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# *Teitiota v New Zealand: The Legal Position of Climate Change Refugees in the International Community*

**Halalisani Xulu\***

*Candidate Attorney, Cliffe Dekker Hofmeyr*

**Tawanda Gonzi\*\***

*LLM Candidate, University of the Western Cape*

## Abstract

*As a result of a “well-founded fear of being persecuted” for various reasons, people relocate from their home countries to seek a place of refuge in other countries.<sup>1</sup> Various States ratified the 1951 Refugee Convention Relating to the Status of Refugees, which sought to offer protection to refugees, by amongst other things, adopting a restrictive definition of a “refugee.”<sup>2</sup> The antagonistic inquiry emerges concerning whether this framework, especially the definition, is comprehensive of individuals who flee from their home countries to other countries because of devastating climatic conditions. This is more significant in the midst of the challenges of global warming. Against this background, this note will critically analyse the recent judgment by the United Nations Human Rights Committee (the Committee) cited as *Teitiota v New Zealand*.<sup>3</sup> Shortly, this case concerns an individual who had fled to New Zealand as he was a victim of devastating climatic conditions in his home country, however, New Zealand declared him as an illegal immigrant and thus deported him to his home country.*

\* LL.B Cum Laude (UFH); LLM (UCT).

\*\* LL.B (UFH); LLM Candidate (UWC).

1 Article 1A of the 1951 Convention Relating to the Status of Refugees.

2 1951 Refugees Convention.

3 CCPR/C/127/D/2728/2016.

*After exhausting all domestic remedies at his disposal under the New Zealand legal regime, he approached the Committee seeking relief. Although this case is reasoned on the basis of human rights, implicitly, the Committee appeared to indicate the Refugee Convention, 1951 (Convention) as the place of relief for climate refugees. The discussion will expand more on whether the word “refugee” as defined in the Convention accommodates climate change refugees, and how international human rights may be useful to States affected by climate change.*

**Keywords:** climate change; climate change refugees; Refugee Convention; *non-refoulement* principle

## 1 THE CRITICAL ANALYSIS OF THE RECENT DECIDED CASE OF *TEITIOTA*

The recent decision by the Committee concerns a married man, Teitiota (the author) from the small island of Tawara, in the Republic of Kiribati. Kiribati is an island found in the South-West Pacific Ocean which is facing rising ocean levels. In 2007, the author and his wife migrated to New Zealand on a residence permit because of environmental change and climate change impacts. This environmental change resulted in, amongst other things, water contamination, land degradation, and the destruction of crops. This was difficult for the author as he solely relied on farming for survival. When they migrated to New Zealand, they were granted a residence permit which expired on 3 October 2010. The author and his wife had three children and none of the children were entitled to citizenship in New Zealand. They made an application for recognition as refugees and/or protected persons in New Zealand. They were denied refugee status because they are not refugees as characterised in the Convention and under the domestic law of New Zealand.<sup>4</sup> Their applications for leave to appeal to the High Court, Court of Appeal, and Supreme Court were all dismissed, and the matter was brought to the Committee. The following analysis will be restricted to the decision of the Committee for purposes of this note.

### 1.1 The Interpretation of the *Non-refoulement* Obligations in context with the Right to Life as Per the International Covenant on Civil and Political Rights.<sup>5</sup>

The Committee, referring to its General Comment No. 31 of 2004, noted on the nature of *non-refoulement* obligations<sup>6</sup> according to which States “may not extradite, deport or expel a person from their territory if there are substantial grounds for believing that there is a risk of irreparable harm”<sup>7</sup> as contemplated in Article 6 of the International Covenant on Civil and Political Rights (ICCPR).<sup>8</sup> It has been contended that the *non-refoulement* principle has accomplished the status of international customary law.<sup>9</sup> Others even argue that it has reached

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4 *Teitiota v Chief Executive Ministry of Business, Innovation and Employment* 2014 173 (NZCA) 173; 2014 668 (NZAR); Xing-Yin Ni “A Nation Going Under: Legal Protection for Climate Change Refugees” 2015 *Boston Collage International and Comparative LR* 330–366 336.

5 UN General Assembly, International Covenant on Civil and Political Rights, 1967.

6 Molner “The Principle of *Non-Refoulement* under International Law: Its Inception and Evolution in a Nutshell” 2016 *Corvinus Journal of International Affairs* 1–11 5.

7 Paragraph 12 of General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant 2004.

8 Article 6 of ICCPR.

9 Coleman “Non-Refoulement Revised Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law” 2003 *European Journal of Migration and Law* 46–63; Chan “The Protection of Refugees and Internally Displaced Persons: *Non-Refoulement* under Customary International Law?” *The International Journal of Human Rights* 231–239 232; Goodwin-Gill *The International Law of Refugee Protection* (2014) 40.

the level of *jus cogens*<sup>10</sup> although, this view has been subject to criticism.<sup>11</sup>

The Committee noted that *non-refoulement* obligations in the Convention have a broader scope as compared to *non-refoulement* obligations under the International Refugee Law as they afford protection to immigrants who are not refugees according to the Refugee Convention.<sup>12</sup> Presumably, this is the rationale for the high threshold set by the Committee for the author to prove there is a substantial risk of irreparable harm if he is deported to Kiribati. However, notwithstanding that the threshold the Committee set in this case appears to be unreasonably high, in the face of unrefuted expert evidence by John Corocan, indicating the lack of water availability and land disputes that led to land fights, it is difficult to be persuaded how the Committee reached its decision. This is seemingly a norm when dealing with the *non-refoulement* principles in socio-economic related issues. This can be seen in the decision of the European Court of Human Rights in *N v United Kingdom*.<sup>13</sup> In this case, the court held that although the applicant's life expectancy will decrease if returned to their country of origin, it does not mean that there is a real risk of persecution.

However, in a dissenting judgment of the *Teitiota* case, the Committee panelist, Muhumuza, called for a human-sensitive approach to human rights issues.<sup>14</sup> It transpired that if the author returned to Kiribati, his health and that of his family was going to be at risk because his children had had their health deteriorate one time they had returned to Kiribati. Neither the Committee nor the State Party commented on the deterioration of the author's children's bad health issues (blood poisoning). The Committee failed to comment on how this is not a real risk or deprivation of life in Kiribati. As such, against this background, it is unconvincing how these factors were not substantial enough to indicate that the author may suffer irreparable harm if deported to Kiribati.

Climate change's effects are transboundary<sup>15</sup> and that must prompt international and collective responsibility for the mitigation and adaptation of climate change. Cooper<sup>16</sup> agrees with Gordenker<sup>17</sup> on the need to tackle refugee crises collectively as no one government can do it alone. Behrman and Kent<sup>18</sup> have argued that if the life of a refugee seeker is threatened, the sending State is bound by the principle of *non-refoulement*, and the principle will be applicable extraterritorially. Scott<sup>19</sup> argues that Annex II countries,<sup>20</sup> which includes New Zealand, have an obligation to align themselves with the *non-refoulement* principle in favour of persons who cannot return to host countries due to natural disasters because such Annex II countries are the

10 Allain "The *Jus Cogens* Nature of Non-Refoulement" 2001 *International Journal of Refugee Law* 533–558 538.

11 Worster "The Evolving Definition of the Refugee in Contemporary International Law" 2012 *Berkeley Journal of International Law* 94–160 105.

12 *Soehring v United Kingdom* 1989 11 (EHRR) 439.

13 *N v United Kingdom* [2008] ECHR 453 para 42.

14 *Teitiota* case para 1.

15 Gray, Tarasofsky, and Carlarne (ed) *The Oxford Handbook of International Climate Change Law* (2018) 502.

16 Cooper, "Environmental Refugees: Meeting the Requirements of the Refugee Definition" 1998 *New York University Environmental LJ* 480 486.

17 Gordenker *Refugees in International Law* (1987) 30.

18 Behrman and Kent (ed) *Routledge Studies in Environmental Migration, Displacement and Resettlement* (2018) 163.

19 Scott, "Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights" 2014 *International Journal of Refugee Law* 404 421.

20 Annex II countries are those which are not transitioning to the market economy. The UNFCCC places different obligations on countries in Annex I and Annex II.

greatest emitters. This obligation is seemingly a moral one rather than a legal one.

The issue which the Committee failed to address was the position of *non-refoulement* obligations in cases where socio-economic rights may be at risk if the refugee seeker is returned to the country of origin. The principle of *non-refoulement* has no direct link to climate change but it has been argued that there may be a link.<sup>21</sup> The Committee did not deny that the author, who argued that his rights to clean and healthy water, land, and housing were under threat in Kiribati, deserved protection under the principle of *non-refoulement* but instead, the Committee held that there was no evidence that there will be magnified effects if the author is returned to Kiribati.<sup>22</sup> The threshold used was high and unreasonable. Foster<sup>23</sup> argues that the block to the applicability of the *non-refoulement* principles to the potential violation of socio-economic rights is the inability of the sending State to ascertain whether the receiving State has failed to take steps to ensure the progressive realisation of the rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR).

## 1 2 Socio-Economic Dimensions of the Right to Life.

The flawed language used by the UNHRC failed to recognise various human rights that were at play in this case. These include socio-economic rights as they fall within the ambit of the right to life.<sup>24</sup> In *Hungary v Slovakia*,<sup>25</sup> the court stressed that there is an intrinsic relationship between the right to life and environment. This is dictated by the interconnectedness and interdependence between the right to life under the ICCPR and the co-minimum obligations under the ICESCR.<sup>26</sup> This view is affirmed by the Committee’s decision in the case of *Toussaint v Canada* where the panel reasoned as follows;

State parties have the obligation to provide access to existing health care services that are reasonably available and accessible, when lack of access to the health care would expose a person to a reasonably foreseeable risk that can result in loss of life.<sup>27</sup>

Socio-economic rights and civil and political rights are interlinked.<sup>28</sup> Some of the socio-economic rights provided for by the ICESCR, include the right to basic housing and supply of safe and potable water, and minimum essential food.<sup>29</sup> These rights are logically the impacts which affected Teitiota and his family: Human congestion and flooding have an impact on the right to housing, while seawater contamination deprives people of safe water to drink as well

21 Scott “Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights” 2014 *IJRL* 404 421.

22 *Teitiota* case para 9.7.

23 Foster “Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law” 2009 *New Zealand LR* 257 279.

24 *The Social and Economic Rights Action Centre and The Centre for Economic and Social Rights v Nigeria* Communication No. 155/96.

25 In the Case Concerning the Gabcikovo-Nagymaros Project (*Hungary v Slovakia*), Judgment of 25 September 1997, para 53.

26 Joseph “Extending the Right to Life under the International Covenant on Civil and Political Rights: General Comment 36” 2019 *Human Rights LR* 347–368 350; Wicks “The Meaning of ‘Life’: Dignity and the Right to Life in International Human Rights Treaties” 2012 *Human Rights LR* 199–220 206; Pasqualucci “The Right to a Dignified Life (*Vida Digna*): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System” 2008 *Hastings International and Comp LR* 1–32 9.

27 CCPR/C/123/D/2348/2014 Para 13; *Portillo Cáceres v Paraguay* CCPR/C/126/D/2751/2016, para 7.3.

28 Office of the High Commissioner for Human Rights “Economic, Social and Cultural Rights” <https://www.ohchr.org/en/human-rights/economic-social-cultural-rights> (accessed 07-06-2023).

29 UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 14: The Right to the Highest Attainable Standard of Health, 11, E/C.12/2000/4 <https://www.refworld.org/docid/4538838d0.html> (accessed 23-04-2020).

as food. Notwithstanding that the UNHRC is solely mandated to administer the ICCPR,<sup>30</sup> the broadness of the right to life necessitated the consultation of other human rights instruments as they contribute to the substance of the right in question. As such, this is a grave omission that serves as a magnet that attracts a critique against this judgment.

## 2 THE LACK OF RECOGNITION OF THE STATUS OF CLIMATE CHANGE REFUGEES UNDER THE REFUGEE CONVENTION

The plight that was faced by Teitiota and his family following the Committee's judgment requires an immediate revisit to the rights of persons displaced by climate change. Climate change displacements may be caused by sudden-onset events and slow-onset processes.<sup>31</sup> The Intergovernmental Panel on Climate Change warned that climate change will cause a large scale of human displacement.<sup>32</sup> It is estimated that by 2050, almost 200 million people would have been overtaken by such events.<sup>33</sup> This is problematic because, in the event that such people are expelled from the States where they seek refuge, they find themselves without anywhere to go. Teitiota found himself and his family going back to a society in crisis, in Kiribati.<sup>34</sup> This is a result of the *lacuna* which exists in international law, which raises a contention regarding the status of climate refugees under the Refugee Convention. The question which remains unanswered and open to debate is what should be done to protect climate change refugees? There are proposals that have been made to remedy this *lacuna*. These include a new international agreement on human rights for climate change refugees, a revision of the 1951 Convention, and a new Convention which offers temporary protection of climate change refugees whilst addressing the cause, to mention a few.

The definition of what constitutes a refugee was set out in the Refugees Convention, so as to protect non-European refugees, who fled to Europe as a result of world war.<sup>35</sup> Later it was adopted by most of the countries implementing their refugee status.<sup>36</sup> Therefore, the definition requires a "well-founded fear of being persecuted for reasons of race, religion, nationality, and membership of a particular social group or political opinion."<sup>37</sup> Only if there is a strict adherence to these prerequisites that those who are fleeing may be afforded refugee status by the host country.<sup>38</sup> The narrowness of this definition in the Convention serves as the point of reference within which the exclusion of climate refugees may be deduced.<sup>39</sup> As such urgent relief ought to be provided considering the predicted number of climate change refugees that may arise in the future. However, scholars are not in *ad idem* on the solutions they propose in

30 Article 11 of the ICCPR.

31 The Committee identifies sudden-onset events as "discrete occurrences" that affect people "...over a period of hours or days ..." and "... slow-onset effects (that) have a gradual, adverse impact on livelihoods and resources over a period of months to years." para 9.11.

32 Brookings LEC "Climate Change and Internal Displacement" <https://www.brookings.edu/research/climate-change-and-internal-displacement/> (accessed 26-04-2020).

33 Kyung-wha Kang "Climate Change, Migration and Human Rights, at the Conference on Climate Change and Migration: Addressing Vulnerabilities and Harnessing Opportunities" *Conference Paper* 2008 <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9162> (accessed 26-04-2020).

34 *Teitiota* case para 2.4.

35 Musalo *Refugee Law and Policy: A Comparative and International Approach* 3rd edn (2007) 36; Walker "Defending the 1951 Convention Definition of Refugee" 2009 *Georgetown Immigration LJ* 583–609 587.

36 Musalo *Refugee Law and Policy: A Comparative and International Approach* 36 587.

37 Article 1A of Refugee Convention.

38 Fragomen "The Refugee: A Problem of Definition" 1970 *Case Western Reserve Journal of International Law* 45–70 49.

39 Joanna "The Concept of 'Climate Refugee' towards a Possible Definition" 2019 *Briefing* [https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621893/EPRS\\_BRI\(2018\)621893\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621893/EPRS_BRI(2018)621893_EN.pdf). (accessed 24-04-2020).

this regard. Taimur<sup>40</sup> argues that although climate refugees may be facing persecution from environmental disasters, the Convention cannot accommodate climate change refugees for the fact that climate change does not belong to the enlisted grounds upon which the refugee seeker may be persecuted.

Keane proposes that the definition be expanded in the Refugee Convention in light of the advancement of international human rights law.<sup>41</sup> Like Taimur, Keane's perception is based on the fact that:

The five freedoms contained in the definition, i.e., freedom from persecution for reasons of race, religion, nationality, membership of a social group and political opinion, are all rights set forth in the Universal Declaration of Human Rights.<sup>42</sup>

Moreover, it must be noted that some regional conventions have extended the definition to include those fleeing "events seriously disturbing public order."<sup>43</sup> The same expansion is visible under the Cartagena Declaration on Refugees.<sup>44</sup>

Other authors criticise the expansion of the definition. Hong for instance argues that the expansion of the refugee definition to include climate change refugees "would open the door for the flood of climate change refugees which cannot be handled by the international community."<sup>45</sup> The UNHRC has indicated that expanding the refugee definition "could result in lowering standards for refugees and potentially undermine the entire refugee's regime."<sup>46</sup> Thus, the counter-arguments of scholars such as Kean and Hong as well as the UNHRC opinions on the refugees' classification raise a higher standard of scholarly persuasion against the broadening of the Refugees Convention definition.

Docherty and Giannini<sup>47</sup> posit that there must be a new legal instrument that deals with the human rights of climate change refugees, and humanitarian and international law which deals with people who have been displaced by climate change. They argue that this new instrument, which can be in the form of a protocol to the 1951 Refugee Convention or the United Nations Framework Convention on Climate Change, must guarantee human rights protection and humanitarian aid to the climate change refugees in host States, home States and international communities. Attention must not only be given to the change of laws but also to the institutions such as a global fund, coordinating agency, and a body of scientific experts.

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40 Taimur, "Climate Change Refugees: Should Applicant's Escaping the Sudden, Disastrous Onset of Climate Change be Accorded the Same Protection as Those Escaping Persecution?" 2021 *RSIL Law Review* 118 123.

41 Keane "The Environmental Causes and Consequences of Migration: A Search for the Meaning of Environmental Refugees" 2004 *Georgetown International Environmental LR* 209–224 216.

42 Keane 2004 *GIELR* 216.

43 Article 1(2) of the Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969; Okello "The 1969 OAU Convention and the Continuing Challenge for the African Union" *Forced Migration Review* 70–73 72; Wood "Who Is a Refugee in Africa? A Principled Framework for Interpreting and Applying Africa's Expanded Refugee Convention" 2019 *International Journal of Refugee Law* 290–320 293.

44 Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama.

45 Hong "Refugees of the 21 Century: Environmental Injustice" 2001 *Cornell Journal of Law and Public Policy* 323–348 339.

46 Mohamed "International Law Reform towards the Flood of Future Climate Change Refugees" 2010 *Indonesian Journal of International Law* 105–116 109; UNHCR "The State of The World's Refugees 2000: Fifty Years of Humanitarian Action" <https://www.unhcr.org/publications/sowr/4a4c754a9/state-worlds-refugees-2000-fifty-years-humanitarian-action.html> (accessed 29-04-2020).

47 Docherty, Bonnie and Giannini, "Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees" 2009 *Harvard Environmental LR* 349 372.

### 3 THE INTERNATIONAL HUMAN RIGHTS PERSPECTIVE: THE MEASURES THAT THE REPUBLIC OF KIRIBATI SHOULD HAVE TAKEN AGAINST THE MAJOR GREENHOUSE GAS (GHG) EMITTERS

States should protect the right to life (which must not be understood in a restrictive manner) by taking positive steps which value human life.<sup>48</sup> Human rights are interlinked with climate change related issues,<sup>49</sup> because climate change is largely caused by human actions, through GHG emissions.<sup>50</sup> It is a scientifically proven matter that developed countries like the United States of America and China are major GHG emitters.<sup>51</sup> In addition, the change of climate conditions in Kiribati implicated various rights which include the right to life and the right to food and shelter. Furthermore, the USA for instance as well as many other developed countries that emit GHG have ratified most of the Human Rights instruments including the Universal Declaration of Human Rights, the ICCPR, and the ICESCR. These instruments give rise to legal obligations against the party States, thus the people of Kiribati may invoke responsibility against the greenhouse gas emitters to advocate their rights. The human rights perspective is therefore of necessity in this regard as it emphasises the legal rights guaranteed by human rights documents that are ratified by many States and enforceable against emitting States.<sup>52</sup> This view is in line with the regulatory entrenched polluter-pays principle that those harming the environment should bear the cost of protecting it.<sup>53</sup>

### 4 CONCLUSION AND RECOMMENDATIONS

The judgment of *Teitiota* brought more confusion than clarity in respect of the status of climate change refugees in the international community. The committee appeared to imply that climate change refugees may be protected under the Refugee Convention, depending on the facts of the case. Such reasoning is misleading. The case has shown that there is a link between climate change and human rights law. There is still debate amongst scholars on whether the 1951 Convention includes persons displaced by natural disasters as refugees.

In addition, the committee considered whether the right to life may have been infringed by the party State in this case, viewing this through the lens of *non-refoulement* obligations. However, its reasoning on this point became sensitive to criticism as it failed to acknowledge various socio-economic dimensions that were at play in this case. The author's inability to enjoy his socio-economic rights threatened his right to life, as well as that of his family. This was evident from the deteriorating health of the author's child who was suffering from blood poisoning due to unhealthy water. The main judgment ignored the state of health of the author's daughter. Furthermore, the human rights approach is discussed above according to which States that are major emitters of GHG may be held accountable, as this contributes to climate change which subsequently tampers with the rights afforded to other States. However, notwithstanding the possible protection of climate change refugees under human rights frameworks, the legal status

48 Ramcharan (ed), *The Right to Life in International Law* (1985) 5.

49 Knox "Linking Human Rights and Climate Change at the United Nations" 2009 *Harvard Environmental L R* 478–498 481; Doudda "Human Rights and Climate Change" 2007 *Australian International LJ* 161–184 162; Keim "Climate Change and Human Rights" 2013 *Journal Jurisprudence* 305–318 307.

50 Duong "When Islands Drown: The Plight of Climate Change Refugees and Recourse to International Human Rights Law" 2010 *University of Pennsylvania Journal of International Law* 1239–1266 1253.

51 Global Carbon Atlas "Carbon Emissions" <https://globalcarbonatlas.org/emissions/carbon-emissions/> (accessed 03-06-2023)

52 Duong 2010 *University of Pennsylvania Journal of International Law* 1254.

53 United Nations "Rio Declaration on Environment and Development" Conference Paper 1992 [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_CONF.151\\_26\\_Vol.I\\_Declaration.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf) (accessed 23-04-2020); Wagner "International Investment, Expropriation and Environmental Protection" 1999 *Golden Gate University LR* 465–470.

of climate refugees in the international community remains unclear or undefined.

This case prompts the international community to address the *lacuna* in the law protecting climate change refugees or more broadly, climate change displaced persons (CCDPs). The question which arises is: what should happen to future climate change refugees or people who have been displaced because of climate change? This is so because the present Convention arguably does not protect climate change refugees. Hence, in our view, crafting a new instrument under a human rights framework, which will be ratified by willing States to cater to climate refugees, appears to be a viable solution. This Convention must also protect the rights of persons who have been internally and externally displaced because of climate change. This note thus agrees with Docherty and Giannini,<sup>54</sup> and Hodgkinson *et al.*'s<sup>55</sup> views that climate change refugees and CCDPs must have the right of *non-refoulement* and not the right to permanently settle where they have relocated.<sup>56</sup> This new convention must also differentiate refugees displaced by sudden-onset events and those by slow-onset event.

When invoking the *non-refoulement* principle under the 1951 Convention, the person seeking refugee status must show that there is a real risk of persecution upon their deportation. This is the reason we suggest a new convention because the real risk of persecution in climate change cases is different, especially considering that climate change effects may be caused by sudden-onset events and slow-onset events.

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54 Docherty, Bonnie and Giannini 2009 *Harvard Environmental R* 349 377.

55 Hodgkinson *et al.* "The Hour When the Ship Comes In: A Convention for Persons Displaced by Climate Change" 2010 *Monash University LR* 69 110.

56 This note could not discuss internal displacements because they were not an issue in the case under discussion.