

Rising Sea Levels: Promoting Climate
Justice through International Law:
Climate Displacement as a Human
Rights Violation





**British Institute of
International and
Comparative Law**

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Table of Contents

Summary.....	4
1. The Human Rights Committee View.....	5
2. The Legal Questions Surrounding the HRC View	7
3. Conceptual Climate Displacement	8
4. Timeframes Within the View	10
5. The Question of Cruel and Inhuman Treatment.....	11
6. Alternative Approaches and Ways Forward.....	13

Summary

The British Institute of International and Comparative Law (BIICL) and Landmark Chambers, London held a webinar series on '[Rising Sea Levels: Promoting Climate Justice through International Law](#)'. The series approached climate-induced sea level rise as a global and intergenerational problem and the legal implications arising from it from the lens of international law and climate justice.

Four separate webinars were held examining the topic from different legal dimensions:

- Webinar 1: Rising Sea Levels & International Law: The role of the International Law Commission
- Webinar 2: Rising Sea Levels: A Matter for the ICJ?
- Webinar 3: Rising Sea Levels: Climate Displacement as a Human Right Violation
- Webinar 4: Rising Sea Levels: Climate Change Litigation before Domestic Courts

Participants included Government representatives, representatives of international governmental and non-governmental organisations, academics and practitioners of international law, and members of civil society. The webinar series was convened by [Dr Constantinos Yiallourides](#), Arthur Watts Research Fellow in the Law of the Sea, BIICL. BIICL wishes to thank all speakers, and, indeed, all those attending the series for their support and active participation.

The present report provides a summary of the discussion and synthesises some of the main conclusions of Webinar 3: Rising Sea Levels: Climate Displacement as a Human Rights Violation.¹ The panel discussion was chaired by Dr Irene Antonopoulos, Royal Holloway, University of London. Speakers included: Scientia Professor Jane McAdam, University of New South Wales (UNSW), Emeline Siale Ilolahia, Pacific Islands Association of NGOs (PIANGO), Prof Benoit Mayer, The Chinese University of Hong Kong, Matthew Reed QC, and Admas Habteslasie, Landmark Chambers.

A year after the publication of the Human Rights Committee view, the webinar aimed to enquire and discuss the significance and implications of the adopted view of the Human Rights Committee decision of October 2019 on the application authored by Ioane Teitiota raising links between climate migration, human rights and the non-refoulement principle.² The panel discussed the possible significance of the terms 'climate migrant' and 'climate refugee' and the impact of terminology in this area.

This report is issued on the understanding that if any extract is used, BIICL should be credited, preferably with the date of the event.

Suggested Citation:

British Institute of International and Comparative Law, '*Rising Sea Levels: A Matter for the ICJ?*' (11 March 2021) <<https://www.biicl.org/events/11468/webinar-series-rising-sea-levels-promoting-climate-justice-through-international-law>>.

¹ The recording of the event can be found here: <<https://youtu.be/DdKANB4zaXM>>.

² Human Rights Committee, Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2728/2016, CCPR/C/127/D/2728/2016, 7 January 2020.

1. The Human Rights Committee View

1. The Human Rights Committee decision comes several years since the start of Mr Teitiota's challenge of his deportation by New Zealand to Kiribati (his country of origin). Mr Teitiota moved with his family to New Zealand under a work permit which he overstayed. He claimed that he was unable to return to his home country due to the severe effects of climate change on Kiribati which included rising sea levels and environmental degradation and are forcing people to leave their homes.³ His claim relied on his interpretation of Article 1A(2) of the 1951 Refugee Convention, as being able to include 'environmental refugees'. The Article defines refugee as the person who 'owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'. The New Zealand authorities found that Mr Teitiota was unable to show that upon his return he would face persecution for reasons included in the Convention, and his appeal of the deportation order was therefore rejected.⁴ After several layers of appeal, the Supreme Court agreed with the previous courts' decisions that Mr Teitiota did not face 'serious harm' upon return to Kiribati.⁵ Additionally, the Supreme Court acknowledged that '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'.⁶
2. In his application to the Human Rights Committee, Mr. Teitota argued that his deportation from New Zealand to Kiribati was unlawful.⁷ if he were to be returned, he faced a risk to his life as protected by Article 6 of the International Convention on Civil and Political Rights (hereinafter ICCPR).⁸ This threat to life allegedly derived from multiple factors associated with climate change, including social tensions as a result of diminishing land and the diminishing source of freshwater due to its contamination by salt water. He, therefore, challenged his deportation order from New Zealand as a violation of his right to life raising the issue of the potential application of the non-refoulement principle.⁹ The Human Rights Committee agreed that such circumstances have the potential to raise a claim under the non-refoulement principle.¹⁰ Nevertheless, the Committee concluded that 'the State party's authorities thoroughly examined that issue and found that Kiribati was taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms. Based on the information made available to it, the Committee is not in a position to conclude that the domestic authorities' assessment that the measures taken by Kiribati would suffice to protect the author's right to life under article 6 of the Covenant was clearly arbitrary or erroneous in that regard, or amounted to a denial of justice.'¹¹ Whilst the Committee recognised the unlawfulness of a

³ *Ioane Teitiota v The Chief Executive of the Ministry of Business and Innovation and Employment* [2015] NZSC 107, para 5

⁴ *Ibid* para 5.

⁵ *Ibid*, para 12.

⁶ *Ibid* para 13

⁷ Human Rights Committee, Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2728/2016, CCPR/C/127/D/2728/2016, 7 January 2020

⁸ Article 6(1) of the ICCPR stipulates that 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'

⁹ According to the non-refoulement provision of the 1951 Refugee Convention: 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

¹⁰ Human Rights Committee, Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2728/2016, CCPR/C/127/D/2728/2016, 7 January 2020, para. 9.3.

¹¹ *Ibid* para. 9.12.

deportation order to a country where the effects of climate change are creating life-threatening risks, in this case, it did not find a violation of Article 6 of the ICCPR by New Zealand.

3. The panel discussed the reasoning of the decision, the Individual Opinions of Committee Member Duncan Laki Muhumuza and Committee Member Vasilka Sancin, in assessing the significance of the decision to the future of policymaking in the area of climate displacement, its implications for future jurisprudence in other jurisdictions as well and the appropriateness of the terms 'refugee' and 'migrant' in this context.

2. The Legal Questions Surrounding the HRC View

4. Matthew Reed explained that the first step in assessing the significance of the case is to discuss the questions that determined its admissibility. Beyond the risks outlined above, related to lack of potable water, for example, the Committee had to find 'arbitrariness, manifest error or injustice in the state party's evaluation of the author's claim'. Such conditions cannot derive from the general conditions that one finds at the receiving state unless these conditions are extreme as explained in General Comment 36 on Article 6 of the ICCPR.¹² The requirement here is that the risk of harm that derives from these extreme conditions is imminent. In this case, the Committee's decision shows that this was not established through the facts of the case.
5. Professor McAdam identified the significance of the decision to lie on the recognition that deteriorating conditions resulting from climate change may be able to prevent removal if certain conditions are met. The Human Rights Committee, in this decision, acknowledged that, as a matter of legal principle, the deportation of people to countries in which they will be exposed to life-threatening circumstances as a result of the impacts of climate change is unlawful. The decision is a landmark decision since this is the first time that a 'quasi-judicial body' stated that 'Without robust national and international efforts, the effects of climate change may expose people to life-threatening risks or to cruel, inhuman or degrading treatment, thereby triggering the non-refoulement obligations of sending states'.¹³ Such responsibilities extend to the continuous evaluation of the data on the impacts of climate change. Significantly, according to Professor McAdam, the decision suggests that future claims raising similar concerns might be successful, especially as climate impacts start to be felt more acutely.¹⁴

¹² Ibid para. 30.

¹³ Ibid para. 9.11.

¹⁴ For further elaboration see Jane McAdam, 'Protecting People Displaced by the Impacts of Climate Change: the UN Human Rights Committee and the Principle of Non-Refoulement' (2020) Vol 114 (4) *The American Journal of International Law* 708.

3. Conceptual Climate Displacement

6. In general, the discussion over climate displacement has been overtaken by emotion and policy ambition, with those affected, scholars and practitioners who work in this area battling with those emotive terms utilised by the media and media misrepresentation of litigation, creating a discourse of victimhood and misunderstanding over the legal meaning of 'refugee' and the true significance of the Human Rights Committee view. Professor Mayer suggested that 'climate migration' is not the appropriate term in this context as it creates a conceptual problem. In a similar tone, Professor McAdam suggested that anticipatory migration, in advance of disasters or severe environmental degradation, may be a form of adaptation in itself.
7. Professor McAdam has previously explained in her work that the term 'climate refugee' is not appropriate or legally accurate.¹⁵ A term that acknowledges that people are facing deteriorating life conditions due to disasters and the impacts of climate change is more appropriate. The association of the climate change circumstances to the 1951 Refugee Convention has been supported and challenged in equal measure in debates in this area. The UNHCR's 2019 legal considerations document on the application of refugee law in the context of climate change and disasters provides a useful guide as to how refugee law may sometimes be applicable in this context. The ILA Sydney Declaration of Principles on the Protection of Persons Displaced in the context of sea-level rise similarly explains that the underlying disaster or climate change process will not constitute "persecution" per se, it may provide a context in which forms of harm that do engage existing international protection regimes may arise—for instance, where the disaster causes a breakdown of law and order or is used by a government as a pretext for persecutory acts against certain parts of the population';¹⁶ affirming the necessary distinction between the hazard paradigm and social paradigm in the context of climate displacement.¹⁷
8. In essence, the human rights implications of climate change allow for a broader scope of protection beyond the Refugee Convention, which is reflected in the development of Teitiota's argument if we follow his legal claim in New Zealand.¹⁸ Professor McAdam added that 'The Human Rights Committee emphasized that the right to life includes the right of individuals to enjoy a life with dignity, which necessarily requires a certain standard of living'. But according to Professor McAdam, the threshold set by the Committee in establishing the living conditions that would be considered to threaten one's dignity is very high. The Committee's threshold of unsafe water that could lead to 'unnatural or premature death' and the lack of crops leading to 'indigence, deprivation of food and extreme precarity' were not met. The fact that the Committee has established a number of conditions to be able to decide that specifically Teitiota's circumstances amounted to a threat to this dignity, created an impossible claim. Matthew Reed agrees with this suggesting that the significance of the

¹⁵ See Jane McAdam, 'Protecting People Displaced by the Impacts of Climate Change: the UN Human Rights Committee and the Principle of Non-Refoulement' (2020) Vol 114 (4) *The American Journal of International Law* 708.

¹⁶ International Law Association Res. 6/2018, Annex, Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise (Aug. 2018); See also UN High Commission for Refugees (UNHCR), Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters, 1 October 2020.

¹⁷ Matthew Scott, 'Finding Agency in Adversity: Applying the Refugee Convention in the Context of Disasters and Climate Change' 35 *Refugee Surv. Q.* 26.

¹⁸ *Teitiota v. The Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125; *Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173; *Teitiota v. The Chief Executive of the Ministry of Business Innovation and Employment* [2015] NZSC 107.

Human Rights Committee decision is questionable. The application relied on deciding that Kiribati failed to fulfil its positive obligations to protect Teitiota's right to life by addressing 'violence over land disputes, inability to find land, to provide accommodation for himself or his family, an inability to grow crops, a lack of access to water, overpopulation, and then frequent and increasingly intense flooding and breaches of sea walls as a result'.

9. The panel also discussed the human rights language utilised in the case brought before the Human Rights Committee. When analysing climate change, migration and state obligations, Professor Mayer explains that there are two different arguments brought forward: the human rights argument and the state responsibility argument. Whilst there is a state obligation to protect the rights of vulnerable people including migrants, climate change does independently provide for special human rights protections. At the same time, 'state responsibility' also means that any state should not harm other states and the principles of international environmental law, such as the principle of reparation would apply in such a scenario. In the second argument, migrants are not mentioned.
10. Professor Benoit Mayer added that 'there is no consistent, rational way of making an argument for the protection of the rights of climate migrants or people displaced by the impacts of climate change, because those are not a distinguishable category of population, because they are not in a political situation of vulnerability, and because state responsibility will require the states responsible for climate change to provide reparation to the states most affected by climate change and not impose new obligations on those states most affected by the impacts of climate change'. Professor Mayer explained that the Committee's focus was not on climate change rather on the potential vulnerability that Teitiota found himself in when returned to his home country. In this argument, there is nothing to suggest that state responsibility applies as an argument specifically on climate migrants, especially in light of the application of Public International Law. As a result, the application of the non-refoulement principle will not ensure that the states that are mostly responsible for climate change take action to protect 'climate migrants'. On the contrary, according to Professor Mayer, the imposition of standards on the protection of 'climate migrants' would generally create an obligation for the states most affected by climate change, as most individuals affected by climate-related disasters tend to stay in their country of origin or else to move to neighbouring countries.
11. According to Professor Mayer, the concept of climate migration does not build on a sound conceptual or normative argument.¹⁹ While the concept has sometimes been presented as reflecting a protection need for would be "climate migrants", this protection need is not specific to climate change. Individuals displaced by environmental disasters or other phenomena (famine, war, etc) are in the same need for protection notwithstanding whether the phenomenon is related to climate change.²⁰ On the other hand, the concept of climate migration has sometimes been presented as a way to implement the responsibility of polluting states. If so, migration is the wrong focus, as migration studies have repeatedly shown that the most vulnerable individuals seldom have the necessary resources to migrate, especially overseas.

¹⁹ See Benoit Mayer, *The Concept of Climate Migration: Advocacy and its Prospects* (Edward Elgar 2016); Benoit Mayer, "Environmental Migration" as Advocacy: Is It Going to Work? (2014) *Refuge: Canada's Journal on Refugees* 27; Calum Nicholson, 'Climate Change and the Politics of Causal Reasoning: The Case of Climate Change and Migration' (2014) 180 *Geographical Journal* 151.

²⁰ See Alexander Betts, *Survival Migration: Failed Governance and the Crisis of Displacement* (Cornell University Press, 2013)

4. Timeframes Within the View

12. On imminence, Reed suggested that the question one could ask here is what is the relationship between state responsibility and imminence of risk. In reality, according to Reed, the Committee decided that there were steps that could have been taken to minimise the risk, and therefore this risk wasn't imminent. And that is a fair conclusion to draw when one looks at the actions necessary to eliminate a risk. But Reed clarifies that the Committee should also examine whether the state is in a position to take these steps. The Committee did not set an imminence standard. Instead it made a distinction between the role of imminence in admissibility versus substantive consideration.²¹
13. Professor McAdam suggested that a claim on behalf of Mr Teitiota's children could have offered an interesting perspective. The timeframe cited within the decision could have had a different effect for the rights of his children. For example, Mr Reed explained that Teitiota added in his application, that one of his children suffered from a water bourn illness upon their return to Kiribati. In addition, the speculation that there is no immediate risk of harm, and that such harm might be present in 10 to 15 years, creates a rather uncertain framework on whether to provide protection or not. According to Matthew Reed, it is not clear whether the Committee accepted the 10 to 15 years' timescale of rising sea levels that could render Kiribati uninhabitable but did not deny it either. This nevertheless takes into consideration that several developments at a political, economic, technological and social level might ameliorate some of the risks predicted for the next decade. According to McAdam, Foster, Lambert and Anderson, the important element is to determine the real risk, whether there is a potential to mitigate it or not.²²

²¹ See Jane McAdam, 'Protecting People Displaced by the Impacts of Climate Change: the UN Human Rights Committee and the Principle of Non-Refoulement' (2020) Vol 114 (4) *The American Journal of International Law* 720

²² A Anderson, M Foster, H Lambert and J McAdam, 'Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection' (2019) 68 *International & Comparative Law Quarterly* 111–40.

5. The Question of Cruel and Inhuman Treatment

14. As regards the ICCPR, Professor McAdam suggested that article 7 would have been another possible route that Teitiota could have explored. According to Professor McAdam, it would have been interesting for the Committee to decide on the same conditions within the wording of Article 7 of the ICCPR: 'No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment' (compared to the wording of Article 6 on the right to life).
15. Admas Habeltasie provided an alternative human rights view from another jurisdiction. He was able to unpick the jurisdiction of the European Court of Human Rights and make some predictions in relation to future of decision making by the European Court in climate change cases. Mr Habeltasie focused on Article 2 of the European Convention on Human Rights which protects the Right to Life being interchangeable with Article 3, Right to Freedom from Torture and Inhuman or Degrading Treatment when discussing potential risk at the receiving state.
16. The Court has traditionally discussed the positive rather than the negative duties under Article 2 and Article 3. In particular, in the case of *Osman v UK*, the Court clarified that such state obligations should not be disproportional.²³ Mr Habeltasie explained the environmental circumstances leading to death that the Court found were the basis of Article 2 violations including accidental explosion in a rubbish tip,²⁴ forcible mudslide,²⁵ risk of life due to flash flood,²⁶ prolonged exposure to asbestos in shipyards.²⁷ In these cases, the obligations associated with these failures relate to taking procedural measures to avoid them. This is a different situation compared to the situation where the non-refoulement principle might be applicable. While on the first one, the state has duties to ensure the enforcement of its own environmental laws and policies, in the latter, the state has an obligation to ensure that an individual is not exposed to a risk in another country. These two situations show two alternative views of the application of Article 2 and 3.
17. Mr Habeltasie drew parallels with the 'deathbed' cases, where the European Court of Human Rights has found Article 3 violations.²⁸ These cases surround cases of illness treated in the sending state, but the risk of facing ill-treatment due to the illness in the receiving state. In this scenario, the imminence of death is not relevant per se, rather the imminence of death if treatment is no longer available due to removal of an individual suffering from an illness. Could there be a similar approach in relation to Article 2 cases (similarly to Mr Teitiota's claim)? In general, the Court has a long history of deciding Article 2 and Article 8 cases (Right to private and family life) in environmental cases. The Court has also shown its willingness to decide on climate change cases. But according to Mr Habeltasie, the questions that the Court will face are similar to those observed in the Human Rights Committee: issues of causation, threshold of harm and responsibility will present across jurisdictions if this becomes a human rights question. The much anticipated pending decision of the *Agostinho* case is raising issues of responsibility for climate change despite the International Law instruments that specifically discuss

²³ *Osman v The United Kingdom*, App No 87/1997/871/1083, 28 October 1998.

²⁴ *Öneryildiz v. Turkey* App no 48939/99 (ECtHR, 30 November 2004).

²⁵ *Budayeva and Others v Russia* App no 15339/02 (ECHR, 20 March 2008).

²⁶ *Kolyadenko and others v Russia* App no 17423/05, 20534/05, 20678/05 and 3 more (ECtHR, 28 February 2012).

²⁷ *Brincat and Others v Malta*, App no 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11 (ECtHR, 24 July 2014).

²⁸ For further analysis see Cathryn Costello, Michelle Foster and Jane McAdam, *The Oxford Handbook of International Refugee Law*, 2021, Oxford: OUP

climate change as a shared responsibility matter.²⁹ It is interesting, that the Court has asked questions concerning Article 3. Some interesting parallels can be drawn from the Advisory Opinion of the Inter-American Court of Human Rights, on whether infrastructure works that created damage to the marine environment, created liability under the American Convention on Human rights.³⁰ Here the Court identified a causal link between the pollution caused and the interference of human rights of those outside the territory due to this transboundary harm, looking at the right to the environment as a precondition to protecting other rights.

²⁹ Duarte Agostinho et autres c. Portugal et 32 Autres États, App no 39371/20.

³⁰ Inter-American Court of Human Rights, Environment and Human Rights, Advisory Opinion OC-23/17 Request by the Republic of Colombia, 15 November 2017.

6. Alternative Approaches and Ways Forward

18. Matthew Reed discussed the Individual Opinion of Committee Member Duncan Laki Muhumuza, who criticised the risk of setting too high a threshold in such circumstances.³¹ The Individual Opinion of Committee Member Vasilka Sancin expressed the view that there was a breach of Article 6 relying on the Report of the Special Rapporteur on the human right to safe drinking water and sanitation, following her 2012 mission to Kiribati, over the failure to implement national strategies for water resource improvement.³² This earlier report, according to Sancin, should have led the Committee to decide that New Zealand should have considered the report when deciding over Teitiota's deportation order, based on the right to dignity and the lack of potable water as claimed by Mr Teitiota.
19. Mathew Reed explained that there is not much to be done in terms of domestic law or national decision making to address climate change that could have changed the decision of the Human Rights Committee. According to Reed, the questions around the applicability of Article 6 of the ICCPR and climate change have already been discussed prior to this case, through an examination of imminence of risk and state responsibility. This was already covered in the domestic decisions over Mr Teitiota's challenge of his deportation. For the scholars and lawyers working in this area, this was not an unexpected development. The developing jurisprudence in Australia and New Zealand in the context of climate change and the discussion over the potential application of the non-refoulement principle, were confirmed by the decision of the Human Rights Committee. Admas Habeltasie agreed that there is not 'a particularly big leap to develop the non-refoulement case law into the climate change context. The difficulties are in terms of establishing severity, imminence and impact on an individual basis of harm and causation.'
20. Professor McAdam suggested that multiple alternative examples can be seen around the world that could provide possibilities of movement prior to harm materialising. She also highlighted the need for local, national, regional and global initiatives to address mobility in the context of climate change and disasters, such as the 'toolkit' set out in the Nansen Initiative's Protection Agenda.³³ Free movement agreements, plans for internal relocation and pathways for migration can avoid displacement under life-threatening circumstances.

³¹ Human Rights Committee, Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2728/2016, CCPR/C/127/D/2728/2016, 7 January 2020, Annex 1

³² Human Rights Council, Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Caterina de Albuquerque: Mission to Kiribati, A/HRC/24/44/Add.1, 28 June 2013

³³ The Nansen Initiative, *Towards a Protection Agenda for People Displaced Across Border in the Context of Disasters and the Effects of Climate Change* <<https://www.nanseninitiative.org/secretariat/>>.

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