

# BOFAXE

## A SIGNIFICANT OPENING (Part 2)

### On the HRC's groundbreaking first ruling in the case of a "climate refugee"

#### — The HRC's Consideration of Admissibility

Responding to the argument made by the State party, laid out in the previous Bofax, the HRC recalls the victim threshold first established in the [Mauritian Women's Case](#) of 1981. In order to be recognized as a victim, the author of a communication must show that "he or she is actually affected". Although it is "a matter of degree how concretely this requirement should be taken", he or she "must demonstrate either that a State party has, by act or omission, already impaired the exercise of his [or her] right or that such impairment is imminent" (8.4). So far, so settled. However, it then continues to develop a notion of "imminence" specifically for deportations. It holds that in such cases, "the requirement of imminence primarily attaches to the decision to remove the individual, whereas the imminence of any anticipated harm in the receiving state influences the assessment of the real risk faced by the individual." The HRC concludes that Teitiota's claim does not concern a "hypothetical future harm but a real predicament" and that for the purpose of admissibility the author had sufficiently demonstrated a "real risk of impairment to his right to life" (8.5-8.6).

An interesting case for comparison is [Bordes and others v France](#) of 1997. In that case, French nationals residing in Tahiti had asserted violations *inter alia* of their right to life through underground nuclear testing in the South Pacific. The HRC dismissed the authors' argument that the underground tests would lead to deterioration of the geological structure of the relevant atoll, as "this [was] highly controversial even in concerned scientific circles". In 2013, this case led Sarah Joseph and Melissa Castan to [conclude](#) "that any future complaint by a person regarding the impact of global warming on his or her human rights might face difficulties in proving precise causation" (at 3.45). In 2020, the HRC responded to Joseph's and Castan's scepticism when it held that "the author sufficiently demonstrated, for the purpose of admissibility, that due to the impact of climate change and associated sea level rise [...] he faced [...] a real risk of impairment to his right to life".

#### The HRC's Consideration of the Merits

The author lost the case on its merits due to the HRC's deferential approach towards the evaluation of facts and evidence. The Committee held that in order to assess whether a deportation would violate Article 6 ICCPR "all relevant facts and circumstances [...] including the general human rights situation in the author's country of origin" must be taken into account. However, it then recalled that "it is generally for the organs of States parties to examine the facts and evidence of the case" and that "[i]n the present case, the Committee [...] must assess whether there was clear arbitrariness, error or injustice in the evaluation by the State party's authorities". After the poignant and far-sighted statements in the consideration of admissibility, one might consider this deferential approach and the finding that the author's rights were not violated because the treatment of his case by the state party did not suffer from said shortcomings somewhat underwhelming. However, reading the merits part closely, one finds some quite remarkable statements.

When discussing the author's argument that Kiribati would become uninhabitable within 10 to 15 years, the HRC took the opportunity to invite individual States parties as well as the international community as a whole to take action against climate change when it held that "without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 and 7 of the covenant, thereby triggering the *non-refoulement* obligations of sending states" (9.11). In this, the HRC recognized the international dimension of climate change as well as its direct and indirect implications for international human rights. Inaction in the face of global warming, can lead to violations of human rights and trigger *non-refoulement* obligations. Moreover, the HRC concluded by reminding States parties of their "continuing responsibility [...] to take into account in future deportation cases the situation at the time [...] and new and updated data on the effects of climate change and rising sea-levels" (9.14). Here, the HRC does not only highlight important (procedural) obligations of states when making decisions about deportation. The passage is also a statement against those who deny climate change and discredit scientific findings on the matter.

#### Outlook

There is certainly a lot to criticise and discuss about the ruling of the HRC. Due to the deferential approach taken by the HRC, the ruling is not the unconditional assurance that human rights protect those most affected by climate change which many have been hoping for. Moreover, the ruling raises challenging questions about its compatibility with the right to "enjoy a life in dignity" which the HRC acknowledged in its recent [General Comment 36 on the right to life](#). The two dissenting opinions make this more than clear. They both refer to the negative implications of the climate change for a life in dignity and emphasize that the standard of proof "should not be too high and unreasonable". Committee member Duncan Laki Muhumuza even called upon the HRC "to handle critical and significantly irreversible issues of climate change, with the approach that seeks to uphold the sanctity of human life." However, the clear statement of the HRC that "climate refugees" are not without protection, and that ways to make their voices heard and seek international justice are not closed *per se* is already rightfully [well-received in the human rights community and beyond](#). The ruling is a powerful contribution of the HRC to the discussion around human rights and climate change. It opens the door for further use of the human rights system to exert pressure on the international community to address issues of climate change effectively.

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