

The Refugee Burden of Proof: Legal Gaps and Future Considerations For Climate Migrants

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NOTE

THE REFUGEE BURDEN OF PROOF: LEGAL GAPS AND FUTURE CONSIDERATIONS FOR CLIMATE MIGRANTS

Aedan Raleigh*

As impacts of climate change become increasingly imminent and devastating, especially for the world's most vulnerable communities, climate processes and events have forced certain populations to flee their homes. Climate refugees, also called environmental or climate migrants, describes those displaced by environmental disruption; however, international law has yet to delineate how these individuals fit into current refugee law or other areas of immigration assistance. This paper begins by examining current international refugee law, challenges to seeking asylum, and how this applies, or fails to apply, to climate migrants. I will then explore the burden of proof for the principle of non-refoulement and the difficulty in its application to those displaced by climate change. The United Nations Human Rights decision in the landmark case of Ioane Teitiota v. New Zealand, provides significant insight into the state of climate-caused displacement and highlights future paths in addressing this issue. Ultimately, I will argue that the current administration of international refugee law does not sufficiently accommodate climate migrants, and additional changes and considerations are required to appropriately handle the rapidly growing climate migrant crisis.

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I. INTRODUCTION

Climate change is no longer a discussion of future repercussions of inaction or physically distant manifestations. An urgent global response is needed to limit and adapt to the impacts of climate change that are already being felt. The 1.1^o Celsius increase in global temperatures since the nineteenth century has already caused visible and intense changes to the climate, and it is expected that global temperatures will rise at least another 1.5^o C in the next twenty years.¹ However, some scientists estimate that a warming of 4^o C may be a more realistic estimate.² This continuing temperature increase is largely caused by the burning of coal, oil, and gas for energy, and its effects are being felt globally. The existence of many small island states is being threatened by the rapid rise in sea levels.³ Further, extreme weather events are increasing food and water insecurity; and human health is being impacted by severe temperature changes and the spread of disease.⁴ These are only a few of the effects that are already being felt globally. These impacts are interrelated and disproportionately impact vulnerable populations, including indigenous peoples, communities of color, low-income communities, women, and members of the LGBTQ+ community.⁵

1. See Brad Plumer & Henry Fountain, *A Hotter Future Is Certain, Climate Panel Warns. But How Hot Is Up to Us.*, N.Y. TIMES, <https://www.nytimes.com/2021/08/09/climate/climate-change-report-ipcc-un.html> [<https://perma.cc/WAF6-33WQ>] (Nov. 11, 2021) (explaining how the 1.1^oC increase in temperature has resulted in devastating impacts, including deadly heat waves and natural disasters).

2. See J.B. Ruhl & Robin Kundis Craig, *4°C*, 106 MINN. L. REV. 191, 199–200 (2021) (considering the potential impacts of a 4^o C warmer world and policies that the government should adopt to respond).

3. See Plumer & Fountain, *supra* note 1 (“[E]very additional degree of warming brings far greater perils, such as ever more vicious floods and heat waves, worsening droughts and accelerating sea-level rise that could threaten the existence of some island nations.”).

4. See *Climate Change Impacts*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., <https://www.noaa.gov/education/resource-collections/climate/climate-change-impacts> [<https://perma.cc/Z484-SUKP>] (last updated Aug. 13, 2021).

5. See *Climate Changes Health: Vulnerable Populations*, AM. PUB. HEALTH ASS’N., <https://www.apha.org/topics-and-issues/climate-change/vulnerable-populations> [<https://perma.cc/4XAC-7VNV>] (last visited Jan. 29, 2023); Anuj Behal, *How Climate*

As climate change wreaks havoc globally, living conditions are worsening, and the existence of entire populations and nations are being threatened, forcing millions of the most vulnerable from their homes.⁶ While most displaced populations attempt to relocate within their home country, many are seeking safety in other countries to escape the chaos and destruction of their communities.⁷ The already difficult process of international migration, and of attempting to obtain refugee status in some cases, however, is made more difficult by the novelty of recognizing climate refugees and the unique circumstances forcing their movement. In this paper, I will use the term climate refugee to denote those who have been displaced across international borders by climate-related causes. It is also important to note that, despite the frequent use of the term climate refugee throughout this paper, the term “climate refugee” is not entirely accurate, well-defined, or acknowledged by the United Nations.⁸ Certain principles of international law govern the protection of refugees, such as non-refoulement,⁹ but the obstacles that climate refugees encounter make it more difficult to determine the exact burden of proof to reach these standards.¹⁰

While new and evolving methods of national and international environmental law will be necessary to mitigate the impacts of

Change is Affecting the LGBTQIA+ Community, DOWN TO EARTH (Jan. 11, 2021), <https://www.downtoearth.org.in/blog/environment/how-climate-change-is-affecting-the-lgbtqia-community-74988> [<https://perma.cc/TW65-FED6>].

6. See Tim McDonnell, *The Refugees the World Barely Pays Attention to*, NPR (June 20, 2018), <https://www.npr.org/sections/goatsandsoda/2018/06/20/621782275/the-refugees-that-the-world-barely-pays-attention-to> [<https://perma.cc/A4CQ-DCJ8>] (“Since 2008, an average of 24 million people have been displaced by catastrophic weather disasters each year. As climate change worsens storms and droughts, climate scientists and migration experts expect that number to rise.”).

7. See Frank Biermann & Ingrid Boas, *Protecting Climate Refugees: The Case for a Global Protocol*, 50 ENV'T: SCI. & POL'Y FOR SUSTAINABLE DEV. 8, 11 (2008).

8. See *Climate Change and Disaster Displacement*, UNHCR, <https://www.unhcr.org/en-us/climate-change-and-disasters.html/> (last visited Jan. 30, 2023) (“[T]he term ‘climate refugee’ is not endorsed by the [United Nations High Commissioner for Refugees], and it is more accurate to refer to ‘persons displaced in the context of disasters and climate change.’”).

9. Non-refoulement refers to the practice of not forcing refugees back to the country in which they are seeking refuge from. See Ellen F. D’Angelo, *Non-Refoulement: The Search for a Consistent Interpretation of Article 33*, 42 VAND. J. TRANSACTIONAL L. 279, 283 (2021).

10. See Guy S. Goodwin-Gill, *Non-Refoulement and the New Asylum Seekers*, 26 VA. J. INT’L L. 897, 902, 905 (1986) (discussing whether the claimant or the state should bear the burden of proof).

climate change, new laws will also need to be developed to accommodate the millions of people displaced as a result. Further discussion is also required to quickly define this situation in an inclusive and equitable manner. As many institutions are not equipped to deal with the forthcoming climate refugee crisis, it is becoming increasingly important to consider the technical burdens and challenges that many populations are already facing in combating these issues when developing laws tailored to address this crisis.¹¹ This includes several procedural adjustments, for example, access to identification.¹²

Section II of this paper provides a background on the history of international law governing refugees. This includes the current status of refugees, how they are defined, and the more recent pressures to further develop protections for growing class of climate refugees.¹³ Section III analyzes the elements of an international refugee's burden of proof to trigger non-refoulement provisions in a foreign country and the possible barriers that exist in a climate refugee context.¹⁴ Section IV addresses the potential gaps in protecting climate refugees as well as the policy considerations to develop law that adapts to the increased number of climate refugees.¹⁵ Ultimately, this paper will propose that the current international refugee law regime does not properly consider climate-displaced persons, and further clarification and development will be required to handle the increasing number of climate migrants or a separate area of law.

11. See McDonnell, *supra* note 6 (noting that global compacts are a start, but they aren't going to be sufficient to put an end to this crisis); Biermann & Boas, *supra* note 7, at 11–12 (discussing concern that the United Nations is not equipped, without major reform, to support climate refugees).

12. See, e.g., *Registration and Identity Management*, UNHCR, <https://www.unhcr.org/en-us/registration.html> (last visited Apr. 15, 2023) (Detailing how important certain procedures and documents, such as refugee identification cards, are for refugees seeking protection.).

13. See *infra* Section II.

14. See *infra* Section III.

15. See *infra* Section IV. It is important to note that, despite the frequent use of the term climate refugee throughout this paper, the term “climate refugee” is not entirely accurate, well-defined, or acknowledged by the United Nations. See *Climate Change and Disaster Displacement*, UNHCR, <https://www.unhcr.org/en-us/climate-change-and-disasters.html/> (last visited Jan. 30, 2023) (“[T]he term ‘climate refugee’ is not endorsed by the [United Nations High Commissioner for Refugees], and it is more accurate to refer to ‘persons displaced in the context of disasters and climate change.’”).

II. UNDERSTANDING INTERNATIONAL REFUGEE LAW

A. Categorizing Displaced Persons

Each year, millions of people are forced from their homes in pursuit of safety and protection that their home countries cannot provide. According to the 1951 Convention Relating to the Status of Refugees (“1951 Refugee Convention”), a refugee is a person who is either unwilling or unable to remain in their country of origin “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”¹⁶ As a result of conflict, human rights violations, persecution, and many other reasons, about 26.4 million people were categorized as refugees in 2020 and 27.1 million people were categorized as refugees in 2021.¹⁷ Over 68% in 2020 and over 69% in 2021 of all refugees came from either Syria, Venezuela, Afghanistan, South Sudan, or Myanmar;¹⁸ and the major host countries of these refugees were Turkey, Colombia, Pakistan, Uganda, and Germany.¹⁹ Additionally, children, who account for only 30% of the world’s population, make up about 41% of those displaced.²⁰

The term refugee, however, does not include all displaced populations. Many displaced populations are categorized as “internally displaced persons” (“IDPs”). IDPs are defined as “persons or groups of persons who have been forced or obliged to flee or to leave their homes . . . who have not crossed an internationally recognized State border.”²¹ IDPs are generally forced from their homes for reasons

16. G.A. Res. 429 (V), at 48 (Dec. 14, 1950).

17. See UNHRC, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2020 2 (2021), <https://www.unhcr.org/en-us/statistics/unhcrstats/60b638e37/global-trends-forced-displacement-2020.html?query=UNHCR%20Global%20Trends%202020> [hereinafter 2020 GLOBAL TRENDS REPORT]; UNHRC, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2021 2 (2022), <https://www.unhcr.org/62a9d1494/global-trends-report-2021> [hereinafter 2021 GLOBAL TRENDS REPORT]. While the 2021 report was updated before the war in the Ukraine, it likely influenced the figured. See 2021 GLOBAL TRENDS REPORT, *supra* note 17, at 6–7.

18. See 2020 GLOBAL TRENDS REPORT, *supra* note 17, at 2; 2020 GLOBAL TRENDS REPORT, *supra* note 17, at 2.

19. See 2020 GLOBAL TRENDS REPORT, *supra* note 17, at 2; 2020 GLOBAL TRENDS REPORT, *supra* note 17, at 2.

20. See 2020 GLOBAL TRENDS REPORT, *supra* note 17, at 3; 2020 GLOBAL TRENDS REPORT, *supra* note 17, at 3.

21. Rep. of the U.N. Secretary-General, *Guiding Principles on Internal Displacement*, ¶ 2, at 5 U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) [hereinafter *Guiding Principles on Internal Displacement*].

similar to that of refugees—conflict, violence, etc.—but they are afforded less definitive legal protections and are distinguished from refugees because they do not migrate across international borders.²² Despite the fact that IDPs do not cross international borders, that does not minimize the importance of their acknowledgement because over fifty-three million people are displaced within their country each year.²³ This term is especially important in the discussion of climate refugees, as the majority of those displaced by climate change relocate internally.²⁴ In addition to IDPs, many displaced populations are also categorized as “asylum-seekers.” The term “asylum-seekers” includes those who have left their home countries seeking protection, but they have yet to gain refugee status in a host country.²⁵ About 4.6 million people were classified as asylum-seekers in 2021.²⁶

B. Challenges Accompanying Displacement

In general, displaced persons face many challenges in their path to safety and are a source of some disagreements in how to develop sufficient international protection. Refugees and other displaced populations have significant difficulty accessing food, shelter, and

22. See Judy El-Bushra & Kelly Fish, *Refugees and Internally Displaced Persons, in* INCLUSIVE SECURITY, SUSTAINABLE PEACE: A TOOLKIT FOR ADVOCACY AND ACTION 1, 1 (2004) (Refugees have crossed international

borders and are entitled to protection and assistance from the states into which they move and from the international community through the United Nations (UN) and its specialist agencies. IDPs, on the other hand, are displaced within their own country. Although international law generally provides them with protection, there is no international law or standard specifically covering IDPs, and no UN agency is specifically mandated to ensure their welfare.”). For a discussion of the needs of IDPs and the rights and guarantees relevant to their protection, see generally *Guiding Principles on Internal Displacement*, *supra* note 21.

23. See 2021 GLOBAL TRENDS REPORT, *supra* note 17, at 2.

24. See McDonnell, *supra* note 6 (“[T]he majority of today’s climate refugees are displaced within the borders of their own country. . .”).

25. See *Refugees, Asylum Seekers and Migrants*, AMNESTY INT’L, <https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/> (last visited Nov. 20, 2021) (“An asylum seeker is a person who has left their country and is seeking protection from persecution and serious human rights violations in another country, but who hasn’t yet been legally recognized as a refugee and is waiting to receive a decision on their asylum claim.”); See UNHCR, GLOBAL REPORT 2012 203 (2013) (“An individual who is seeking international protection. In countries with individualized procedures, an asylum-seeker is someone whose claim has not yet been finally decided on by the country in which the claim is submitted.”).

26. See 2021 GLOBAL TRENDS REPORT, *supra* note 17, at 2.

healthcare.²⁷ Further, displaced populations are frequently victims of physical and sexual assault.²⁸ The COVID-19 pandemic left many seeking international protection stranded in their home countries as borders closed.²⁹ Despite this, the number of those forcibly displaced increased.³⁰ Displaced populations were also among the most vulnerable groups during the pandemic.³¹ Further, refugees are also frequently subject to harassment in their host countries for reasons of xenophobia and political disagreements that exists around how to address refugees in many countries.³² IDPs, although displaced within their home country, are often forced to relocate to overpopulated cities and precarious shelter situations.³³

Although the United States was previously one of the world's global leaders in resettling refugees, the Trump administration "drastically reduced the maximum number of refugees that could enter the United States."³⁴ Many new security measures instituted during the Trump administration also created several hurdles for asylum-seekers wishing to enter the United States, including more in-depth vetting measures and data collection.³⁵ These measures left refugees stranded in precarious situations even longer. In January 2017, President Trump issued an executive order which suspended refugee admissions into the United States for 120 days.³⁶ Additionally, the rhetoric surrounding refugees during this administration was that of economic burdens, security threats, and criminal activity, although

27. See *Guiding Principles on Internal Displacement*, *supra* note 21, ¶ 1, at 2 ("Internal displacement . . . denies access to such vital necessities as food, shelter, and medicine."); 2021 GLOBAL TRENDS REPORT, *supra* note 17, at 7, 14 (noting difficulties in accessing food and healthcare, respectively).

28. See *Guiding Principles on Internal Displacement*, *supra* note 21, ¶ 1, at 2; 2021 GLOBAL TRENDS REPORT, *supra* note 17, at 47.

29. See 2020 GLOBAL TRENDS REPORT, *supra* note 17, at 5.

30. See *id.*

31. *Id.* at 5–6.

32. See Nicola Poccock & Clara Chan, *Refugees, Racism and Xenophobia: What Works to Reduce Discrimination?*, OUR WORLD (June 20, 2018), <https://our-world.unu.edu/en/refugees-racism-and-xenophobia-what-works-to-reduce-discrimination>.

33. See McDonnell, *supra* note 6.

34. AM. IMMIGR. COUNCIL, AN OVERVIEW OF U.S., REFUGEE LAW AND POLICY 1 (2022), https://www.americanimmigrationcouncil.org/sites/default/files/research/10.22_overview_of_u.s_refugee_law_and_policy_fact_sheet.pdf.

35. See *id.* at 6.

36. See *id.* at 7; Exec. Order No. 13815, 82 FR 50,055 (Oct. 24, 2017).

this is not supported by most research.³⁷ The Biden administration has been actively trying to reverse this damage by raising the refugee admission cap, but this comes at a difficult time considering the multiple political crises and skewed global migration patterns caused by the COVID-19 pandemic.³⁸

C. Development of Refugee Law and its Application to Climate Refugees

Following World War II, millions of Europeans had either fled or lost their homes, and in 1950 the United Nations General Assembly created the United Nations High Commissioner for Refugees (UNHCR) to solve this issue and coordinate an international response.³⁹ While originally only intended as a three-year commission, the UNHCR has received several extensions and still functions today.⁴⁰ It has superseded several previous organizations governing refugees, including the International Refugee Organization (IRO).⁴¹ The key governing documents of the UNHCR and international refugee law are the 1951 Refugee Convention and its 1967 Protocol.⁴² The 1951 Refugee Convention, developed in reaction to those displaced by World War II, remains the only “binding refugee protection instrument of a universal character.”⁴³ This Convention was primarily concerned with the

37. See Hamutal Bernstein & Nicole DuBois, *The Debate Versus the Reality of Refugees in the US*, URB. INST. (Apr. 9, 2018), <https://www.urban.org/urban-wire/debate-versus-reality-refugees-us>; Hippolyte d’Albi et al., *Macroeconomic Evidence Suggests that Asylum Seekers are Not a “Burden” for Western European Countries*, 4 SCI. ADVANCE 1, 1–3 (2018).

38. See *How Many Refugees Will President Biden Welcome from Afghanistan and Other Countries?*, REFUGEE.ORG (Sept. 28, 2021), <https://www.rescue.org/article/how-many-refugees-will-president-biden-welcome-afghanistan-and-other-countries> (detailing President Biden’s decision to raise the refugee admission ceiling to 125,000 – significantly higher than the limitations under President Trump); see also *Migration Data Relevant for the COVID-19 Pandemic*, MIGRATION DATA PORTAL (Apr. 1, 2022), <https://www.migrationdataportal.org/themes/migration-data-relevant-covid-19-pandemic>.

39. See generally G.A. Res. 428 (V) (Dec. 14, 1950) (establishing the UNHCR); see also *History of UNHCR*, UNHCR, <https://www.unhcr.org/en-us/history-of-unhcr.html> (noting that the UNHCR was developed in the aftermath of World War II)

40. See *Office of the United Nations High Commissioner for Refugees: History*, THE NOBEL PRIZE, <https://www.nobelprize.org/prizes/peace/1954/refugees/history/> (last visited Nov. 20, 2021).

41. See *id.*

42. See *id.*

43. Erika Feller, *The Evolution of International Refugee Protection Regime*, 5 WASH. U. J.L. & POL’Y 129, 131 (2001).

status of refugees and state responsibilities, but it also created a definition of refugees and detailed some key principles in refugee law.⁴⁴

While the 1951 Refugee Convention was incredibly important to the development of refugee protections, it only contained the basics of refugee protections in international law.⁴⁵ In the midst of several global events, including the Hungarian Revolution and the decolonization of Africa,⁴⁶ greater international collaboration was needed to handle the surplus of refugees. In 1967 the Convention was amended to include the 1967 Protocol. The 1967 Protocol extended protections and elaborated on the scope of the refugee definitions.⁴⁷ The 1951 Refugee Convention and its 1967 Protocol remain the backbone of international refugee law, with 149 State parties to either or both.⁴⁸

Currently, one of the biggest conversations regarding the refugee crisis is the impact that climate change will have on the already high statistics of refugees. In 1990, the Intergovernmental Panel on Climate Change (“IPCC”) predicted that one of the biggest impacts of climate change is that of forced migration.⁴⁹ A report by the International Organization for Migration (IOM) divides the impacts of climate change into two categories: climate processes and climate events, both of which drive people out of their homes.⁵⁰ These impacts can force migration both directly and indirectly: directly through instances like the disappearance of coastal communities due to the rise of sea levels and desertification of regions and indirectly through conflicts over resources which can drastically threaten human health or

44. *See id.*

45. *See id.* at 132; *see also History of UNHCR, supra* note 39 (“The document outlines the basic minimum standards for the treatment of refugees, including the right to housing, work and education while displaced so they can lead a dignified and independent life.”).

46. *See History of UNHCR, supra* note 39.

47. *See Feller, supra* note 43, at 132.

48. *See The 1951 Refugee Convention, UNHCR*, <https://www.unhcr.org/en-us/1951-refugee-convention.html> (last visited Feb. 13, 2023).

49. *See OLI BROWN, INT’L ORG. FOR MIGRATION, MIGRATION AND CLIMATE CHANGE 9* (2008), https://publications.iom.int/system/files/pdf/mrs-31_en.pdf.

50. *See id.* at 17 (Climate processes include the increase in water scarcity, land degradation, and the rise of sea-levels, while climate events include the increased frequency in extreme weather events. Brown explains that climate drivers make certain regions or states uninhabitable as a result of climate change, forcing millions to leave their homes and seek refuge elsewhere. Further detailing that, “[climate processes] erode livelihoods and change the incentives to ‘stick it out’ in a particular location. Some women in the Sahel, for example, already have to walk up to 25 kilometres a day to fetch water. If their journey gets longer they will simply have to move permanently.”).

alter the way of life in communities.⁵¹ It is estimated that by 2050 the number of climate migrants will reach 200 million people.⁵²

Despite calls for protection, however, a clear international legal path for climate refugees does not yet exist. For example, there is an ongoing debate over whether these populations should be referred to as climate refugees, a term that conveys the situation's urgency while not necessarily legally correct, or climate migrants, a term that implies a voluntary decision.⁵³ Because refugee is defined under the 1951 Refugee Convention as those with a well-founded fear of persecution primarily for reasons of conflict and violence,⁵⁴ it is difficult for someone fleeing climate processes to obtain refugee status without a resulting conflict or severe event.⁵⁵ Although the 2021 United Nations Climate Change Conference, COP26, in Glasgow hosted a few events to discuss the climate refugee crisis, there were no major announcements on policy to specifically address climate displacement, except for general pledges to reduce contributions to climate change.⁵⁶ Some also see the funds pledged from developed countries to assist with developing countries' adaptation efforts, which are crucial to creating migration policy, as "woefully low."⁵⁷

III. NON-REFOULEMENT AND THE BURDEN OF PROOF

The customary principle of non-refoulement was established in Article 33 of the 1951 Refugee Convention.⁵⁸ Non-refoulement is the

51. *See id.* at 17–18.

52. *See id.* at 11.

53. *See id.* at 13–15.

54. *See Feller, supra* note 44, at 131–32 (discussing how the 1951 Refugee Convention defined refugee and put into place foundations of refugee protections).

55. *See McDonnell, supra* note 6 (While some climate migrants flee due to severe disasters, others are forced out by slow-onset changes to the environment, "which can make it hard to identify them as climate refugees.").

56. *See Human Mobility at COP26*, INT'L ORG. FOR MIGRATION (last visited Mar. 4, 2023), <https://environmentalmigration.iom.int/human-mobility-cop26>; Anna Palmer, *Transformative Climate Action Must Include Loss & Damage Suffered by Migrants*, CLIMATE REFUGEES (Oct. 27, 2021), <https://www.climate-refugees.org/spotlight/lossanddamage>.

57. *See Palmer, supra* note 56.

58. *See Goodwin-Gill, supra* note 10, at 897–98; *see also Customary International Law*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/customary_international_law (last visited Mar. 4, 2022) ("Customary international law refers to international obligations arising from established international practices, as opposed to obligations arising from formal written conventions and treaties. Customary international law results from a general and consistent practice of states that they follow from a sense of legal obligation.").

principle that “refugees should not be returned to face persecution or the threat of persecution.”⁵⁹ The theory behind this principle is that seeking asylum is primarily a humanitarian and social issue, therefore it should not create disputes between nations.⁶⁰ Additionally, it cannot be reasonably expected that those fleeing their country to avoid conflict or persecution can enter a country through normal migration measures, and refugees may face severe repercussions if they are turned away.⁶¹ In practice, the 1951 Refugee Convention takes a very individualized approach to refugee status, which benefits the human rights importance of asylum-seeking, but it also tends to blur definitions to prove refugee status.⁶² The burden of proving sufficient persecution to apply non-refoulement then becomes difficult as well, as a state could potentially be held liable for breaching conventional and customary international law.⁶³

A state which returns foreign nationals to a country known to produce refugees, or to have a consistently poor human rights record, or to be in a civil war or a situation of disorder, must therefore justify its actions in light of the conditions prevailing in the country of origin. The very existence of a program of involuntary return should shift the burden of proof to the returning state when the facts indicate the possibility of some harm befalling those returned for any of the above reasons.⁶⁴

Although this opinion seems to place the burden of proof on the State to prove that their refusal of entry was justified, generally the burden falls upon the refugee themselves to travel to a state government and prove their need for asylum.⁶⁵

Often refugees need to approach the UNHCR rather than another country because of the difficulty in finding a host country that is a party to the Convention and willing to take them in.⁶⁶ However, the UNHCR is often limited in its refugee status determination (“RSD”)

59. Feller, *supra* note 43, at 131–32.

60. *See id.* at 132.

61. *See id.*

62. *See* Goodwin-Gill, *supra* note 10, at 898.

63. *See id.* at 902.

64. *Id.*

65. *See id.* at 901–02.

66. *See* Michael Alexander, *Refugee Status Determination Conducted by UNHCR*, 11 INT’L J. REFUGEE L. 251, 251 (1999). Further, even some countries that are parties “do not have their own refugee status determination processes, so refugees cannot apply directly to those governments for recognition.” *See id.*

abilities because the 1951 Convention did “not prescribe any mechanism for determining whether or not someone is a refugee.”⁶⁷ Thus, the UNHCR often leaves this up to the state as to not intrude upon state sovereignty or government responsibility, which creates a lose-lose situation.⁶⁸ Despite this limitation, the UNHCR is often a resource for RSD best practices and guidelines for other countries.⁶⁹ The development of international human rights law has influenced how many countries have determined their own RSD guidelines.⁷⁰ Many of these RSD guidelines include administrative tribunals and judicial review, but practices vary greatly between governments and there is often unequal access to information for refugees.⁷¹ Understanding how refugee status is determined is important, however, because it determines whether a state should be held liable for a violation of their duty of non-refoulement when deciding to refuse a migrant entry at its borders.

The standard of proof for RSD primarily lies in the language of a “well-founded fear of persecution.”⁷² Best practices of the UNHCR hold that a well-founded fear “must be established to a reasonable degree.”⁷³ While the UNHCR considers it necessary to provide the refugee with the benefit of the doubt, labeling fear as reasonable or not is a difficult line to draw. The test in the United States “is whether there is a ‘reasonable possibility’ of persecution; in Canada whether there is a ‘reasonable chance’; in the UK, whether there is ‘a reasonable degree of likelihood’ of persecution; in Australia, whether there is a ‘real chance’ of being persecuted.”⁷⁴ Most courts also consider subjective and objective elements to prove this fear. The subjective component describes “the asylum seekers subjective fear of being persecuted if they return to their home countries.”⁷⁵ While the objective component “refers to the objective situation that asylum seekers must establish through evidence to help corroborate the subjective mental

67. *Id.* at 254.

68. *See id.*

69. *See id.* at 254 (“In 1977, the UNHCR Executive Committee recommended to governments that procedures should satisfy certain basic requirements and requested UNHCR to prepare a handbook for the guidance of governments.”).

70. *See id.*

71. *See id.* at 256.

72. *Id.* at 264.

73. *Id.*

74. *Id.* at 265 (citations omitted).

75. Grace Kim, *Abandoning the Subjective and Objective Components of a Well-Founded Fear of Persecution*, 16 *Nw. J.L. & Soc. Pol’y* 192, 193 (2021).

state.”⁷⁶ Many states claim that the seemingly semantic differences in standards often lead to confusion and variations in practices that negatively impact the efficiency of RSD.⁷⁷

The burden falls to the applicant refugee to produce evidence that proves a well-founded fear of persecution to a reasonable degree, but this burden varies depending upon the specific procedure being undertaken.⁷⁸ This includes the variations in proof between non-refoulement liability and establishing a *prima facie* RSD case.⁷⁹ The unique nature of the refugee situation creates a distinguished burden sharing scheme. Although the applicant has the burden to produce evidence showing their need for asylum, the decision-maker shares “the duty to ascertain and evaluate all the relevant facts.”⁸⁰ The evidentiary requirements also cannot be applied too strictly and must leave room for special situations, which means that the applicant may produce evidence displaying their situation through witness testimony or documentation but often only the applicant’s oral testimony is available.⁸¹ The UNHCR, non-governmental organizations, diplomatic organizations, and state governments have also been making efforts to disseminate information regarding significant events and regional situations.⁸² This flexibility is also important when considering the “potential seriousness of an erroneous negative decision and because objective evidence will frequently be unavailable or inaccessible . . .”⁸³ Therefore, states are encouraged to consider the difficulty in obtaining documentation and possible associated trauma when evaluating a case.⁸⁴

Although there is flexibility in the standard of proving refugee status, the applicant must “make sincere attempts to access and

76. *Id.*

77. *See* Alexander, *supra* note 66, at 266.

78. *See* Brian Gorlick, *Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status*, 15 INT’L J. REFUGEE L. 357, 361 (2003).

79. *See id.* (“[T]he standard of proof for excluding someone from refugee status or the level or proof required to determine that an individual has a *prima facie* refugee claim differs from inclusion considerations.”).

80. *Id.* at 362.

81. *See id.*

82. *See id.* (“In some national procedures, decision-makers commonly make use of sources of information which are not available to a refugee applicant including reports from diplomatic missions or fellow governments or even, in some cases, reports from security intelligence agencies.”).

83. *Id.* at 363.

84. *See id.* (listing the consideration of whether an applicant has established a well-founded fear).

present all the relevant facts and circumstances of his or her case.”⁸⁵ Once all relevant facts are presented, the primary concern is that of credibility, which is assessed by considering a variety of factors, such as the consistency of claims, the coherence of the testimony, and knowledge of the situation in the country of origin, among other factors.⁸⁶ Where an applicant can produce a story that is coherent, plausible, and aligns with generally known facts, the UNHCR Handbook says that the applicant should be given the benefit of the doubt.⁸⁷ Additionally, there has been a wide variety of case law that is very circumstantial considering how these burdens carry into past, present, and future fears. This becomes increasingly important with more abstract areas of causation, such as climate, where the primary concern stems from the future repercussions of present action, or inaction and projections of damage are speculative.⁸⁸

This evidentiary burden itself becomes less clear when immigrants are being driven from their homes by things like natural disasters or rising sea levels because causation is less direct. Generally, the type of conflict being avoided by refugees can be tracked to a clear starting point or cause, such as changes in leadership or cultural disputes.⁸⁹ In contrast, the effects of climate change often occur in slow-onset scenarios over several stages and may require rapidly changing scientific data to establish causation.⁹⁰

As previously detailed, in order to establish refugee status, the applicant must prove a subjective well-founded fear of persecution.⁹¹ However, many argue that persecution implies a requirement of a human driven cause of migration, which non-human climate processes

85. *Id.*

86. *See id.* at 371 (listing the credibility factors).

87. *See id.* at 366.

88. *See, e.g.,* *Mbonga v. Garland*, 18 F.4th 889, 892 (6th Cir. 2021) (Although a refugee can qualify based on “past persecution,” they should be denied status if the country has a fundamental change in circumstance, such as a shift in political power.); *Jian Hui Shao v. Bd. of Immigr. Appeals*, 465 F.3d 497, 501 (2d Cir. 2006) (clarifying that the “well-founded fear” requirement necessitated both a subjective fear and objective reasonableness, the latter of which they were unsure could be satisfied based on future fears).

89. *See* Jane McAdam, *From Economic Refugees to Climate Refugees?*, 10 MELB. J. INT’L L. 579, 583 (2009) (reviewing MICHELLE FOSTER, *INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGE FROM DEPRIVATION* (2007)).

90. *See id.*

91. *See* Alexander, *supra* note 66, at 264.

and events cannot satisfy.⁹² The definition of refugees under the 1951 Refugee Convention and 1967 Protocol considers also persecution “for reasons of race, religion, nationality, membership of a particular social group or political opinion”⁹³ While the Convention does not provide a strict limitation to those enumerated reasons, these categories of persecution fail to mention non-human caused, or indirectly human caused, factors leading to questions of whether the discussion of climate “refugees” is correct, or whether the definition of refugee should be changed.⁹⁴ Despite this, if considering a State’s human rights obligations to their citizens, these rights should be protected from both direct or indirect causes of violations by their governments, and “if the State fails to do so, then a claim for asylum could presumably be made.”⁹⁵

Even if establishing the persecution component of a well-founded fear could be addressed by direct or indirect human causation, the objective reasonableness of the fear comes into question when it is caused by climate change. This is because the individual claiming refugee status must prove a nexus between the persecution and the fear; in climate refugee cases they must present the likelihood of the persecution occurring.⁹⁶ When thinking of this from a more theoretical standpoint, would the nexus be created by the ocean encroaching upon your home eventually, or the likelihood of conflict over increased scarcity in resources? The answer is unclear, and it is even less clear when considering what qualifies as persecution.

The United States Supreme Court has reasoned that in the refugee context, the probability of persecution does not need to be more

92. For a discussion of the debate among academics, see Martha Cassidy-Neumiller, *Seeking Safety: The Case for Prima Facie Status for Climate Refugees* 7–8 (2021) (M.A. Thesis, McMaster University). https://www.academia.edu/58615434/Seeking_Safety_The_case_for_prima_facie_status_for_climate_refugees. On one hand, although climate events could lead to fatalities, they do not rise to the level of “persecution.” *See id.* On the other hand, it is persecution when a government cannot protect their citizens’ human rights. *See id.*

93. Convention Relating to the Status of Refugees, art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954); *see also* Katrien Steenmans & Aaron Cooper, *Ioane Teitiota v New Zealand: A Landmark Ruling for Climate Refugees?*, 25 COVENTRY L. J. 23, 27 (2020) (discussing the 1951 Convention definition of refugee and how it applies to climate refugees).

94. *See* Steenmans & Cooper, *supra* note 93, at 27. (“Climate migrants are thus not considered [refugees] under this definition because (1) they are not persecuted, (2) climate change is not one of the reasons accepted, and (3) climate displacement can be internal rather than to another country . . .”).

95. Cassidy-Neumiller, *supra* note 92, at 8.

96. *See* Kim, *supra* note 75, at 195 (discussing the nexus requirement).

likely than not.⁹⁷ The Court has gone so far as to say that a ten percent chance may be enough in some circumstances, citing a hypothetical:

Let us . . . presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have 'well-founded fear of being persecuted' upon his eventual return.⁹⁸

This example, however, is a statistic that appears to be easily calculable and isolated to a specific event or region.⁹⁹ In a climate change context, probability, while severe in many cases, is complex and variable in projections because it changes rapidly depending on human action and technological development. Thus, it is difficult to produce the direct and specific evidence that is required to support a claim.¹⁰⁰

In practice, attempting to prove causation and persecution through climate change has been a very difficult case to make. This is especially true for the small island developing states ("SIDS") who have contributed the least to global environmental degradation but are the most threatened.¹⁰¹

IV. CASE STUDY: IAONE TEITIOTA V. NEW ZEALAND

Recently, Iona Teitiota, a citizen of the Republic of Kiribati, attempted to become the first climate refugee when seeking asylum in New Zealand.¹⁰² Kiribati is a central Pacific SIDS that many believe will be the first nation to disappear under rising sea levels as a result

97. See *Immigr. & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) ("That the fear must be 'well-founded' does not alter the obvious focus on the individual's subjective beliefs, nor does it transform the standard into a 'more likely than not' one. One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.").

98. *Id.* (quoting A. GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 180 (1966)).

99. See *id.* (quoting GRAHL-MADSEN, *supra* note 98, at 180).

100. See Kim, *supra* note 75, at 195 (noting that applicants need "'credible, direct, and specific' evidence to support their claims" (quoting *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 444 (BIA 1987))).

101. See Steenmans & Cooper, *supra* note 93, at 23.

102. See *id.* at 23; see also *Teitiota v. The Chief Exec. of the Ministry of Bus., Innovation & Emp't* [2013] NZSC 3125, ¶ 51 (N.Z.) (finding that Teitiota's claims were "unconvincing").

of climate change.¹⁰³ Storm surges and flooding threaten citizens' access to safe freshwater, crop yields, and homes.¹⁰⁴ Further, rising sea levels are forcing those closer to the coast to retreat inwards, causing overcrowding and lack of space for agriculture, which has already resulted in violence among neighbors. Additionally, rising ocean temperatures put stress on coral reefs crucial to the island's infrastructure.¹⁰⁵

After difficulties accessing safe drinking water and facing land disputes in Kiribati, Teitiota and his family fled to New Zealand where they applied for refugee status in 2010 when his visa expired.¹⁰⁶ When New Zealand denied Teitiota's refugee application, he appealed in the New Zealand High Court, arguing that rising ocean levels and environmental degradation caused by climate change are forcing citizens to flee Kiribati.¹⁰⁷ However, the High Court did not find this reasoning persuasive in terms of satisfying the persecution requirement through human rights violations or harm.¹⁰⁸ The Court also expressed concerns of opening the floodgates to endless climate migrant cases based on the threats that Teitiota was facing.¹⁰⁹ On further appeal, the Court of Appeals again dismissed the refugee application stating that although climate change poses serious threats to one's livelihood, it does not fulfill the refugee definition under the 1951 Refugee Convention.¹¹⁰ In February 2016, Teitiota then brought suit against the government of New Zealand at the United Nations Human Rights Committee (HRC) for violating his right to life under their basic human rights obligations, gaining global attention to the climate refugee crisis.¹¹¹

103. See *Kiribati: The First Country Rising Sea Levels Will Swallow Up as a Result of Climate Change*, IBERDROLA, <https://www.iberdrola.com/sustainability/kiribati-climate-change> (last visited Feb. 6, 2023).

104.

105. See *id.*; *Republic of Kiribati*, UNION OF CONCERNED SCIENTISTS, <https://www.climatehotmap.org/global-warming-locations/republic-of-kiribati.html> (last visited Feb. 6, 2023); Steenmans & Cooper, *supra* note 93, at 25.

106. See *Teitiota*, NZHC 3125, ¶ 19.

107. See *id.* ¶¶ 6.

108. See *id.* ¶ 51.

109. See *id.*

110. See *Teitiota v. The Chief Exec. of the Ministry of Bus., Innovation & Emp't* [2014] NZCA 173, ¶¶ 21, 40–41 (N.Z.).

111. See U.N. Hum. Rts. Comm'n, Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2728/2016, U.N. Doc. CCPR/C/127/D/2728/2016 (Oct. 24, 2019) [hereinafter Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol].

The HRC found that Teitiota “did not establish that he faced a risk of an imminent, or likely, risk of arbitrary deprivation of life upon return to Kiribati.”¹¹² However, the Committee recognized that climate change can threaten an individual’s right to life, noting:

Reports indicate that sudden-onset events are discrete occurrences that have an immediate and obvious impact over a period of hours or days, while slow-onset effects may have a gradual, adverse impact on livelihoods and resources over a period of months to years. Both sudden-onset events (such as intense storms and flooding) and slow-onset processes (such as sea level rise, salinization, and land degradation) can propel cross-border movement of individuals seeking protection from climate change-related harm. The Committee is of the view 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 or 7 of the Covenant, thereby triggering the *non-refoulement* obligations of sending states. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized.¹¹³

Thus, “decision-makers need to take this into account when examining challenges to deportation.”¹¹⁴ Through each stage of appeal, the courts generally agreed that the evidence presented of Kiribati’s breakdown in the wake of climate change was credible.¹¹⁵ However, the causation simply did not fit within traditional definitions of international refugee law.¹¹⁶ This was a landmark decision by the Committee because, although Teitiota was not given the refugee status that he sought, the decision stated that, in future cases, climate change could be used to prove a human rights violation.¹¹⁷ Kate Schuetze, a Pacific

112. *Id.* ¶ 9.6.

113. *Id.* ¶ 9.11 (internal footnotes omitted).

114. See *UN Landmark Case for People Displaced by Climate Change*, AMNESTY (Jan. 20, 2020), <https://www.amnesty.org/en/latest/news/2020/01/un-landmark-case-for-people-displaced-by-climate-change/>.

115. See Simon Behrman & Avidan Kent, *The Teitiota Case and the Limitations of the Human Rights Framework*, 75 *QUESTIONS INT’L L.* 25, 27 (2020).

116. See *id.* at 27–29 (discussing why the claim repeatedly failed despite its credibility).

117. See Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, *supra* note 111, ¶ 9.11.

Researcher at Amnesty International, stated that the primary takeaway from this case is that “Pacific Island states do not need to be under water before triggering human rights obligations to protect the right to life.”¹¹⁸

Parts of the ruling, however, triggered further debate and raised questions that may be important to determine how to address the climate refugee crisis.¹¹⁹ Coventry Law School lecturers, Katrien Steenmans and Aaron Cooper, raise the question of “what changed for there to be explicit acknowledgement of the possibility of seeking asylum as a result of climate change effects?”¹²⁰ Whether it be media attention or scientific data displaying the urgency of climate pressures, Steenmans and Cooper believe that the answer to this question may be important in creating binding climate refugee measures.¹²¹ Additionally, the lecturers highlight the section of the *Teitiota* decision that encourages taking affirmative action on climate change and Kiribati taking adaptation measures.¹²² The decision specifically states,

[i]n the present case, the Committee accepts the author’s claim that sea level rise is likely to render Kiribati uninhabitable. However, it notes that the time frame of 10 to 15 years, as suggested by the author, could allow for intervening acts by Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population.¹²³

This reasoning has potential to harm the development of climate refugee law moving forward because SIDS, like Kiribati, are not, and have not in the past, substantially contributed to the climate crisis and cannot mitigate its affects single-handedly.¹²⁴ It also underrates the urgency of the climate crisis by requiring life threatening impacts projected to cause harm within the next ten years to be considered sufficient imminence to fall within the consideration of persecution.

118. *UN Landmark Case for People Displaced by Climate Change*, *supra* note 114.

119. See Steenmans & Cooper, *supra* note 93, at 27 (discussing the unanswered questions in light of the *Teitiota* ruling).

120. *Id.*

121. See *id.* at 27–28.

122. See *id.* at 28.

123. See Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, *supra* note 111, ¶ 9.12.

124. See Steenmans & Cooper, *supra* note 93, at 28 (“Climate change is a *wicked* and *collective action* problem, meaning that there is no single, simple, one-off solution, which no country can solve on its own.” (Footnote omitted)).

While significant debate remains as to where this decision leaves the development of climate refugee law, it has provided a clear outline as to where noteworthy gaps exist, and environmentalists, human rights activists, and legal scholars are asking more defining questions.

V. FUTURE CONSIDERATIONS

International refugee law is important in recognizing the specific definitions, governing bodies, and Convention standards in forming immigration customs. State-specific refugee law has been helpful in conceptualizing possible gaps in integrating those displaced by climate change. The case of *Ioane Teitiota v. New Zealand (Teitiota)*, has now provided novel insight into international human rights court attitudes towards the current state of affairs of the climate refugee crisis. Now that these questions of how to accommodate displaced people are being raised more frequently and with new possibilities, it is important to identify what these paths are and the specific considerations to account for when exploring them.

A. Adapting to Current Refugee Law

Attempts by scholars to further climate refugee law traditionally focused on figuring out how climate refugees can fit into refugee law as it was set out in the 1951 Refugee Convention.¹²⁵ The term climate refugee itself signifies this effort. While providing climate refugees with the protections (i.e., family unity, education, work, welfare, etc.) afforded to traditional refugees fleeing persecution would clearly be favorable, as previously established, those fleeing the impacts of climate change face unique barriers in the refugee burden of proof that would need to be addressed moving forward.¹²⁶

The first element of the refugee burden that will need to be clarified further in the courts, is how causation or probability of future persecution is best defined in the wake of developing scientific data. Between 2008 and 2016, the UNHCR estimated about 21.5 million people were forcibly displaced by climate change, with estimates of tens of millions more likely to be displaced within the next few

125. See, e.g., *id.* at 8 (discussing the issue of adopting a universal legal instrument for climate refugees).

126. See Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954) (providing the protections to be provided to traditional refugees fleeing prosecution); see also *supra* Section III (discussing the burden of proof requirement in the climate refugee context).

decades and thousands more left uncounted due to slower onset affects.¹²⁷ It is clear from this data that there is correlation between climate change and forced migration. Further, the courts in *Teitiota* did not dispute at least some causation between climate change and Teitiota's displacement.¹²⁸ Moving forward, attempts can be made to channel funding into climate displacement data collection for more accurate statistics on annual climate displacement. In the United States Supreme Court case of *INS v. Cardoza-Fonseca*, however, the court determined that "[o]ne can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place."¹²⁹ The court may consider the experiences of the migrant in their determination; however, the projections of these experiences could be considered speculative, could understate the severity of the situation and ignore the vulnerable populations most affected.

Another element that will need to be addressed is how persecution is defined, and whether it requires a direct, human-driven harm. When considering a state's positive obligation to protect against human rights violations and its negative obligation to not act in a way that violates a person's human rights, many scholars see a path for persecution to be reached when a state can no longer prevent human rights violations against its citizens.¹³⁰ In affirming the Global Compact on Refugees, The UN General Assembly recently recognized that "climate, environmental degradation and disasters increasingly interact with the drivers of refugee movements."¹³¹ This creates an assumption that the UNHCR is becoming more sympathetic to the lack of inclusivity of climate migrants within the persecution definition. If lawmakers wish to continue down the path of refugee law, however,

127. See THE WHITE HOUSE, THE REPORT ON THE IMPACT OF CLIMATE CHANGE ON MIGRATION 4 (2021).

128. See Behrman & Kent, *supra* note 115, at 27 ("The evidence detailed coastal erosion, increased storm surges and flooding, contamination of relatively scarce sources of potable water that in turn has caused diseases especially amongst young children, loss of land on which to live and grow food that has in turn led to violent disputes between neighbours. Specifically, it was accepted that these deteriorating conditions of life on the islands has been caused, at least partly, by the effects of climate change, both sudden and slow-onset. So clearly there was substantial evidence for a threat to life on Kiribati as a result of the effects of climate change.")

129. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

130. See Cassidy-Neumiller, *supra* note 92, at 8.

131. UNITED NATIONS, GLOBAL COMPACT ON REFUGEES 4 (2018).

climate change must be identified and defined within the Convention for clearer RSD practices.

The *Teitiota* Court also identified five benchmarks for an individual to obtain refugee status.¹³² Those elements require that the individual be: (1) involved in a land dispute or faced a real chance of being physically harmed in such a dispute in the future; (2) unable to find land to provide accommodation for himself (and family); (3) unable to grow food or to access potable water; (4) faced with life-threatening environmental conditions if returned; or (5) faced with a situation materially different than every other resident.¹³³ These factors provided significant clarity to questions of refugee definitions in a climate context. However, as international bodies, such as the UNHCR, continue to use uncertain language, like “there may be situations where . . . refugee law frameworks *could* apply,” it will be for independent state courts to broaden their definitions or look towards other paths of accommodation.¹³⁴

B. Human Rights Paths

A noteworthy strategy raised within the *Teitiota* case, is the possibility of climate migrants reaching asylum through human rights law.¹³⁵ In the decision, the HRC acknowledged the argument that the adverse effects of climate change may violate an individual’s right to life under Article 6 of the International Covenant on Civil and Political Rights (ICCPR).¹³⁶ Although *Teitiota* could not present evidence that, upon his return to Kiribati, his life would be jeopardized or that the violence occurring was “personal,” the Court explained that Article 6 imposed a positive obligation on states to provide basic necessities for life, interpreted broadly, so there was space for interpretation in a refugee context.¹³⁷

This strategy does not come without difficulty, however. The first of which is it’s a high threshold to meet. In this case, Kiribati lies

132. See Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, *supra* note 111, ¶ 2.8.

133. See *id.*

134. *Climate Change and Disaster Displacement*, *supra* note 15 (emphasis added).

135. See Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, *supra* note 111, ¶¶ 2.8, 9.5.

136. See *id.* ¶ 9.5 (“[S]evere environmental degradation can adversely affect an individual’s well-being and lead to a violation of the right to life.”).

137. See *id.* ¶¶ 2.9, 9.7.

mere meters above sea level and is already able to document clear, and at times, life threatening impacts from climate change that are endangering citizens quality of life.¹³⁸ The imminence requirement of Article 6 was still not met, with the Court claiming that ten to fifteen years before the island is uninhabitable is enough time to take action to change the situation¹³⁹ This implies that a state must be essentially uninhabitable in a matter of a few years in order to meet the imminence requirement of Article 6. It is difficult to imagine the circumstance that will trigger an Article 6 claim, but the Court did leave the door open for attempts and identified a three-factor test that must be satisfied.¹⁴⁰ To prove that a state has violated its obligation under Article 6, there must be “(1) an act or omission by government that indicates a risk that the individual would be deprived of life; (2) a sufficient degree of risk at the relevant time; and (3) a situation materially different from that of every other citizen.”¹⁴¹ This clear statement will force states to consider their climate change mitigation and adaptation tactics moving forward and provide an opportunity for individuals to pursue a legal claim against their government.

C. Redefining “Climate Refugees”

A topic that has been touched upon throughout this discussion, and perhaps the most important decision moving forward, is whether “climate refugees” will even continue to be the proper term for those displaced by the impacts of climate change. Some feel that the term “climate refugee” communicates the urgency of the situation, relates

138. *See id.* ¶ 2.4.

139. *See id.* ¶ 9.12 (“[T]he timeframe of 10 to 15 years . . . could allow for intervening acts by the Republic of Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population.”); *see also* Adaena Sinclair-Blakemore, *Teitiota v New Zealand: A Step Forward in the Protection of Climate Refugees under International Human Rights Law?*, OXFORD HUM. RTS. HUB (Jan. 28, 2020), <https://ohrh.law.ox.ac.uk/teitiota-v-new-zealand-a-step-forward-in-the-protection-of-climate-refugees-under-international-human-rights-law/> (“Finally, although expressly recognizing that both sudden-onset and slow-onset events caused by climate change create a real risk that Kiribati may become entirely submerged resulting in widespread population displacement, the HRC rejected that this risk was ‘imminent’ as required for there to be a violation of article 6.”).

140. *See* Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, *supra* note 111, ¶¶ 9.6, 9.7. Lucia Rose, *The World After Teitiota: What the HRC Decision Means for the Future of Climate Migration*, 12 SAN DIEGO J. CLIMATE & ENERGY L. 41, 58–60 (2021) (applying the factors set out by the Teitiota Court to a hypothetical “that could be successful in the eyes of the Committee”).

141. Rose, *supra* note 140, at 56 (footnote omitted).

to the persecution that is occurring primarily in vulnerable population, and properly “politicizes” the situation.¹⁴²

Others feel that refugee status is not a proper path for climate-induced migrants to seek sanctuary and that it has turned into a harmful colloquial term.¹⁴³ The settling of these discrepancies is not only crucial to developing legal strategies and procedural considerations moving forward, but it is also necessary to garner awareness and streamline existing efforts towards ameliorating the crisis.

One major reason that the term “climate refugee” may not be appropriate is that it does not provide a comprehensive illustration of the situation and is not inclusive of all affected.¹⁴⁴ First, it improperly ignores the fact that most forced climate migration happens internally.¹⁴⁵ For example, the indigenous Biloxi-Chitimacha-Choctaw tribe, currently residing on Isle de Jean Charles in the Gulf of Mexico off of the Louisiana coast, is being forced to resettle on the mainland and leave where has been their home for the past 200 years.¹⁴⁶ Due to extremely rapid sea level rise, the island has shrunk by ninety-eight percent since 1955 and levels are expected to rise another 1.41 and 2.72 feet by 2067.¹⁴⁷ These indigenous peoples’ are being referred to as “Louisiana’s first climate refugees.”¹⁴⁸ However, this term is not correct. The Biloxi-Chitimacha-Choctaw tribe did not need to apply for refugee status or cross international borders.¹⁴⁹ Most do not even need to leave the state. But, that is not to say that they are not seeing climate change completely disrupt their lives, culture, and livelihoods right in front of them.¹⁵⁰ This is just one of many examples globally of how the term “climate refugee” is not representative of the massive populations being displaced, which in some cases is preventing them

142. See François Gemenne, *One Good Reason to Speak of ‘Climate Refugees’*, 49 FORCED MIGRATION REV. 70, 71 (2015) (arguing that there are good reasons to use the term ‘climate refugee’).

143. See *id.*

144. See Dina Ionesco, *Let’s Talk About Climate Migrants, Not Climate Refugees*, UNITED NATIONS (June 6, 2019), <https://www.un.org/sustainabledevelopment/blog/2019/06/lets-talk-about-climate-migrants-not-climate-refugees/>.

145. See *id.*

146. See Robynne Boyd, *The People of the Isle de Jean Charles Are Louisiana’s First Climate Refugees—but They Won’t Be the Last*, NRDC (Sept. 23, 2019), <https://www.nrdc.org/stories/people-isle-jean-charles-are-louisianas-first-climate-refugees-they-wont-be-last>.

147. See *id.*

148. *Id.*

149. See *id.*

150. See *id.*

from accessing the necessary protections. Internal migrants make up the majority of climate refugees currently, as many primarily flee to urban areas in their home state or country.¹⁵¹

Another concern of maintaining current terminology includes weakening current refugee protections by adjusting the 1951 Refugee Convention.¹⁵² This could leave millions of persecuted individuals without the protections that they rely upon in the wake of crisis.¹⁵³ Also, in some situations, migration, although pressured by climate change, is not necessarily forced, which could exclude these populations from protection.¹⁵⁴ Many scholars also believe that the use of the term “refugee” will cause governments to lose focus on climate change mitigation and prevention measures or create lengthy and unnecessary new bodies of law instead of utilizing existing measures.¹⁵⁵

It is difficult to tell at this point whether the term climate refugee will continue to be used as a colloquial “catch-all” for those displaced by climate change, or whether a push for a more accurate and inclusive term may be necessary. However, it is worth reiterating that the UNHCR does not endorse the term “climate refugee.”¹⁵⁶

D. Additional Procedural Concerns

Additionally, with the projected increases in displaced persons in the near future, more procedural changes need to be made. For example, as tens of millions of people are expected to migrate within the next twenty to thirty years due to climate change identification, procedures will need to be put in place to accommodate the massive amounts of people.¹⁵⁷ Development expert, Erol Yayboke, at the Center for Strategic and International Studies recently stated that internally displaced people “fall through the cracks.”¹⁵⁸ Efforts are already underway to create global access to identification, including

151. See THE WHITE HOUSE, *supra* note 127, at 4.

152. See Ionesco, *supra* note 144.

153. See *id.* This point is especially important in consideration of current world events including recent conflict in the Ukraine and Afghanistan, among other nations, and the COVID-19 pandemic.

154. See *id.*

155. See *id.*

156. See *Climate Change and Disaster Displacement*, *supra* note 15 (“[T]he term ‘climate refugee’ is not endorsed by the [United Nations High Commissioner for Refugees], and it is more accurate to refer to ‘persons displaced in the context of disasters and climate change.’”).

157. See McDonnell, *supra* note 6.

158. *Id.*

Sustainable Development Goal 16.9, which aims to “provide legal identity for all including free birth registrations” by 2030.¹⁵⁹ Some other concerns include urban planning to accommodate additional immigrants and a variety of other adaptation and mitigation strategies.¹⁶⁰

VI. CONCLUSION

Unfortunately, this issue is not expected to improve, in fact, it is projected to become far worse. While many climate projections used for international cooperation efforts predict warming within the 2° C range this century, science is increasingly indicating this number will fall closer to 4° C.¹⁶¹ This difference of 2° C has the potential to create irreversible changes to the environment and trigger detrimental reactions within our natural systems.¹⁶²

While mitigation efforts, including attempting to minimize greenhouse gas emissions and concentrations in the atmosphere, are more important now than ever, governments around the globe need to recognize the rapidly developing and unavoidable modifications to millions of peoples’ lifestyles that is already occurring, through adaptation strategies.¹⁶³ It is crucial that international governing bodies and legal systems begin to make adjustments to substantive law and procedures regarding the climate refugee crisis. If those displaced by climate change are only provided with the option of claiming refugee status, then changes will likely need to be made to burdens of proving refugee status to trigger non-refoulement provisions, or at least cohesive messaging of refugee status possibilities within the United Nations will be required.¹⁶⁴ Furthermore, despite the HRC’s insistence that SIDS, like Kiribati, will not become uninhabitable for ten to fifteen years (i.e., not imminently), changes to migrant policy will need to be

159. G.A. Res 70/1, ¶ 16.9, at 25, Transforming Our World: The 2030 Agenda for Sustainable Development (Oct. 21, 2015).

160. See *id.* ¶ 34, at 9.; McDonnell, *supra* note 6.

161. See Ruhl & Craig, *supra* note 2, at 202.

162. See *id.* at 201–02.

163. See *id.* at 196.

164. See Rose, *supra* note 140, at 50 (identifying the factors detailed by the UNHRC in the *Teitiota* case for a climate displaced person to obtain refugee status). But see *Climate Change and Disaster Displacement*, *supra* note 15 (explaining that “the term “climate refugee” is not endorsed by UNHCR).

adjusted to accommodate climate migrants rapidly.¹⁶⁵ Migration policies must determine what level of urgency is imminent enough in light of this rapid progression.¹⁶⁶ Procedural problems will also exacerbate this issue to a greater extent as more and more people are forced from their homes which must be considered. This was discussed, albeit briefly, at the 2021 United Nations Climate Change Conference, COP26, in Glasgow although no major progress was made.¹⁶⁷

Possibly the most effective path to facilitate climate migration is to provide more detailed terminology that does not exclude populations from seeking safety or undermine the urgency of the crisis. Shifting away from the term “climate migrants” altogether may allow for more specific law making and prevent the abandonment of mitigation measures. However, following the recent developments from the *Teitiota* case, many are looking increasingly towards a human rights law approach in achieving refugee status, which could have strong potential to begin this adjustment.¹⁶⁸

Looking forward, the 2021 United Nations Climate Change Conference, COP26, in Glasgow hosted a few events to discuss the climate refugee crisis. However, there were no major announcements on policy to specifically address climate displacement, except for general pledges to reduce contributions to climate change.¹⁶⁹ In the United States, President Biden recently signed Executive Order 14013, titled “Rebuilding and Enhancing Programs to Resettle Refugees and Planning for the Impact of Climate Change on Migration,” which tasked security advisors to report on climate change’s impact on migration.¹⁷⁰ In October 2021, the White House released its first “Report on the Impact of Climate Change on Migration,” detailing the state of the crisis and how the United States is taking steps to best ensure “safe, orderly, and humane” migration strategies.¹⁷¹ While this is far too small of a

165. See Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, *supra* note 111, ¶ 9.10 (noting that the Republic of Kiribati will likely “become uninhabitable within 10 to 15 years”).

166. See Behrman & Kent, *supra* note 115, at 36.

167. See generally INT’L ORG. FOR MIGRATION, *supra* note 56 (discussing the phenomenon of people being forced from their homes).

168. See Behrman & Kent, *supra* note 115, at 33.

169. See generally INT’L ORG. FOR MIGRATION, *supra* note 56 (discussing major announcements on various policies).

170. See Exec. Order No. 14013, 86 Fed. Reg. 8839 (Feb. 4, 2021); see also THE WHITE HOUSE, *supra* note 127, at 4 (“This report marks the first time the U.S. Government is officially reporting on the link between climate change and migration.”).

171. See generally THE WHITE HOUSE, *supra* note 127 (providing an overview of climate change and its impact on migration and displacement, while also making

step in combatting the colossal issue of displacement, it is a necessary signal from the largest carbon polluter in history. Among other world powers, and, in the past two years alone, climate migrants have garnered global attention in politics, press, and international law.¹⁷² Whether a new legal regime is developed or refugee law is altered to include those displaced by climate events and processes, it is evident that this will be a pressing issue to solve in international, environmental, and immigration law among several intersections of human rights protections.

recommendations to help guide the United States in their approach to climate migration).

172. See Justin Gillis & Nadja Popovich, *The U.S. Is the Biggest Carbon Polluter in History. It Just Walked Away from the Paris Climate Deal*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/interactive/2017/06/01/climate/us-biggest-carbon-polluter-in-history-will-it-walk-away-from-the-paris-climate-deal.html>.