

THE LEGAL STATUS AND LEGAL PROTECTION TOWARDS CLIMATE REFUGEES UNDER INTERNATIONAL LAW: A STUDY OF IOANE TEITIOTA CASE

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Abstract

This study aims to examine the legal status of climate refugees in international law according to the Ioane Teitiota case and how international law in general protects climate refugees. This study is a normative legal research. The types of approach used are statute, case, and conceptual approaches. The legal materials of this study comprise of primary, secondary, and tertiary legal materials. In collecting data this study used the library research data collection technique. The analysis technique used is the inductive reasoning method. The results of this study reveal that the 1951 Refugee Convention is unable to accommodate climate refugees. However, UN Human Rights Committee in its recommendation acknowledges the effects of climate change as one of the determining factor for the affected persons to seek asylum in other countries which triggers the enforcement of non-refoulement principle. The protection under international law towards climate refugees derive from state obligation to comply with the non-refoulement principle, ad hoc aids from other states influenced by Nansen Initiative's Protection Agenda, and the tangible protections provided by UNHCR and its cooperation with local authorities.

Keywords: *Legal status, Climate refugees, Legal protection under international law, Ioane Teitiota, Climate change.*

A. INTRODUCTION

The ever-evolving international community and the growing complexity of their problems are influencing international law development. The changes happening within international community demand a constant reevaluation towards the structure and provisions of international law (Shaw, M. N., 2017). One of which is the significant development within the regime of international refugee law, with the increasing phenomenon of people forced to leave their homes to seek asylums in other countries due to the effects of climate change.

Climate change threatens every aspects of human lives, including human settlement patterns. Although the effects vary depending on the region and society surrounding it, one of the biggest consequences of climate change is the volume of people forced to leave their homes since environmental destruction is affecting their livelihoods (Karakitapoglu, E. B. et al, 2017). These people are commonly referred to as "climate refugees".

The term "climate refugees" was first introduced in 1985 by Essam Al-Hinawi (1985). However, the efforts made by international community to overcome climate displacement have often been weak or without sufficient political support (Karakitapoglu, E. B. et al, 2017). Further, Dun and Gemenne (2008) argued that it is difficult and challenging to conclude a human movement, voluntarily or involuntarily, to be caused directly by

climate change. As a result, there is currently no consensus in international law on the definition and term used to describe climate change induced human movement (Weber, C., 2019). Thus, the term "climate refugees" has not been recognized by international law nor endorsed by the United Nations (Karakitapoglu, E. B. et al, 2017). In this study, the term "climate refugees" refers to people who are forced to leave their homes and seek asylums in other countries as a direct or indirect result of climate change.

One of the most pertinent case of climate refugee in international law is the Ioane Teitiota case (AF (Kiribati) [2013] NZIPT 800413). Ioane Teitiota is a Kiribati national, one of the most climate change risked country due to its low-elevation island position (Frohlich, C. J. & Klepp, S., 2018). In 2013, Ioane Teitiota applied for refugee status in New Zealand under Part 5 of 2009 New Zealand Immigration Act. The claim was based on "changes to his environment in Kiribati caused by sea-level-rise associated with climate change" (AF (Kiribati) [2013] NZIPT 800413).

Ioane Teitiota's refugee status application was dismissed by New Zealand Immigration and Protection Tribunal (IPT), and later by High Court of New Zealand and Court of Appeal of New Zealand in 2013 and 2014. The decisions of High Court and Court of Appeal were then supported by a Supreme Court decision in 2015 (Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment [2015] NZSC 107).

IPT, High Court, Court of Appeal, and Supreme Court of New Zealand are all sympathetic with the situation in Kiribati, however they also stipulated that “person seeking to better his or her life by escaping the perceived results of climate change is not a person to whom Article 1A(2) of the Refugee Convention applies” and decided that it was not for the Court to change the scope of Refugee Convention (Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment [2013] NZHC 3125; Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment [2014] NZCA 173). Following the Supreme Court decision, Ioane Teitiota was deported from New Zealand back to Kiribati in 2015. Ioane Teitiota then filed a complaint to Human Rights Committee (HRC) alleging New Zealand of violating his right to life by deporting him back to Kiribati (CCPR/C/127/D/2728/2016).

The increasing flow and intensity of climate change induced refugees within the international community show that this is an ongoing problem which needs to be solved. Without a firm legal stance, international law will keep on failing to protect climate refugees. Thus, this study will reflect on Ioane Teitiota case as a starting point to research the legal status and legal protection of climate refugees in international law.

B. RESEARCH METHOD

This study is a normative legal research. The approaches used are statute, case, and conceptual approaches. The legal materials of this study comprise of primary, secondary, and tertiary legal materials. In collecting data this study used the library research data collection technique. Library research is done by studying relevant literatures, books, laws, documents, and other research results and court decisions (Marzuki, P. M., 2014). Further, the analysis technique used is the inductive reasoning method which used specific facts as a starting point to arrive at a more generalized conclusion. Thus, inductive reasoning method will result in a general and abstract conclusion induced from a collection of specific and concrete facts (H., Ishaq, 2017).

C. RESULT AND DISCUSSION

1. The legal status of climate refugees in international law based on Ioane Teitiota case

There is currently no universally agreed legal definition on climate refugees. Refugee Convention itself has a set of rigid provisions and does not explicitly enclose climate induced persecution within the provided refugee definition. Thus, it creates a legal vacuum which caused a major hindrance in providing protection

towards asylum seekers who based their application on the effects of climate change.

The jurisprudence of Ioane Teitiota case and other climate change based asylum cases (one of which is the 2000 Refugee Appeal No. 72313) show the significance of interpreting Article 1 A (2) of Refugee Convention in refugee status determination. This interpretation is important since the consensus reached in relation to the scope and requirements to be recognized as a refugee in courts causes the legality of climate refugees to be questioned. Without a legal status, climate refugees will not be able to enjoy the legal protection provided within the Refugee Convention nor other international instruments. Thus, to deal with climate refugee problems, a firm legal recognition of climate refugees in international law is needed.

a. Interpretation of Article 1 A (2) of Refugee Convention as the basis to consider climate refugees recognition in international law based on international refugee law

Article 1 A (2) of Refugee Convention provided the qualification of a refugee, namely wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. In the context of climate refugees, the interpretation of Article 1 A (2) of Refugee Convention is significant to determine the status of a climate change induced refugee (Scott, M., 2020).

The gravity of Article 1 A (2) interpretation in climate refugee status determination could be noted in the Ioane Teitiota case. The judges of New Zealand IPT brought up two fundamental questions as the components to determine a refugee status, namely the chance of the appellant being persecuted if returned to the country of nationality and whether or not the persecution is based on a Convention reason (AF (Kiribati) [2013] NZIPT 800413). In interpreting the term “persecution”, New Zealand refugee law applies the “human rights-based”

interpretation as divulged by James Hathaway and Michelle Foster (AF (Kiribati) [2013] NZIPT 800413). This method of interpretation is based on the Preamble of Refugee Convention in which explicitly referred to UDHR, thus it can be concluded that the provisions under Refugee Convention was established by considering human rights principles and have a clear humanitarian object and purpose, in which become the background of individual provision interpretation (Hathaway, J. C. & Foster, M., 2014). Through this method of interpretation, "being persecuted" can emanate from the conducts of state actor or non-state actor, causing a violation of human rights (AF (Kiribati) [2013] NZIPT 800413).

In general, environmental degradation caused by climate change does not fulfill the requirements to be persecuted as provided in Refugee Convention due to its non-discriminatory nature. However, there is a complexity that could not be generalized and opens a pathway to recognize climate change as a Convention reason. IPT Judges in Ioane Teitiota case affirmed that this complex reality could be founded in a case of environmental degradation which occurred in a non-democratic state which does not respect the human rights of affected population and the possibility of social conflict caused by natural disasters or environmental degradation (AF (Kiribati) [2013] NZIPT 800413).

Thus, to enjoy Convention based protection, asylum seekers shall also based their refugee status on reasons within Article 1 A (2) as an addition to climate change reasons. In the context of Ioane Teitiota, the judges found that the situation in Kiribati does not fulfill these requirements, since there are not enough evidence on threats of persecutions caused by environmental degradation towards Ioane Teitiota if being sent back to Kiribati.

**b. Human Rights Committee Recommendation
CCPR/C/127/D/2728/2016 as a legitimization on the climate refugee status in international law based on international human rights laws**

On 15 September 2015, Ioane Teitiota filed a complaint to Human Rights Committee (HRC) alleging New Zealand of violating his right to life by deporting him back to Kiribati in accordance to Article 6 (1) of ICCPR:

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.

According to several documents (including General Comments and decisions on individual complaints) adopted by HRC, right to life is a fundamental, non-derogable right. A violation of Article 6 of ICCPR will therefore triggers the non-refoulement principle with a wider application than the one under Article 33 of Refugee Convention (Mohammed Alzery v. Sweden, CCPR/C/88/D/1416/2005).

In the context of climate refugees, what needs to be proven is whether or not an environmental degradation and climate change induced violence is a threat to one's lives which triggers the non-refoulement principle. HRC in its recommendation on Ioane Teitiota case decided that New Zealand did not violate Article 6 of ICCPR by deporting Ioane Teitiota back to Kiribati, however HRC also recognizes that without a robust national effort, climate change may expose individuals to an extreme risk of a violation of their right to life (Ioane Teitiota v. New Zealand (advance unedited version), CCPR/C/127/D/2728/2016, HRC). In other words, climate change may trigger non-refoulement obligation for sending state. Therefore, the HRC recommendation on Ioane Teitiota case becomes a new precedence to recognize that climate change is a threat to one's lives which triggers

the non-refoulement obligation and to recognize the existence of climate refugees in international law.

2. Legal protection towards climate refugees in international law

As the main instrument on refugee protection, Refugee Convention has yet to accommodate climate refugees in its provisions as shown in Ioane Teitiota case. Consequently, as a new category of refugee, climate refugees are not able to enjoy Convention-based protection. Exceptions could be made only if climate change as the basis of refugee status application also inflict a threat of persecution as provided in Refugee Convention. Therefore, a further study on legal protection towards climate refugee in international law is needed.

a. Non-refoulement principle as form of protection towards climate refugees

Article 33 (1) of Refugee Convention provided that no Contracting State shall expel or return 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. This principle is considered a customary international law which makes it an obligation for every state despite their relations with Refugee Convention (Nicholson, F. & Kumin, J., 2017). This view is based on a consistent practice combined with a collective recognition by States that the principle has a normative character (UNHCR, 1994). Furthermore, this principle is adopted in various international and regional instruments regarding refugees, namely: a) Convention relating to the International Status of Refugees of 28 October 1933; b) The Convention relating to the Status of Stateless Persons of 28th September 1954; c) The United Nations Declaration on Territorial Asylum of 14 December 1967; d) The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU

Convention); and e) Cartagena Declaration on Refugees of 22 November 1984 (Kartagena Declaration). In international refugee law regime, OAU Convention and Cartagena Declaration are said to accommodate legal protections towards climate refugees. Both regional instruments provide a broader refugee definitions than one stipulated in Refugee Convention which included climate refugees by interpreting the phrase “have seriously disturbed public order” which encompasses the effects of climate refugees, thus triggering the non-refoulement obligation (UNHCR, 2021). Nonetheless, both instruments only apply regionally.

Non-refoulement principle also regulated under international human rights law in a more universal manner. It is explicitly provided in Article 3 of the 1985 United Nations Convention against Torture (CAT). It specifically regulates with regard to prohibition on tortures as an implementation on Article 7 of ICCPR. According to HRC’s interpretation as iterated by Tamás Molnár (2016), violation on Article 7 also triggers a broader application on non-refoulement principle than the one contained in Article 3 of CAT by extending the ban beyond torture to cruel, inhuman and other degrading treatment or punishment as well.

Furthermore, a violation on Article 6 of ICCPR which concerns the inherent right to life also triggers the application of non-refoulement principle. Right to life is also contained in several international and regional human rights instruments (McAdam, J., 2012). According to OHCHR, right to life “encompasses existence in human dignity with the minimum necessities of life” (E/CN.4/RES/2005/16). Meaning, the right to life can only be guaranteed if other human rights including right to health, prohibition of torture, and minimum standard of life are also respected (Sciaccaluga, G., 2020). Climate change, in this manner, has a

significant role in threatening the enjoyment of right to life as supported in Human Rights Council Resolution A/HRC/RES/48/13 and the HRC recommendation in Ioane Teitiota case.

b. Nansen Initiative and the Protection Agenda

In October 2021, Norway and Switzerland initiated Nansen Initiative, a state-led consultative process outside of the UN in order to build a consensus in international community addressing the issue of cross-border displacement in the context of climate change (Kälin, W., 2015). The consultation results are consolidated in a global consultation held in 12-13 October 2015 in Geneva which resulted in The Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (Protection Agenda).

Protection Agenda is a non-binding recommendation, supported by 109 states including New Zealand. The objective of Protection Agenda is to support states and regional organizations in implementing the recommendations into their own normative frameworks in accordance with their specific situations and challenges to prevent, avoid, and respond to climate change induced cross-border displacement (Karakitapoglu, E. B. et al, 2017). An important note is that Nansen Initiative does not support the term climate refugees, however it recognizes the role of international refugee law, international human rights law, and other international, regional, and national instruments regarding refugees in protecting people forced to leave their homes due to the effects of climate change.

Since the adoption of Protection Agenda, there has been various national and international implementations towards the protection of people forced to leave their homes due to climate change. In international scale, notable development is shown in the

adoption of Global Compact for Safe, Orderly, and Regulated Migration (GCM) and Global Compact on Refugees (GCR). GCM implemented the elements provided in the Protection Agenda, while GCR emphasized on the relevancy of OAU Convention and Cartagena Declaration in recognizing climate change as one of the determining factor on cross-border displacement, including in refugees (Scott, M., 2019).

In national scale, protection towards cross-border displacement is often given in the form of humanitarian ad-hoc aids, as done by Denmark who is known to issue residence permits to people affected by famine in Afghanistan (Scott, M. & Garner, R., 2022). Further, Ethiopia has also claimed to act in accordance with OAU Convention while accepting climate change induced refugees like the 200,000 Somalis entering their territory (McAdam, J., 2016). Whereas regulatory, national implementation could be shown in Part 4 Swedish Aliens Act and part 2A of Finnish Aliens Act which governed the protection of refugees as result of natural disasters (Scott, M. & Garner, R., 2022).

c. The role of UNHCR in climate refugees protection

UNHCR (United Nations High Commissioner for Refugees) is a UN mandated body which has a humanitarian nature and aims to cooperate with governments to provide permanent solutions for refugees. According to Article 3 of UNHCR Statute, UNHCR works under the mandates of UN General Assembly or ECOSOC and is limited to provide protection towards Convention refugees. However, UNHCR also practices "good offices" outside of its mandates (UNHCR, 2013).

One of UNHCR's efforts to protect climate change induced displaced persons is by participating in Nansen Initiative and Platform on Disaster Displacement which develops cross-border displacement related

programs as a continuation of the Protection Agenda. UNHCR also cooperates with governments to provide humanitarian aids towards people forced to leave their homes due to the effects of climate change. As the majority of refugees live in "climate change hotspots", they are exposed to the risk of repeated displacements (Karakitapoglu, E. B. et al, 2017).

Further, UNHCR also adopted documents, recommendations, and reports to fulfill their function in supervising the implementation and proposing amendments towards international refugee law instruments. In the context of climate refugees, UNHCR adopted Legal Considerations regarding Claims for International Legal Considerations regarding Claims for International

Protection Made in the Context of the Adverse Effects of Climate Change and Disasters (legal consideration). It recognizes the threats of climate change which, in certain situation, could trigger the relevancy of Refugee Convention and recognizes the implementation

of OAU Convention and Cartagena Declaration as a relevant regional instrument concerning the protection of climate change induced displaced persons (Scott, M., 2022). Matthew Scott (2022) contends that the primary contribution of this legal consideration is the consolidation of jurisprudences, academic literature, and other legal materials to stipulate that legal protection towards climate refugees is broader than expected.

D. CONCLUSION

This study concludes that the decision on Ioane Teitiota case (New Zealand's domestic courts and HRC's recommendation) offers a new paradigm of potentials to legally recognize climate refugees in international law. Additionally, international law offers some protection towards climate refugees in form of state obligation to comply with the non-refoulement principle. Further, international law also provided protection based on ad-hoc aids provided by states on humanitarian grounds and the tangible protections given by UNHCR.

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