s. It was not in the contemplation of the authors of the Universal Declaration on Human Rights 1948 or the Refugee Convention 1951.[3] Yet it requires to be addressed in the same comprehensive and far-sighted manner as the rights challenges which confronted the authors of those instruments.

In the years ahead, climate change seems likely wholly to 'reshape the concept of global citizenship',[4] not least because of the anticipated increase in climate change-related migration.[5] Four key prompts for such migration will be the greater frequency/intensity of weather-related disasters; the adverse consequences of climate change for health, food

[*] I am grateful to Professors Gavin Barrett and Suzanne Kingston of UCD Sutherland Law School for their comments on an earlier draft of this artide. Any errors and all views are mine alone. All views are expressed in a personal capacity.

1 Arthur Schlesinger, 'Human Rights and the American Tradition' (1978) 57(3) Foreign Affairs 503-26, 511.

2 Global Citizenship Commission, *The Universal Declaration of Human Rights in the 21st Century* (New York: Global Citizenship Commission 2016) 47.

3 See Universal Dedaration of Human Rights, <*www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf*> Accessed 23 October 2020. See also, Convention and Protocol Relating to the Status of Refugees (UNCHR) <*www.unhcr.org/3b66c2aa10*>. Accessed 23 October 2020.

4 ibid footnote 2.

5 International Organization for Migration (IOM), *IOM Outlook on Migration, Environment and Climate Change* (Geneva: IOM 2014) 5. A question perhaps arises as to whether the full awfulness of the experience of displacement by virtue of dimate change is captured by the somewhat anodyne but still widely used terms 'dimate change migration' and 'dimate change migrant'.

security, water availability and natural resource-dependent livelihoods; competition for shrinking natural resources; and increased uninhabitability of coastal areas and islands (thanks to rising tides).[6] Estimates for the number of climate change migrants by 2050 vary widely, from 25 million people to 1 billion people.[7] The actual number will depend on, eg 'which climate change scenarios will be borne out…what adaptation actions are undertaken…and…the evolution of various socioeconomic, political and demographic factors'.[8] One recent study shows that in the European Union alone, holding everything else constant, climate-related 'asylum applications by the end of the century are predicted to increase, on average by 28% (98,000 additional asylum applications per year)'.[9]

Children, the innocent inheritors of a future bequeathed to them by previous generations, are likely to be especially badly impacted by climate change in at least four ways: (1) their physiological/cognitive development and simple curiosity make them more exposed to environmental risks; (2) many of the disease risks to young children, eg cholera, diarrhoea and other vector-borne illnesses are sensitive to climate conditions; (3) the least developed countries (which have large child populations) will likely bear the worst of climate change; and (4) climate-related civil strife exposes children to all manner of risks, including psychological trauma, forced migration, familial separation and recruitment into armed forces.[10] Women, the elderly, indigenous peoples, and people with disabilities are also at heightened risk.[11] It behoves lawmakers and lawyers to ensure that, when climate change migration becomes an even more pressing reality than already presents (and it already presents), the international/regional/domestic legal systems are duly equipped to take a 'human-sensitive' approach to the various issues presenting.[12]

At the European level, measures such as the Temporary Protection Directive seem unlikely to suffice in terms of meeting the challenge of climate migration.[13] (The Directive does not mention environmental factors and the notion of 'mass influx' would only meet certain types of climate-related migration).[14] The need for further coordination/action by member states

6 ibid 38.

7 ibid. The divergence of estimates as to the scale of likely future dimate change migration is one of the 'substantial challenges' that present when it comes to '[p]olicy deliberations on environmentally related migration" (Victor Mence and Alex Parrinder, 'Environmentally related international migration: Policy challenges' in Marie McAuliffe and Kosser Khalid, *A Long Way to Go* (Canberra: ANU Press 2017) 317-42, 317).

8 ibid.

9 Anouch Missirian and Wolfram Schlenker, 'Asylum Applications Respond to Temperature Fluctuations' (2017) 358 Science 1610-14, 1610.

10 Katharina Ruppel-Schlichting and others, 'Climate Change and Children's Rights' in Oliver Ruppel and others (eds), *Climate Change: International Law and Global Governance* (Baden-Baden: Nomos Verlag 2013), Volume I, 349-377, 354.

11 ibid 349.

12 United Nations Human Rights Committee, Views adopted by the Committee under artide 5 (4) of the Optional Protocol, concerning communication No. 2728/2016 (CCPR/C/127/D/2728/2016) hereafter '*Teitiota*', Dissenting View of Mr Muhumuza, para 6.

13 ie Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (O.J. L212, 07.08.2001, 12-23).

14 The term 'mass influx' is defined in Art. 2(d) of the Directive as meaning the 'arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme'. The potency of the Directive is perhaps limited by the fact that the existence of a mass influx can only be 'established by a Council Decision adopted by a qualified majority on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council' (Art. 5(1)).

in this context has been recognised by the European Commission, eg in its Working Document on *Climate Change, Environmental Degradation and Migration*,[15] which posits that:

> The Commission and Member States should…reflect [on] how existing measures…could be better coordinated and targeted to form a comprehensive response to the challenges posed by climate change….Joint reflection on the need for possible new measures should also continue together with partner countries and other international actors.[16]

And notably in this regard, the European Commission's flagship new 'European Green Deal' will involve an Adaptation Strategy which will deal, *inter alia*, with migration.[17]

Climate change litigation is important in offering a 'measure of the participation of the public [*demos*] as watchdog' in the climate change context.[18] Already, there has been a pattern of increased climate change litigation at the international/national levels, [19] with 'liability issues…related to climate change…[only] likely to gain in importance'.[20] Peel and Osofsky observe, *inter alia*, in this regard that such climate change litigation cases as have been brought show 'a growing receptivity of courts towards human rights-based argumentation',[21] and also, notably, the importance of bringing such cases, whether or not they ultimately succeed (albeit that nothing succeeds like success), with such cases having 'important flow-on effects through the ways in which they shape public dialogue, business attitudes and government action'.[22] In Ireland, the general potency of human rights law can be under-estimated by practitioners, sufficiently so as to elicit the following observation from the High Court in *Merriman* v *Fingal County Council and ors*:[23]

> [T]he number of judicial review applications in which the [European] Convention [on Human Rights] features in the statement of grounds, gets lightly touched upon in the written submissions, and seems to peter out completely at oral hearing is striking. The Convention is a serious and important document, not lightly to be prayed in aid and, if referred to in pleadings, ought in truth to receive fulsome attention thereafter in order that a court may confidently proceed in the full knowledge of any human rights concerns contended to present. Human rights are too important and consequential for an alleged breach of those rights simply to be included in pleadings as a 'catch all' or supplementary ground by reference to which relief is sought and then scarcely touched upon thereafter.[24]

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15 SWD (2013) 138 final.

16 ibid 34-35.

17 See Communication from the Commission to the European Parliament, the European Council, the Council, the Council, the European Economic and Social Committee and the Committee of the Regions (The European Green Deal) COM (2019) 640 final.

18 Noriko Okubo, 'Climate Change Litigation: A Global Tendency' in Ruppel (n 11) 756.

19 Paradoxically, intra-State litigation can have a significant, if indirect, international effect in that 'citizen suits in domestic courts can result in potentially effective enforcement of individual state responsibility'. See David Estrin, *Limiting Dangerous Climate Change: The Critical Role of Citizen Suits and Domestic Courts – Despite the Paris Agreement* (London: C Hurst 2016) 25.

20 Ina Ebert, 'Climate Change and Liability: An Overview of Legal Issues' in Ruppel (n 10) 865.

21 Jacqueline Peel and Hari Osofsky, 'A Rights Turn in Climate Change Litigation' (2018) 7(1) Transnational Environmental Law 37-67, 66.

22 ibid 67.

23 [2017] IEHC 695.

24 ibid [265].

The most prominent recent climate change case in Ireland is *Friends of the Irish Environment CLG* v *The Government of Ireland and ors*,[25] a challenge by the *Friends* – an Irish NGO active in the environmental arena for circa. 20 years – to Ireland's National Mitigation Plan, as approved by the Irish Government under Ireland's Climate Action and Low Carbon Development Act 2015.[26] At the heart of that case was a claim that the Irish Government:

> in measures which it…adopted in the Plan…failed to take action to ensure a reduction in [greenhouse gas] emissions particularly in the short and medium-term and thereby to attempt to achieve the targets which the international community has deemed to be…necessary in order to protect the world's climate and environment.[27]

The *Friends* enjoyed a notable success before the Supreme Court; the court holding that the Plan was insufficiently specific and did not comply with the provisions of the Act of 2015. However, the case was also something less than a success for the *Friends* in that the Supreme Court took the opportunity to disagree with a previous finding of the High Court in *Friends of the Irish Environment* v *Fingal County Council* [2017] IEHC 695 that there exists under the Irish Constitution a right to a healthy environment. The decision, in short, represented perhaps something of a forwards-backwards decision for environmental rights campaigners. However, Clarke CJ, who delivered the sole judgment in the Supreme Court, did not perhaps close the door altogether to constitutional rights being of assistance to environmental rights campaigners in the years ahead, observing, *inter alia*, that 'I would reserve the position of whether, and if in what form, constitutional rights and state obligations may be relevant in environmental litigation to a case in which those issues would prove crucial'.[28] And rights-based litigation is clearly here to stay: the success, in December 2019, of the *Urgenda* claim before the Dutch Supreme Court,[29] which claim was based on Articles 2 and 8 ECHR, has led to significant interest in rights-based claims in ECHR-contracting states. In passing, it is perhaps worth nothing that not all climate change litigation need be or is rights-based litigation, as evidenced by the successes scored by pro-environment litigants in the *Third Runway at Vienna International Airport* case.[30]

A detailed consideration of the *Friends* litigation is beyond the scope of this article which is concerned instead with the Views expressed by the UN Human Rights Committee (the 'Committee') in the Teitiota application.[31] Consistent with Okubo's observation that 'There are no adequate international organisations which have compulsory jurisdiction [in climate change matters]',[32] the Views expressed in *Teitiota* have no legal force. However, they show

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25 See [2019] IEHC 747 and [2020] IESC 49.

26 No. 46 of 2015.

27 ibid [12].

28 ibid [9.5].

29 *The Netherlands* v *Stichting Urgenda* (ECLI:NL:HR:2019:2007) <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf> Accessed 23 October 2020.

30 See Peel and Osofsky (n 21).

31 ie the Views of the Committee adopted at its 127th Session (14th October–8th November 2019) in the application of Ioane Teitiota (UN Document CCPR/C/127/D/2728/2016).

32 Noriko Okubo (n 19) 741. At the national level, a question arises whether in the context of the international dimate emergency presenting, dimate change ought to be tried before a generalist court such as the High Court of Ireland (and appealed to generalist appellate courts), rather than being tried and appealed within a specialised, environmental/planning forum such as the Land and Environment Court of New South Wales, which has been praised for its part in '[t]*he de-binarisation of public interest from ESD* [economically sustainable development]' towards ecologically sustainable development. See Robyn Bartel, Paul McFarland and Colin Hearfield, 'Taking

how a distinguished international body perceives the present 'lie of the land' in terms of the legal issues that presented before it. The Views are also likely a good indicator as to the types of issue around which climate change migration cases will crystallise now and in the near future, whether in administrative law cases directed against governments or administrative agencies, or in climate tort actions against, eg producers of fossil fuels, direct users of such fossil fuels, and companies that manufacture/market products whose use aggravates climate change.[33]

That a human rights committee should be centre-stage in the international climate change litigation arena is testament to the truth of Posner's observation that 'if international environmental law is weak, international human rights law is, by comparison robust',[34] the general truth that 'environmental law claims are more likely to succeed if they can be reconceptualized as international human rights claims',[35] and perhaps also the practical reality that environmentalists need to 'consider underutilized and unexplored alternatives to the environmental law canon' when seeking to advance their cause/s.[36] However, even the human rights community may need to manifest more urgency when it comes to climate change than it has evinced to now. As Philip Alston, (who, until recently, was the UN's Special Rapporteur on Extreme Poverty and Human Rights), observed, *inter alia*, in this regard in his Report of 25 June 2019 to the Human Rights Council: [37]

> The human rights community, with a few notable exceptions, has been every bit as complacent as most governments in the face of the ultimate challenge to mankind represented by climate change. The steps taken by most United Nations human rights bodies have been patently inadequate and premised on forms of incremental managerialism and proceduralism which are entirely disproportionate to the urgency and magnitude of the threat. Ticking boxes will not save humanity or the planet from impending disaster. This report has identified a range of steps that should be taken in order to begin to rectify this failure to face up to the fact that human rights might not survive the coming upheaval. It has also sought to highlight the fact that the group that will be most negatively affected across the globe are those living in poverty. Climate change is, among other things, an unconscionable assault on the poor.[38]

The Global Compact

Climate change-related migratory trends have led in recent years to the adoption of the Global Compact for Safe, Orderly and Regular Migration (2018),[39] which builds on the New

a de-binarised envirosocial approach to reconciling the environment vs company debate' (2014) 85(1) Town Planning Review 67-95, 84.

33 See David Hunter and James Salzman, 'Negligence in the Air: The Duty of Care in Climate Change Litigation' (2007) University of Pennsylvania L.R. 1741-94, 1750.

34 Eric Posner, 'Climate Change and International Human Rights Litigation: A Critical Appraisal' (2007) 155(6) University of Pennsylvania LR 1925-45, 1927.

35 ibid.

36 Todd Aagaard, 'Using Non-Environmental Law to Accomplish Environmental Objectives' (2014) 30(1) Journal of Land Use and Environmental Law 35-62, 61.

37 United Nations Document A/HRC/41/39.

38 ibid 39.

39 Resolution adopted by the General Assembly on 19 December 2018 (A/Res/73/195).

York Declaration for Refugees and Migrants (2016).[40] The Global Compact seeks, *inter alia*, (i) to address all aspects of international migration (in this respect it can be seen as something of a return to 'the principles of indivisibility and universality of human rights' espoused by 'the founding mothers and fathers of the United Nations system of protection and promotion of human rights'),[41] (ii) to enhance global cooperation, coordination and governance as regards international migration, and (iii) to establish various actionable commitments and, notably, in Art. 48, provides for international peer review. So, there is the potential for some level of international embarrassment if a State party proves to be a 'shirker' in terms of conforming to the Global Compact. That said, the Compact is not a treaty, it is not legally binding and it appears not even to be declaratory of, or to establish, customary international law concerning safe, orderly and regular migration – though one can expect that State parties will seek to act consistently with the objectives of/commitments in the Compact, albeit without the intention or effect of thereby creating international obligations. The advice of New Zealand's Crown Law Officers to the New Zealand Government as to the legal implications of the Global Compact is available online, makes for interesting reading and, in the below-quoted text, adopts a position that would also appear to apply with regard to Ireland:[42]

> 2. The Compact is not legally binding at international law as there is not evidence of the intent to create legally binding obligations. The Compact is explicitly said to be a non-binding cooperative framework, and the form, language and surrounding context confirm this. The Compact contains political or moral commitments only. Accordingly, New Zealand's support for the Compact would not limit the actions of future governments to determine New Zealand's national immigration or migration policies. This is explicitly confirmed in the Compact too.
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> 3. The Compact is not directly enforceable in domestic legal proceedings. Courts may be willing, however, to refer to the Compact and to take the Compact into account as an aid in interpreting immigration legislation or policy, especially if this is not clear. But we consider it is unlikely to have a determinative or substantial interpretive impact. In short, the Compact will not be legally irrelevant but, in the event that the Courts consider it, it will be taken into account in a limited way.

Of course, while this may be the position at law, as Martin observes, echoing the observation of Arthur Schlesinger, Jr, quoted at the head of this article, 'even nonbinding language in aspirational instruments may… return to haunt those governments whose officials participated in giving life to them, by eventually restricting the government's room to maneuver'.[43] There are at least three ways in which this can occur: invocation of such norms in internal political debates, a legitimisation of intervention by outsiders (states, intergovernmental organisations, NGOs) in what was previously viewed as a domestic preserve, and a realisation by domestic courts that an international norm also presents in

[40] Political Declaration of 19 September 2016 (A/71/L.1).

[41] Flinterman, Cees, 'The United Nations Human Rights Committee: Some Reflections of a Former Member' (2015) 33 Neth. Q. Hum. Rts 4, 7.

[42] Letter from Crown Law to Ministry of Foreign Affairs
'Advice to Minister regarding Global Compact' (17 December 2018)
<www.img.scoop.co.nz/media/pdfs/1812/5008076_Advice_to_Minister_regarding_Global_Compact.pdf> Accessed 23 October 2020.

[43] David Martin, 'Effects of International Law on Migration Policy and Practice: The Uses of Hypocrisy' (1989) 23(3) The International Migration Review 547-78, 558.

some form under national law (albeit that courts must ever be careful not to become or supplant law-making bodies and there is in any event a natural limit to their capacities in this regard: 'exaggerated claims for unduly ambitious enforcement roles by domestic courts risk undercutting a narrower interpretive role for which they are well suited').[44]

Climate-Change 'Refugees'

Cross-border climate change migrants are sometimes colloquially referred to as climate change 'refugees.' However, as natural disasters and environmental degradation do not, *per se*, constitute a recognised form of persecution under the Refugee Convention, climate change migrants typically are not 'Convention refugees', unless in any one case environmental and political factors coincide such that the criteria under the Convention are satisfied. In fact, bodies such as the IOM and the UN High Commissioner for Refugees prefer to avoid the term 'refugee' altogether in the context of climate change migrants as to do so 'could potentially undermine the international legal regime for the protection of refugees'.[45] On a not unrelated note, Betts even suggests that it would be inappropriate to amend the existing refugee regime by reference to particular causes of migration, whether climatic/environmental or otherwise. This is because he considers that the particular cause of movement should not be determinative: what matters 'is the underlying threshold of human rights, which when unavailable in a country of origin necessitates flight as a last resort'.[46] (A possible difficulty with this line of reasoning is that the refugee route represents a *post facto* means of addressing displacement concerns that should preferably be addressed on a prospective basis in order to ensure the highest level of human rights protection for those adversely impacted by climate change).

The Environmental Justice Foundation, a UK-based environmental and human rights charity, has identified, *inter alia*, the following issues to present when it comes to treating climate change migrants as refugees:[47]

(i) the point just touched upon immediately above, *viz.* that the refugee route is a *post facto* means of addressing displacement concerns that should be addressed on an *ex-ante* basis;

(ii) refugee law is unsuitable as a means of treating internal migrants;[48]

(iii) international refugee law would require that one be crossing a border in the context of a conflict linked to environmental degradation, or

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44 ibid 565.

45 IOM, *Outlook on Migration,* (n 5). As Castles observes: '[D]efinitions are crucial in guiding the policies of governments and international agencies towards mobile people'. See Stephen Castles, *Environmental change and forced migration: making sense of the debate*" (Oxford: Refugees Studies Centre Working Paper No. 70 2002) 9.

46 Alexander Betts, *Survival Migration* (Ithaca: Cornell University Press 2013) 182.

47 See Environmental Justice Foundation, *Falling Through the Cracks: A Briefing on Climate Change, Displacement and International Governance Frameworks* (Environmental Justice Foundation: London 2014) 7.

48 They come within the scope of the United Nations' *Guiding Principles on Internal Displacement* 1998. There has been suggestion that these Principles might usefully be extended to embrace international climate change migrants. However, the requirement in the Guiding Principles (Art. 2) that persons 'have been forced or obliged to flee or to leave their homes or places of habitual residence' may pose an issue in instances of multi-causality climate change-related migration or 'slow-onset processes'. See Mence and Parrinder (n 7) 329. The Guiding Principles are in any event non-binding; unless this was to change any benefit arising from the extension of same to international climate change migrants would likely be more ostensible than real.

following the obstruction/refusal of aid and assistance after a climate-related natural disaster; a person might not come within either category and yet be a *bona fide* climate change migrant;

(iv) amending existing refugee law to allow for climate change refugees runs the risk of existing protections for refugees being downgraded in the treaty renegotiation process (a rather sorry insight on the way in which current refugee rights are viewed by some states);

(v) national refugee decision-making processes which deal with applications on an individual basis may be unsuitable for any (if any) climate change-related displacement that involved large numbers of people at one time;

(vi) establishing legal causation between a particular natural disaster and subsequent migration, and, *e.g.*, whom to consider the agent of persecution in such a context, may involve difficulty.

The Committee

Verheyen and Zengerling posit that there are five categories of international climate change case:[49] (i) state to state, based on treaty/customary law; (ii) individual to state, ie human rights cases; (iii) 'public trigger' to State cases, where, eg an NGO or other 'public trigger' argues that a State eg has violated certain treaty rules;[50] (iv) private entity/investor to state, whereby investors can initiate proceedings against private settlement bodies; and (v) (rarely) NGO/individual to multinational disputes, in an international forum.[51] The *Teitiota* matter comes into the second category. Before proceeding to consider the substance of the complaint and the Views expressed by the Committee in that matter, it is worth briefly recalling the Committee's role. It was established in 1977 with the entry into force of the International Covenant on Civil and Political Rights ('ICCPR'), a treaty that seeks to protect the basic civil and political rights of individuals, including, eg, the right to life and the right not to be tortured. The Committee's principal role is the examination of the reports of States party to the ICCPR and the consideration of complaints from individuals in those States parties that have ratified the First Optional Protocol to the ICCPR. Ireland has signed and ratified the ICCPR and signed the First Optional Protocol.

The Committee has been described as having a 'quasi-judicial role…in respect of individual complaints'.[52] Be that as it may, its decisions have political value, rather than legal value. They help to 'promote change and develop jurisprudence',[53] and they possess 'symbolic value by highlighting…violations and suffering to an individual audience'.[54] In this regard, the

[49] Roda Verheyen and Cathrin Zengerling, 'International Climate Change Cases' in Ruppel (n 10) 766-68.
[50] ibid 767.
[51] Verheyen and Zengerling, at 768, give the example of certain OECD disputes in this regard. For a somewhat dispiriting view of the economic inefficiencies presenting in the context of the multifaceted patchwork of policies extant within international climate change policy, see Reimund Schwarze, 'Liability for Climate Change: The Benefits, The Costs, and the Transaction Costs' (2007) 155(6) University of Pennsylvania LR, 1947-1952.
[52] Flinterman (43) 4.
[53] Vera Shikhelman, 'Access to Justice in the United Nations Human Rights Committee' (2018) 39 Mich. J. Int'l Law 453, 458.
[54] ibid.

Committee plays 'a function resembling that of truth commissions, or even that of constitutional courts'.[55] But while it could perhaps be argued that there is a duty to cooperate with the Committee, given the principle of good faith applicable to the observance of Treaty obligations, the absence of enforcement mechanisms in the Optional Protocol is suggestive of the clearest decision by United Nations members that the Committee's Views would have mere 'hortatory force'.[56]

Two potentially more potent forms of litigation that may yet feature more prominently in the years to come against nations recalcitrant to playing their full part in climate change alleviation include the potential for international litigation before the International Court of Justice for damages associated with climate change (as distinct from transnational climate change brought by non-residents in domestic courts which may rely in part on international law),[57] and/or an action before the International Tribunal for the Law of the Sea for pollution to the environment, under Art. 194(2) of the Law of the Sea Convention.[58]

The Majority Views in *Teitiota*[59]

Mr Teitiota, a national of Kiribati, a Pacific island nation, made an unsuccessful refugee application in New Zealand. That application was grounded on the fact that life in Kiribati had become increasingly unstable/precarious due to sea level rise caused by global warming. After exhausting the judicial remedies available in New Zealand, Mr Teitiota was removed to Kiribati on 23 September 2015. Prior to his deportation, he made contact with the Committee, by communication of 15 September 2015, claiming that by removing him to Kiribati, New Zealand was violating his right to life under the Covenant (as sea level rises in his home nation had led to a scarcity of habitable spaces, spawning violent land disputes that endangered his life and more general environmental degradation).[60] When it came to the merits of Mr Teitiota's communication, the Committee held, *inter alia*, as follows in their Majority Views.

Real Risk of Irreparable Harm[61]

The Committee made reference to its own General Comments concerning the ICCPR,[62] in particular General Comment 31 (2004), para. 12, which states, *inter alia*, as follows:

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55 Shikhelman (n 53) 459.

56 Open Society Foundations, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (New York: Open Society Foundations 2010) 126.

57 Eg, the *Luciano* proceedings brought by a Peruvian farmer in the German courts against the German energy company RWE (see generally Agence France-Presse, 'Peruvian farmer sues German energy giant for contributing to dimate change' (*The Guardian*, 14 November 2017) <https://www.theguardian.com/world/2017/nov/14/peruvian-farmer-sues-german-energy-giant-rwe-climate-change> Accessed 23 October 2020.

58 See United Nations Convention on the Law of the Sea <www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf> Accessed 5 March 2021.

59 For a personal account/photo essay concerning Mr Teitiota's case, see Kenneth Weiss and Birgit Krippner, 'Exile By Another Name' (2015) 210 Foreign Policy 48-56.

60 ibid.

61 *Teitiota*, Majority Views, para 9.3.

62 There are ten human rights bodies that monitor implementation of the core international human rights treaties, each of which, *inter alia*, publishes general comments which concern its interpretation of the particular

> [T]he article 2 [ICCPR] obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 [right to life] and 7 [freedom from torture, *etc.*] of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.

This is a form of the principle of *non-refoulement*, here in a refugee context but of wider potential application under the ICCPR. A difficulty that can present in this regard is where a person is removed in the context of home government commitments that go unfulfilled. As will be seen later below, this was a matter of concern for Ms Sancin, one of the dissenting Committee members in *Teitiota*. She noted that while the Government of Kiribati had committed itself to address the effects of climate change, the UN Special Rapporteur on the human right to safe drinking water and sanitation had noted a failure to meet these commitments.[63]

Real Risk Typically Personal[64]

The Committee drew attention to General Comment 36 (2018), para. 30, in which the Committee observes, *inter alia*, that:

> The duty to respect and ensure the right to life requires States parties to refrain from deporting, extraditing or otherwise transferring individuals to countries in which there are substantial grounds for believing that a real risk exists that their right to life under article 6 of the Covenant would be violated. Such a risk must be personal in nature and cannot derive merely from the general conditions in the receiving State, except in the most extreme cases.

By way of amplification, the Committee, in General Comment 36, offers a trio of examples of where it would consider an Art. 6 risk to present, *viz.* where it is proposed (a) to extradite an individual from a country that has abolished the death penalty to a country in which s/he might face the death penalty,[65] (b) to deport an individual to a country in which a *fatwa* has been issued against her/him by local religious authorities, without first verifying that the *fatwa* is '*not likely*' to be followed (though offhand it does not seem, inarguable that a '*real risk*' could present even where a *fatwa* was '*not likely*' to be followed),[66] or (c) to deport an individual to

human rights treaty that is its focus of operations. (The Committee monitors implementation of the ICCPR and its Optional Protocols).

63 *Teitiota*, Ms Sancin's Dissenting View, para 5.

64 *Teitiota*, Majority Views, para 9.3.

65 In *Yin Fong* v *Australia* (2009) (UN Document CCPR/C/97/D/1442/2005), a case concerned, *inter alia*, with the issue of whether a person could be deemed to face a real risk of the death penalty in a state if s/he had not been convicted of any offence in that state (but was the subject of an arrest warrant for offences which could attract the death sentence) the Committee observed, *inter alia*, at para 9.7, 'that an enforced return of the author to the Peoples' Republic of China, without adequate assurances, would constitute violations by Australia, as a State party which has abolished the death penalty, of the author's rights under artide 6 and artide 7 of the Covenant'.

66 In *Shakeel* v *Canada* (2013) (UN Document CCPR/C/108/D/1881/2009), a case in which a Christian pastor from Pakistan daimed that he had been constantly discriminated against by Muslim fundamentalists and that

an extremely violent country in which s/he had never lived, had no social/family contacts and could not speak the local language.[67] (Offhand, linguistic ability could be an odd factor to bring to bear in all instances: it is not difficult, eg, to conceive of instances in which the home language of a child might be that of another country but where the child nonetheless is a complete stranger to that country; and again the issue of assurances/commitments and the extent of the reliance to be placed thereon presents).

Non-Refoulement[68]

The obligation not to deport/extradite/transfer persons under Art. 6 may be broader than the principle of *non-refoulement* under international refugee law because it could apply to the benefit of persons not entitled to refugee status. The principle of *non-refoulement* seems to offer some scope for optimism when it comes to climate change migrants. If, for example, one looks to the jurisprudence of the European Court of Human Rights on Art. 3 ECHR ('No one shall be subjected to torture or to inhuman or degrading treatment or punishment'), as Betts observes, 'A significant and growing proportion of [relevant] jurisprudence [of the Court] has broadened the interpretation of 'inhuman, cruel and degrading treatment' to include some people fleeing socioeconomic deprivations'.[69] An early example of this can be seen in *D* v *United Kingdom* (1997),[70] where it was held that to return a failed asylum-seeker with advanced HIV/AIDS to St Kitts (where he had no access to proper medical treatment, nor accommodation or family/moral/financial support) would amount to inhuman treatment in all the circumstances presenting.

Although the European Court of Human Rights is 'only' a regional court, its decisions are at the cutting edge of international human rights jurisprudence and the Views in *Teitiota*, as considered hereafter, show, if nothing else, the highly interactive dimension of international level decisions in this regard, with different human rights bodies leveraging off the decisions of each other. All that said, the requirement in the context of *non-refoulement* that the harm faced be severe and imminent may yield inadequate protection in the context of 'slow-onset' climate/environmental changes.[71]

Right to Life (General)[72]

for Canada to return him to Pakistan (following a failed asylum application) would breach Artides 6, 7 and 9 (right to liberty and security of the person), the Committee, at para 8.5, was critical of the fact that:
'With respect to the *fatwa*, the State party has failed to undertake any serious examination of its authenticity; the *fatwa* was not given any weight….No official expert analysis was conducted, nor was any thorough investigation undertaken with regard to the author of the *fatwa*….Investigation would have been all the more critical given that it was the author of the fatwa who had filed the [first police report]…against the author [alleging]…an offence under Pakistani criminal law (blasphemy law), which incurs the death penalty'.

67 In *Warsame* v *Canada* (2011) (UN Document CCPR/C/102//D/1959/2010), a case which concerned, *inter alia*, whether the deportation of a person to Somalia (where he could not speak the language and lacked family ties) would breach his rights under Artides 6 and 7, the Committee conduded (para 8.3) that it would.

68 *Teitiota*, Majority Views, para 9.3.

69 Betts (n 46) 180.

70 Application No. 30240/96.

71 Mence and Parrinder (n 7), 328.

72 *Teitiota*, Majority Views, para 9.4.

The Committee noted of the right to life that:

> (i) '[it] cannot be properly understood if it is interpreted in a restrictive manner'[73]…
>
> (ii) '[its] protection…requires States parties to adopt positive measures,'[74]
>
> (iii) it embraces 'the entitlement…to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity',[75] and
>
> (iv) States parties may be in violation of article even if reasonably foreseeable threats and life-threatening situations that can result in loss of life, even if same do not result in loss of life.[76]

As to Proposition (ii), given the reliance placed by the Committee on various decisions of the European Court of Human Rights (considered later below), the referenced positive duty may be more limited than ostensibly appears. This is because, when it comes to positive obligations under the European Convention, the Court of Human Rights allows a broad margin of appreciation when it comes to discharging same. Thus, for example, in *Hatton and ors* v *United Kingdom*,[77] the Court observed, *inter alia*, that 'In…cases involving environmental issues…the Court has…held that the State must be allowed a wide margin of appreciation'.[78]

Proposition (iv) may ostensibly seem odd when expressed in the abstract. However, it makes more sense when viewed, eg, in the real-life context of *Portillo Cácares et al v Paraguay*.[79] That was a case concerned with the poisoning of two families by insecticides/pesticide use in breach of laws which had not been enforced; one family member died, others were hospitalised, various farm animals died and crops were damaged. In its Views in *Portillo Cácares*, the Committee observed, *inter alia*, that 'States parties should take all appropriate measures to address the general conditions in society that may give rise to threats to the right to life or prevent individuals from enjoying their right to life with dignity, and these conditions include environmental pollution'.[80]

Climate Change

The Committee noted that:

> (i) environmental degradation…[and] climate change…constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life',[81]

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[73] This is consistent with the observation in the Committee's General Comment 36 (2018), para 3, that 'The right to life is a right that should not be interpreted literally.'
[74] ibid.
[75] The quoted text is extracted from the Committee's General Comment 36 (2018), para 3.
[76] *Teitiota*, Majority Views, para 9.4.
[77] [2003] All ER (D) 122 (Jul).
[78] ibid para 101.
[79] UN Document CCPR/C/126/D/2751/2016.
[80] Para 7.3
[81] *Teitiota*, Majority Views, para 9.4.

(ii) both the Committee and regional human rights tribunals have determined that 'environmental degradation can compromise effective enjoyment of the right to life,[82] and

(iii) 'severe environmental degradation can…lead to a violation of the right to life.[83]

Observations in the Committee's General Comments and certain decisions were cited in support of these three propositions. Thus, as regards point:

[i] the Committee referenced General Comment 36, para. 62, which states, *inter alia*, as follows: 'Environmental degradation…[and] climate change…constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.'

[Support for this proposition is to be found in (1) the Declaration of the UN Conference on the Human Environment (1972) (the 'Stockholm Declaration'), para.1, which states, inter alia, that 'Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself';[84] (2) the Rio Declaration on Environment and Development (1992),[85] principle 1, which states that 'Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature', and (3) the preamble to the UN Framework Convention on Climate Change (1992),[86] which states, *inter alia*, that 'change in the Earth's climate and its adverse effects are a common concern of humankind', Article 3(1) establishing the principle that 'The Parties should protect the climate system for the benefit of present and future generations of humankind'].

The Committee states that the:

> obligations of States parties under international environmental law should thus inform the content 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.[87]

[Support for this proposition is to be found in the preamble to the Paris Agreement (2015),[88] which states, *inter alia*, that '[C]limate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights'].

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[82] *Teitiota*, Majority Views, para 9.5.

[83] ibid

[84] Louis B. Sohn, 'The Stockholm Dedaration on the Human Environment 1973 14(3) The Harvard International Law Journal <*https://wedocs.unep.org/bitstream/handle/20.500.11822/28247/Stkhm_DcltnHE.pdf*> Accessed 22 March 2021.

[85] See United Nation, Report of the United Nations Conference on Environment and Development (A/CONF.151/26) <*www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf*> Accessed 5 March 2021.

[86] See United Nations Framework Convention on Climate Change (United Nations 1992) <*www.unfccc.int/resource/docs/convkp/conveng.pdf*> Accessed 5 March 2021.

[87] ibid.

[88] See Paris Agreement (United Nations 2015) <*www.unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf*> Accessed

[ii] the Committee referenced:

a) the view expressed by the Inter-American Court of Human Rights in *Kawas Fernández v Honduras* (2009),[89] a case concerned with the obligation of states to protect environmentalists who were in serious jeopardy from human rights violations, that 'there is an undeniable link between the protection of the environment and the enjoyment of other human rights';[90]
b) the Advisory Opinion in 2017 of the Inter-American Court of Human Rights given in response to a request from Colombia concerning State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and personal integrity recognised in Articles 4 and 5 of the American Convention,[91] in which the Court, *inter alia*, recognises, at para. 47 'the existence of an undeniable relationship between the protection of the environment and the realization of other human rights';[92]
c) the Committee's Views in *Portillo Cácares*, where it '[took] note of developments in other international tribunals that have recognized the existence of an undeniable link between the protection of the environment and the realization of human rights and that have established that environmental degradation can adversely affect the effective enjoyment of the right to life',[93] moving on to observe, 'Thus, severe environmental degradation has given rise to findings of a violation of the right to life';[94]
d) para. 3 of General Comment No. 3 of the African Commission on Human and People's Rights on Art. 3 (right to life) in the African Charter on Human and People's Rights, which states, *inter alia*, that 'The General Comment proceeds from an understanding that the Charter envisages the protection not only of life in a narrow sense, but of dignified life. This requires a broad interpretation of States' responsibilities to protect life. Such actions extend to preventive steps to preserve and protect the natural environment'; and
e) the decision of the European Court of Human Rights in *Cordella and Ors v Italy*.[95]

[iii] the Committee referenced the decisions of the European Court of Human Rights in

[89] Judgment of 3 April 2009 (Series C, No. 196).
[90] ibid para 148.
[91] Advisory Opinion OC-23/17 of 15 November 2017 on the environment, in the context of the rights to life and personal integrity. See <www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf> Accessed 5 March 2021.
[92] Author translation from the original Spanish: '*Esta Corte ha reconocido la existencia de una relación innegable entre la protección del medio ambiente y la reliaación de otros derechos humanos*'.
[93] (n 79) para 7.4.
[94] ibid.
[95] Applications No's 54414/13 and 54264/15, para 157. The applicants daimed a violation, *inter alia*, of their right to life and to respect for private life, by reference to certain emissions from steelworks in Taranto, Italy. In its judgment, the Court of Human Rights recalled 'that serious environmental damage can affect the well-being of people and deprive them of the enjoyment of their home in such a way as to harm their private life' (author translation from French; there is no official English translation of the European Court of Human Rights' judgment at the time of writing; the French text reads '*La Cour rappelle que des atteintes graves à l'environnement peuvent affecter le bien-être des personnes et les priver de la jouissance de leur domicile de manière à nuire à leur vie privée*').

Őneruildiz v *Turkey*,[96] *Budayeva and Ors* v *Russia*,[97] and *Őzel and Others* v *Turkey*.[98] These various references to the Court of Human Rights pinpoint to the eminence of that body in the international human rights arena and also to the interactive and cohesive nature of international decision-making in this area.

What the foregoing points to is a convergence of opinion among leading international/regional human rights bodies that there is a link between the protection of the environment and the enjoyment of other human rights, with severe environmental degradation being a predicate on which a violation of the right to life may properly be grounded. They also point to the need for firm and forward-thinking action by non-judicial branches of government as to climate change, environmental degradation and like issues, not just to avoid the risk of being embarrassed before an entity such as the Committee, but because the rights at stake are fundamental and the risk of large-scale climate change migration throughout the 21st century is real.

A process of litigation-inspired law reform may perhaps be viewed as part of a natural evolutionary process whereby 'consensus changes, and the law follows.'[99] (Albeit the pace of

[96] 18 BHRC 145. Mr Őneruildiz lived in a slum area adjacent to a municipal rubbish tip. After various members of his family, induding seven children, were killed in a landslide occasioned by a methane explosion at the dump, proceedings before the Court of Human Rights ensued, it being daimed, *inter alia*, that the national authorities did not do all that could have been expected of them to prevent the deaths of his dose relatives in the accident at the municipal rubbish tip. The various daims were largely successful, the Court holding, inter alia, at para 71, that: '[A]rt 2 ['Right to life'] does not solely concern deaths resulting from the use of force by agents of the state but also, in the first sentence of its first paragraph ['Everyone's right to life shall be protected by law'], lays down a positive obligation on states to take appropriate steps to safeguard the lives of those within their jurisdiction….The court considers that this obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and a fortiori in the case of industrial activities, which by their very nature are dangerous'.

[97] Application No. 15339/02. Following deaths and damage caused by mudslides, the applicants brought a largely successful case before the Court of Human Rights daiming, *inter alia*, that the authorities had violated Art. 2 of the Convention through their failure to take appropriate measures to mitigate the risks posed to their lives by natural hazards. The particular significance of the decision in *Budayeva* was that whereas it had previously been well established by the Court, *inter alia*, in *Őneruildiz* that there was a human right to protection from industrial hazards under Artide 2 ECHR, in *Budayeva* the Court recognised that that protection extended to natural hazards. Notably, the Court held that because natural hazards are beyond human control, the margin of appreciation afforded to States in the discharge of their positive obligations under Art. 2 'must be afforded even greater weight…than in the sphere of dangerous activities of a man-made nature'.[97] Even so, as Lauta and Rytter observe, 'Extending the right to life to protection from natural hazards potentially has wide-ranging…consequences for…contracting States, especially in light of the fact that with dimate changes new natural threats towards Europe emerge'. See Kristian Lauta and Jens Rytter, 'A landslide on a mudslide? Natural hazards and the right to life under the European Convention on Human Rights' (2016) 7(1) Journal of Human Rights and the Environment 111-131, 111.

[98] Applications Nos. 14350/05, 15245/05 and 16051/05. The applicants' relatives were victims of an earthquake. They complained to the Court of Human Rights of, *inter alia*, a breach of their relatives' right to life, as protected by Art. 2 ECHR. In particular, they daimed in this regard that the municipal authorities had authorised developers to erect blocks of flats five or more storeys high in an area prone to seismic activity and had failed to carry out the necessary inspections to ensure the conformity of the buildings or to prevent their construction. The Court of Human Rights reiterated that the positive obligations of States under Art. 2 ECHR apply to all activities, public or private that are capable of endangering life, induding natural catastrophes. The judgment has been criticised because of a perceived missed opportunity by the Court to elaborate upon the issues of whether corporate action can violate human rights and how corporate accountability can/should be enforced by domestic courts. See Lieselot Verdonck, 'How the European Court of Human Rights Evaded the Business and Human Rights Debate in *Őzel* v *Turkey*' (206) 2 Turk. Com. L. Rev 111-18, issues of dear significance in the dimate change context.

[99] Richard Dahl, 'A Changing Climate of Litigation' (2007) 115(4) Environmental Health Perspectives, A204-A207, A205.

climate change may mean that the window for such consensus to evolve is rapidly diminishing). Separately, such litigation also involves the (controversial) potential for an inversion of the typical checks and balances of tripartite government such that 'divided authorities…push each other to action when changing social conditions require it'. [100]

Returning, however, to *Teitiota*, although the conclusions of the majority in that matter are not unexpected, if one has regard to the wider trend of international developments in climate change litigation (or quasi-litigation), so far as Mr Teitiota was concerned, the ultimate views of the majority concerning the issues he raised were doubtless unsatisfactory to him. This is because the Committee ultimately rejected his claims, holding, *inter alia*, [101] that (i) New Zealand's courts provided Mr Teitiota with an individualised assessment of his claimed need for protection, taking note of the various elements of his claim ('including the prevailing conditions in Kiribati, the foreseen risks to the author and the other inhabitants of the islands, the time left for the Kiribati authorities and the international community to intervene and the efforts already underway to address the very serious situation of the islands'), [102] and (ii) as one would instinctively expect, the information made available did not show 'that the conduct of the [New Zealand] judicial proceedings…was clearly arbitrary or amounted to a manifest error or denial of justice, or that the courts otherwise violated their obligation of independence and impartiality'. [103]

The Dissenting Views in *Teitiota*

There were two Dissenting Views in *Teitiota*. The first Dissenting View was that of Ms Sancin. She pointed to the fact that Mr Teitiota had argued that removal to Kiribati would involve removal to a place without access to safe drinking water. She did not consider that this claim was met by New Zealand's finding that there was no evidence to support Mr Teitiota's contention that he was unable to obtain (and had no access) to potable water. 'My concern', Ms Sancin observes in her dissenting view, '[is] that the notion of 'potable water' should not be equated with 'safe drinking water'. [104] Water can be designated as potable, while containing microorganisms dangerous for health, particularly for children', noting in this regard that 'all three of [Mr Teitiota's children, whom, it seems, followed him to Kiribati] were born in New Zealand and were thus never exposed to water conditions in Kiribati'. [105] She also noted that while the Government of Kiribati had committed itself to address the effects of climate change, the UN Special Rapporteur on the human right to safe drinking water and sanitation had noted a failure to meet these commitments. [106] 'In these circumstances', Ms Sancin opined, 'it falls on the State Party, not the author, to demonstrate that the author and his family would 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'. [107]

[100] Benjamin Ewing and Douglas Kysar, 'Prods and Pleas: Limited Government in an Era of Unlimited Harm' (2011) 121(2) Yale Law Journal 350-424, 423.
[101] See *Teitiota*, Majority Views, para 9.13.
[102] ibid.
[103] ibid.
[104] Ms Sancin's Dissenting View, para 3.
[105] ibid.
[106] Ms Sancin's Dissenting View, para 5.
[107] ibid.

The second Dissenting View was that of Mr Muhumuza. He considered the deportation of Mr Teitiota to be 'like forcing a drowning person back into a sinking vessel',[108] stating, inter alia, that: (1) there was a 'need to employ a human-sensitive approach to human rights issues',[109] (2) New Zealand had 'placed an unreasonable burden of proof on [Mr Teitiota]…to establish the real risk and danger of arbitrary deprivation of life',[110] (3) the Committee's approach in climate migration cases should be one that 'seeks to uphold the sanctity of human life',[111] (4) the living conditions on Kiribati identified by Mr Teitiota and 'resulting from climate change [were]…significantly grave, and pose[d] a real, personal and reasonably foreseeable risk of a threat to his life',[112] and (5) while acknowledging that the risk to a migrant must be personal and not deriving from general conditions (save in exceptional cases) 'the threshold should not be too high and unreasonable'.[113]

Both Dissenting Views are of interest in identifying what are likely unfinished arguments at the international level – and doubtless arguments that will also be echoed at the national level – as to the nature and scope of the burden of proof in climate migration cases. Mr Muhumuza's Dissenting View as to when the burden of proof is discharged by a migrant is of interest, albeit a dissenting view:

> 5…. [One] child of [Mr Teitiota]…has already suffered significant health hazards on account of the environmental conditions….[Mr Teitiota]…and his family are already facing significant difficulty in growing crops and resorting to the life of subsistence agriculture on which they were largely dependent….[Thus,] the situation in the author's country of origin, reveals a livelihood short of the dignity that the Convention seeks to protect.
>
> 6….[W]hile it is laudable that Kiribati is taking adaptive measures…it is clear that the situation of life continues to be inconsistent with the [required] standards of dignity….[T]hat this is a reality for many others in the country, does not make it any more dignified for the persons living in such conditions.

Conclusions

The decision in *Teitiota* points to the potential that human rights litigation entails when it comes to securing due protection of climate change migrants, albeit that the decision in that case ultimately went against Mr Teitiota. Perhaps five key points of interest arise from the Majority Views:

(i) Art. 2 of the ICCPR contemplates that there can be no removal of an individual where there are substantial grounds for believing that there is a real risk of irreparable harm, either in the country to which

[108] Dissenting View of Mr Muhumuza, para 6.
[109] ibid para 1.
[110] ibid.
[111] ibid.
[112] ibid.
[113] ibid para 3.

removal is to be effected or in any country to which the person may subsequently be removed.

(ii) that risk must be personal in nature and cannot derive merely from the general conditions in the receiving State, except in the most extreme cases, eg, where it is proposed to remove a person from a country which does not have the death penalty to one which does.

(iii) as to *non-refoulement*, the duty under Art. 6 may be broader than the principle of *non-refoulement* under international refugee law because it could apply to the benefit of persons not entitled to refugee status.

(iv) the Majority Views on the right to life are of interest, *viz.* that it ought not to be interpreted restrictively, it requires the taking of positive measures by States, it embraces life-threatening acts/omissions, and those imperilling the right to enjoy a life with dignity, as is clear from, eg, *Portillo Cácares* it is possible to be in breach of Art. 2 where an individual is exposed to life-threatening (environmental pollution) situations that do not result in death.

(v) in a similar vein, and worthy of especial note in the climate change context, the Majority accepted that climate change is among the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.

The foregoing represents a progressive encapsulation of relevant principle, such 'progressive character' on the part of the Committee (in common with other international human rights bodies) being perhaps an inevitable 'by-product' of decades of UN member-governments being more willing to sign human rights documents than to implement them.[114] Yet notwithstanding the liberal viewpoint manifest in the Majority Views, and despite the fact that human rights and refugee law have a clear contribution to make in terms of dealing with the issue of climate migration, just how those fields of law ought to operate *vis-à-vis* climate change 'refugees' remains unclear. Soft law certainly has a role to play and is already playing a role, eg, in the incorporation of General Comments into the substantive Views of the Committee. However, there is scope for still further development in this regard, not least perhaps through the adoption of comprehensive, non-binding guidelines on the application of international human rights norms. Such guidelines 'would help states by offering an authoritative and agreed-on interpretation of…existing standards and by identifying any normative or operational gaps', and there is, at this time, a gap at the international level in terms of which organizations are ultimately responsible for interpreting rights and who is to police them.[115] Such general agreement would also mitigate the risk of international decision-making bodies running too far ahead of how national governments want to proceed.

[114] Martin (n 43) 552.

[115] Betts (n 46) 184. Warren, having undertaken an assessment of which of the existing bodies within the United Nations is best placed to deal with forced climate change migration, contends that a 'Climate Change Displacement Coordination Facility' within the auspices of the UN Framework Convention on Climate Change and perhaps operating in tandem with the UN Security Council represents the best way forwards. See Philip Warren, 'Forced Migration after Paris COP21: Evaluating the 'Climate Change Displacement Coordination Facility' (2016) 116(8) Columbia L.R. 2103-44. The Sabin Center for Climate Change Law has suggested that among the purposes to be served by such a Facility would be the establishment of standards for the management of internal/international climate-induced displacement, including standards as to:

'• Climate Displacement Status – How can we define those persons who have been displaced (or are at risk of displacement) due to climate change impacts, such that they would be eligible for relocation assistance or other benefits administered by the facility? Would this definition exclude those persons who migrate as a result of climate change, but are not forcibly displaced? How is the line drawn between voluntary migration and forced displacement?

• Temporary Accommodations – What are the requirements for temporary accommodations (in other words, climate "refugee" camps)? How long can a person be kept in a temporary camp, and what provisions must be made available to those persons?

• Internal Resettlement – What procedures should countries follow when addressing displacement within their own borders?

• Treatment in Recipient Nations – What procedures should countries follow when receiving displaced persons from other countries?' See Jessica Wentz and Michael Burger, *Designing a Climate Change Displacement Coordination Facility: Key Issues for COP 21* (New York: Sabin Center for Climate Change Law 2015).