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A NATION GOING UNDER: LEGAL PROTECTION FOR “CLIMATE CHANGE REFUGEES”

XING-YIN NI*

Abstract: Climate change-related disasters displace millions of people each year. Small island states in the Pacific have become emblematic of the problem because they are among the most impacted and the most vulnerable. Often portrayed by global media as drowning beneath the sea, these states are struggling for their very survival. Many of their residents are looking to move overseas, but face a lack of legal options to migrate. A test case in New Zealand from a Kiribati national claiming to be a “climate change refugee” highlights the difficulty of fitting climate-induced migrants into the Refugee Convention mold. To grant refuge, deemed the persecutor, would have turned the refugee paradigm on its head. This case reveals the wide protection gap left by existing domestic and international laws for those hoping to flee their sinking homes. To fill this gap, it will be essential for domestic, regional, and multilateral bodies to proactively work together in developing and implementing effective strategies for migration.

INTRODUCTION

Sinking islands in the Pacific, drowning deltas in South and Southeast Asia, desertification across the West African Sahel and Mexico, and extreme weather events occurring with increasing frequency around the world—climate change-driven natural hazards are displacing millions of people each year.¹ The Intergovernmental Panel on Climate Change (IPCC) predicted in its first assessment report in 1990 that the “gravest effects of climate change may be those on human migration.”² Experts now estimate that by 2050, 200

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¹ See Benoit Mayer, *The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework*, 22 COLO. J. INT’L ENVTL. L. & POL’Y 357, 363–65 (2011); U.N. High Comm’r for Refugees, Summary of Deliberations on Climate Change and Displacement, ¶¶ 1–2 (Apr. 2011), available at <http://www.unhcr.org/4da2b5e19.pdf>, archived at <http://perma.cc/QK7H-A9G9> [hereinafter Summary of Deliberations].

² INT’L ORG. FOR MIGRATION, DISASTER RISK REDUCTION, CLIMATE CHANGE ADAPTATION AND ENVIRONMENTAL MIGRATION 2 (2010), available at http://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/env_degradation/DRR-CCA-Policy-Paper-Final.pdf, archived at <http://perma.cc/C3FF-P2TN>; Sumudu Atapattu, *Climate Change, Human Rights, and Forced Migration: Implications for International Law*, 27 WIS. INT’L L.J. 607, 618 (2009). The IPCC is the a scien-

million or more people will be displaced from their homes due to climate change.³

Accounts of displaced migrants have received widespread and often sensationalized media attention.⁴ In particular, the so-called “sinking island” phenomenon has become symbolic of the plight.⁵ Those displaced by climate change are often inaccurately dubbed “refugees,” which is a legal term of art that does not extend protection to those forced to relocate for environmental reasons.⁶ Current international law does not provide climate-induced migrants with mechanisms to secure resettlement rights or financial assistance.⁷ This wide gap left by law and policy has provoked vigorous academic debate and numerous proposals to address the problem.⁸ Although no single solution has been effective, recent developments suggest that the international community is making progress.⁹

Part I of this Note explores the complex relationship between climate change and migration, particularly in the Pacific island nation of Kiribati. Part II discusses a recent claim for “climate change refugee” status in New Zealand, which highlights the broad scope of climate-induced migration and the

tific body established by the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO) that provides assessment on the current state of knowledge in climate change and its potential environmental and socio-economic impacts. IPCC, <http://www.ipcc.ch/organization/organization.shtml#Uu5O6SjHk5Q> (last visited Apr. 4, 2014), *archived at* <http://perma.cc/L2NQ-3QLZ>.

³ See Frank Biermann & Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, 10 GLOBAL ENVTL. POL. 60, 68 (2010).

⁴ See, e.g., Lisa Friedman, *If a Country Sinks Beneath the Sea, Is It Still a Country?*, N.Y. TIMES (Aug. 23, 2010), <http://www.nytimes.com/cwire/2010/08/23/23climatewire-if-a-country-sinks-beneath-the-sea-is-it-sti-70169.html>, *archived at* <http://perma.cc/F3VF-KQSF>; Jeffrey Goldberg, *Drowning Kiribati*, BLOOMBERG BUS. (Nov. 21, 2013), <http://www.bloomberg.com/bw/articles/2013-11-21/kiribati-climate-change-destroys-pacific-island-nation>, *archived at* <http://perma.cc/8A6K-C3MD>; Gardiner Harris, *Facing Rising Seas, Bangladesh Confronts the Consequences of Climate Change*, N.Y. TIMES (Mar. 28, 2014), http://www.nytimes.com/2014/03/29/world/asia/facing-rising-seas-bangladesh-confronts-the-consequences-of-climate-change.html?smid=pl-share&_r=0, *archived at* <http://perma.cc/2WUG-GG9L>; Vanessa O’Brien, *When Kiribati Disappears, We’re Going to Die With Our Kids*, DEUTSCHE WELLE (Dec. 11, 2013), <http://www.dw.de/when-kiribati-disappears-were-going-to-die-with-our-kids/a-17282402>, *archived at* <http://perma.cc/7EVY-PHNM>.

⁵ See JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW 119–27 (2012) (discussing the impacts of climate change on island states through case studies of Kiribati and Tuvalu, two small Pacific island nations).

⁶ See *id.* at 42; Oli Brown, *Migration and Climate Change*, 31 IOM MIGRATION RES. SERIES 1, 13–14 (2008), *available at* http://www.iisd.org/pdf/2008/migration_climate.pdf, *archived at* <http://perma.cc/AD5Z-YPJZ>.

⁷ Sheila C. McAnaney, Note, *Sinking Islands? Formulating A Realistic Solution to Climate Change Displacement*, 87 N.Y.U. L. REV. 1172, 1174 (2012).

⁸ See *id.*

⁹ See MCADAM, *supra* note 5, at 268; U.N. High Comm’r for Refugees, High Commissioner’s Closing Remarks: 2010 Dialogue on Protection Gaps and Responses, at 2 (Dec. 9, 2010), *available at* <http://www.unhcr.org/4d0732389.html>, *archived at* <http://perma.cc/TC4E-FQJL> [hereinafter Closing Remarks].

limited scope of international refugee law. This Part also explores existing forms of protection for climate-induced migrants beyond the Refugee Convention. Part III examines the limitations of past litigation and considers alternative legal recourses that may be more effective for the Pacific region. This Note concludes by suggesting that a combination of legal and policy approaches—national, regional, and international—will be most successful at protecting persons fleeing from climate-induced environmental threats.

I. BACKGROUND

A. Climate Change and Migration

Scientists have established with increasing certainty that greenhouse gas emissions by industrialized nations are largely to blame for climate change.¹⁰ In 2014, the IPCC assessment report stated that “[w]arming in the climate system is unequivocal” and human influence is “*extremely likely* to have been the dominant cause of the observed warming since the mid-twentieth century.”¹¹ Although humans have long turned to migration to cope with environmental and climatic change, climate-induced migration today is particularly troublesome because of the speed with which it is predicted to occur and the vast number of people it is poised to affect.¹² As a result, the rate and scale of climate-induced migration will likely exhaust the traditional adaptive capacity of many human communities, placing them in vulnerable positions.¹³ For

¹⁰ See REPUBLIC OF KIRIBATI, NATIONAL ADAPTATION PROGRAM OF ACTION, at iii (Jan. 2007), available at <http://unfccc.int/resource/docs/napa/kir01.pdf>, archived at <http://perma.cc/B7K3-PSUE> [hereinafter NAPA]; Brown, *supra* note 6, at 12. The NAPA is an approach to enable least developed countries to communicate their immediate and urgent needs for adaptation to the United Nations Framework Convention on Climate Change (UNFCCC) Conference of the Parties. NAPA, *supra*, at iii.

¹¹ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT CONTRIBUTION OF WORKING GROUPS I, II AND III TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 2, 4, 47 (Rajendra K. Pachaur et al. eds., 2014), available at http://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full.pdf, archived at <http://perma.cc/ZC8N-29GZ> (“Human influence has been detected in warming of the atmosphere and the ocean, in changes in the global water cycle, in reductions in snow and ice, and in global mean sea level rise . . .”).

¹² See INT’L ORG. FOR MIGRATION, INTERNATIONAL DIALOGUE ON MIGRATION NO. 18: CLIMATE CHANGE, ENVIRONMENTAL DEGRADATION AND MIGRATION 17 (2012), available at http://publications.iom.int/bookstore/free/RB18_ENG_web.pdf, archived at <http://perma.cc/RXT9-R94Q>; Jane McAdam, *Swimming Against the Tide: Why a Climate Displacement Treaty is Not the Answer*, 23 INT’L J. OF REFUGEE L. 2, 2–3 (2011). In the Pacific region, there have been relocations of at least eighty-six whole communities, primarily driven by environmental factors. See MCADAM, *supra* note 5, at 143.

¹³ See MCADAM, *supra* note 5, at 2–3.

those facing environmental displacement, migration has become a “survival mechanism of last resort.”¹⁴

Adding to the urgency of the problem is the fact that environmental displacement disproportionately impacts developing countries, which already face a lack of food and mobility options.¹⁵ The sad irony confronting developing states is that, though they have contributed the least to greenhouse gas emissions, they will ultimately bear the brunt of the burden.¹⁶ Small island developing states are particularly vulnerable to the effects of climate change, given their limited territory, susceptibility to extreme weather events, and lack of resources to adapt to the effects of climate change.¹⁷ Continued sea level rise is expected to compound coastal hazards, such as storm surges and erosion, and to place the longevity of island communities at risk.¹⁸ The quality of water resources and human health are predicted to suffer as a result of climate change, as are the viability of fisheries and coral reefs.¹⁹ The experience of Kiribati, a small atoll state in the Pacific, is emblematic of many of these challenges.²⁰

B. Kiribati: A “Sinking” Nation

For Kiribati, one of the world’s lowest-lying nations, the Atlantis legend could become a reality.²¹ Located halfway between Australia and Hawaii in the Pacific Ocean, Kiribati is a string of 32 coral atolls and one island that

¹⁴ Gil Marvel Tabucanon & Brian Opeskin, *The Resettlement of Nauruans in Australia: An Early Case of Failed Environmental Migration*, 46 J. PAC. HIST. 1, 20 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1851910, archived at <http://perma.cc/A4U3-BTZK>.

¹⁵ Katherine H. Regan, *The Case for Enhancing Climate Change Negotiations with A Labor Rights Perspective*, 35 COLUM. J. ENVTL. L. 249, 271–72 (2010); U.N. High Comm’r for Refugees et al., Joint Submission: Human Mobility in the Context of Loss and Damage from Climate Change: Needs, Gaps, and Roles of the Convention in Addressing Loss and Damage, at 2 (Oct. 22, 2012), available at <http://unfccc.int/resource/docs/2012/smsn/igo/106.pdf>, archived at <http://perma.cc/656E-R7TU> [hereinafter Human Mobility].

¹⁶ Brown, *supra* note 6, at 31; see Katrina Miriam Wyman, *Responses to Climate Migration*, 37 HARV. ENVTL. L. REV. 167, 174–75 (2013).

¹⁷ See Roger McLean et al., *Small Islands*, in CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY: CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 689, 705 (M.L. Parry et al. eds., 2007), available at <https://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-chapter16.pdf>, archived at <https://perma.cc/CB83-4Z27>.

¹⁸ See *id.* at 689.

¹⁹ See *id.*

²⁰ See MCADAM, *supra* note 5, at 119.

²¹ *Id.* at 123; Lucy Craymer, *New Zealand Court Rejects ‘Climate Change’ Refugee: Justice Calls Pacific Islander’s Claim ‘Novel’ but Insufficient*, WALL ST. J. (Nov. 26, 2013), <http://online.wsj.com/news/articles/SB10001424052702304465604579221030617117194>, archived at <http://perma.cc/QXV3-46Q3>. Atlantis was “a legendary island, beautiful and prosperous, which sank into the sea.” NEW OXFORD AMERICAN DICTIONARY 101 (Elizabeth J. Jewell & Frank Abate eds., 2001).

straddles the Equator.²² The atolls reach a maximum of three to four meters above sea level, with most of the state only one to two meters above sea level.²³ Climate change threatens to erode habitability in the nation through frequent storm surges, coastal erosion, and increased salination.²⁴ The rate of sea level increase in the western Pacific is quadruple the global average, and climate scientists agree that the sea level surrounding Kiribati will only continue to increase.²⁵ According to a World Bank study, most of Tarawa, the nation's capital, will be submerged by 2050 if new adaptation measures are not adopted.²⁶

Yet climate change is not the only factor threatening Kiribati's long-term viability.²⁷ The United Nations (UN) has classified the nation as one of the world's forty-nine least developed countries based on three measures: poverty, human resource weakness, and economic vulnerability.²⁸ Unemployment is staggering; less than a quarter of the population have jobs.²⁹ Most of the people of Kiribati, who are called the I-Kiribati, survive through subsistence farming of indigenous tree crops.³⁰ Their livelihoods are thus highly vulnerable to coastal erosion, salination of soil, and other impacts of climate change on natural resources.³¹ Kiribati's problems are compounded by its rapid population growth.³² Half of Kiribati's population of 103,000 lives on the main

²² Gyles Beckford, *Pacific Man Seeks Climate Change Asylum in New Zealand*, REUTERS (Oct. 16, 2013), <http://uk.reuters.com/assets/print?aid=UKBRE99F05A20131016>, archived at <http://perma.cc/Y3R6-U529>.

²³ NAPA, *supra* note 10, at 4; Tony Abbott, *Man Seeks Refugee Status in New Zealand Over Global Warming: Pacific Islander Claims Rising Sea Levels Have Made It Too Dangerous to Go Home*, WALL ST. J. (Oct. 15, 2013), <http://online.wsj.com/news/articles/SB10001424052702304106704579136561870305846>, archived at <http://perma.cc/4Q6T-9Z95>.

²⁴ MCADAM, *supra* note 5, at 44; NAPA, *supra* note 10, at 5. Salination, or salinization, is the process of increasing the salt content in soil, eventually reaching a level that is toxic for plant life. See NAT. RES. CONSERVATION SERV., U.S. DEP'T OF AGRIC., SOIL QUALITY RESOURCE CONCERNS: SALINIZATION (1998), available at http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs142p2_053151.pdf, archived at <http://perma.cc/9KLLJ-57Y4>.

²⁵ Bernard Lagan, *Kiribati: A Nation Going Under*, APMEN (Apr. 18, 2013), <http://www.apmen.iom.int/en/m/blogs-and-opinions/266-kiribati-a-nation-going-under>, archived at <http://perma.cc/V2C4-7466>.

²⁶ See *AF (Kiribati) v Refugee Status Branch (RSB) of the Dep't of Labour* [2013] NZIPT 800413, ¶ 23; Lagan, *supra* note 25. Some suggested measures for Kiribati to adapt to the rising seas include constructing sea walls and planting mangroves. See Lagan, *supra* note 25.

²⁷ See MCADAM, *supra* note 5, at 124–25.

²⁸ *Id.* at 124.

²⁹ *Id.* at 125.

³⁰ NAPA, *supra* note 10, at 4; Maryanne Loughry & Jane McAdam, *Kiribati—Relocation and Adaptation*, 31 FORCED MIGRATION REV. 51, 51 (2008), available at <http://www.fmreview.org/FMRpdfs/FMR31/51-52.pdf>, archived at <http://perma.cc/W6KB-JQBM>.

³¹ See MCADAM, *supra* note 5, at 125.

³² *Id.* at 124.

island of Tarawa, the nation's capital and urban center.³³ Many have relocated there from the eroding outer islands in search of employment, causing the atoll's population density to rise above that of London, Hong Kong, and Bangladesh.³⁴

Infrastructure has not kept pace with population growth, and overcrowding has led to resource depletion and poor sanitation.³⁵ Runoff during heavy rains contaminates the groundwater, as does the human waste of squatters in Tarawa who live atop the atoll's main source of fresh water.³⁶ Climate scientists predict that states like Kiribati will become uninhabitable because of diminished water supplies many years before their landmasses disappear beneath the sea.³⁷ Lack of clean water coupled with lack of a functional sewage system has contributed to the spread of disease, such as cholera, dengue fever, diarrhea, and fish poisoning.³⁸ Climate change-induced increases in temperature and sea level are only expected to make disease even more frequent and severe.³⁹ In its most recent roundtable deliberation on climate change and displacement, the Office of the United Nations High Commissioner for Refugees (UNHCR) described how climate change "interacts with several global mega-trends, such as population growth, human mobility, urbanization, as well as food, water and energy insecurity" to multiply and accelerate migration and displacement.⁴⁰

The Kiribati government is desperately seeking to fight back against the devastation of climate change, displaying advertisements proclaiming "Adapt or perish!"⁴¹ Kiribati's president, Anote Tong, has explored countless measures to counteract and adapt to climate change.⁴² For several years, Kiribati has been building sea walls, and in 2011, President Tong traveled to Japan to learn about the possibility of constructing a floating island.⁴³ Nonetheless, he

³³ *Id.*; Jeffrey Goldberg, *Drowning Kiribati*, BLOOMBERG BUS. WK. (Nov. 21, 2013), <http://www.businessweek.com/printer/articles/169372-drowning-kiribati>, archived at <http://perma.cc/B2EX-DZ8B>.

³⁴ MCADAM, *supra* note 5, at 124–25; Lagan, *supra* note 25; Goldberg, *supra* note 33.

³⁵ See MCADAM, *supra* note 5, at 125.

³⁶ NAPA, *supra* note 10, at 16; Lagan, *supra* note 25. Kiribati's main source of potable water is the groundwater lenses, which are "the shallow underground bubble in which fresh water gathers when rain seeps through the ground." Lagan, *supra* note 25; see also NAPA, *supra* note 10, at 15–16.

³⁷ MCADAM, *supra* note 5, at 124.

³⁸ See NAPA, *supra* note 10, at 19.

³⁹ *Id.*

⁴⁰ Summary of Deliberations, *supra* note 1, ¶ 2.

⁴¹ Lagan, *supra* note 25.

⁴² See MCADAM, *supra* note 5, at 124 n.35, 137, 146, 202–03.

⁴³ See *id.* at 137; Lagan, *supra* note 25 ("A week earlier Tong had again garnered international headlines by putting forward a bizarre scheme that involved building floating metal islands off the Kiribati coast, at a cost of \$2 billion."); *Introduction of Mega-Float*, SHIPBUILDING RES. CENTRE

has stated that his nation has only thirty to sixty years of habitability left and has called for a policy of “migration with dignity.”⁴⁴ Claiming Kiribati is “beyond redemption” and “at the point of no return,” President Tong has encouraged neighboring states to open their doors to I-Kiribati who must flee their home country.⁴⁵ The gradual and staggered resettlement of I-Kiribati would be beneficial to both Kiribati and receiving countries: “[m]igration can help to relieve population pressure and fill skills shortages in other countries, thus providing a win-win situation.”⁴⁶

Despite the push for external migration, the citizens of Kiribati do not wish to be labeled as refugees.⁴⁷ The term “refugee” evokes “a sense of helplessness and a lack of dignity which contradicts the very strong sense of Pacific pride.”⁴⁸ Tessie Eria Lambourne, Kiribati’s foreign secretary, has stated, “[w]e do not want to be called refugees because that is very painful for both the people involved and those who are seeking help and those who are helping people look for new homes.”⁴⁹ Similarly, President Tong said in an interview, “when you talk about refugees—climate refugees—you’re putting the stigma on the victims, not the offenders.”⁵⁰

As explained more fully below, the I-Kiribati and legal scholars alike have criticized the use of the term “refugee” to describe persons fleeing climate change.⁵¹ Although talk of “climate change refugees” and islands disappearing under the sea are effective political tools in climate negotiations, these images also contribute to misunderstandings about the nature of climate change-related migration.⁵² By perpetuating a narrative of vulnerability, they

JAPAN, http://www.srcj.or.jp/html/megafloat_en/whatmega/what_index.html (last visited Apr. 4, 2015), archived at <http://perma.cc/YB8K-G57P>.

⁴⁴ Lagan, *supra* note 25 (“There’s no doubt that Tong’s doomsday scenario for his nation—and his savvy media skills—have generated much attention for Kiribati. In late 2011 the United Nations Secretary General, Ban Ki-moon, also focused international attention when he visited South Tarawa and planted mangroves to ward off sea erosion.”).

⁴⁵ *Id.* (“Some saw the president’s rhetoric as overblown, designed to garner more international aid for Kiribati, and to summon world leaders to do more to arrest the rate of climate change by setting definite time frames for reducing greenhouse emissions.”); see also MCADAM, *supra* note 5, at 202 (“The long-term strategy of the government of Kiribati is to secure ‘merits-based migration’ options to neighbouring countries like Australia and New Zealand, so that those who wish to move permanently have an early opportunity to do so. In this way, the President hopes that ‘pockets’ of I-Kiribati communities will build up abroad and I-Kiribati culture and traditions will be kept alive.”).

⁴⁶ MCADAM, *supra* note 5, at 202–05.

⁴⁷ See *id.* at 40.

⁴⁸ *Id.* at 40–41.

⁴⁹ Lagan, *supra* note 25.

⁵⁰ MCADAM, *supra* note 5, at 41.

⁵¹ See INT’L ORG. FOR MIGRATION, *supra* note 12, at 10; MCADAM, *supra* note 5, at 40; Angela Williams, *Turning the Tide: Recognizing Climate Refugees in International Law*, 30 L. & POL’Y 502, 522–23 (2008).

⁵² See MCADAM, *supra* note 5, at 120, 123.

have the potential to diminish the adaptation efforts of states like Kiribati and contribute to “a sense of fatalism that accelerates the[ir] demise.”⁵³ Yet the use of the term “climate change refugee” continues to be widespread, and there have been several asylum cases in Australia and New Zealand in recent years where citizens of Pacific islands have attempted to claim refugee protection for climate change impacts.⁵⁴ All have failed.⁵⁵

II. DISCUSSION

A. The “Climate Change Refugee”

The legal difficulties of classifying persons displaced by climate change as “refugees” are highlighted in a recent asylum case heard in New Zealand.⁵⁶ In *Ioane Teitiota v. Chief Executive of the Ministry of Business Innovation and Employment*, a Kiribati man pursued his claim to be a “climate change refugee” all the way to the High Court of New Zealand and the Court of Appeal of New Zealand.⁵⁷ Although other immigrants had made similar claims in the past, Teitiota’s bid was the first to reach these two appellate bodies.⁵⁸

⁵³ *Id.* at 120.

⁵⁴ See, e.g., *Refugee Appeal Nos. 72189–72195/2000* [2000] Refugee Status Appeals Authority 1, ¶ 8 (N.Z.), available at <http://www.refworld.org/docid/4d08cf7f2.html>, archived at <http://perma.cc/4QQE-PZ26>; 0907346 [2009] RRTA 1168, ¶ 22 (Austl.), available at <http://www.unhcr.org/refworld/docid/4b8fdd952.html>, archived at <http://perma.cc/EF4Y-7PQQ>.

⁵⁵ See *supra* note 54 and accompanying text.

⁵⁶ See André Leslie, *Kiribati Asylum Case Highlights Legal Void on ‘Climate Refugees,’* DEUTSCHE WELLE (Oct. 24, 2013), <http://dw.de/p/1A551>, archived at <http://perma.cc/J7YH-D6CP>; see also *Ioane Teitiota v. Chief Exec. of the Ministry of Bus., Innovation & Emp’t* [2013] NZHC 3125 (explaining the Tribunal and High Court’s rejection of Teitiota’s claim that he constituted a refugee under the Refugee Convention).

⁵⁷ See *Teitiota*, NZHC 3125, ¶¶ 17, 34–40; *Teitiota v. Chief Exec. of the Ministry of Bus., Innovation & Emp’t* [2014] NZCA 173. Established in 1841, the High Court of New Zealand has general jurisdiction and responsibility for the administration of justice throughout New Zealand. N.Z. MINISTRY JUSTICE, <http://www.justice.govt.nz/courts/high-court/high-court-home> (last visited Apr. 4, 2015), archived at <http://perma.cc/N835-8UD2>. Its jurisdiction extends over both criminal and civil matters, and it deals with cases at first instance or on appeal from other courts and certain tribunals. *Id.* Established in 1862, the Court of Appeal is New Zealand’s intermediate appellate court. N.Z. MINISTRY JUSTICE, <http://www.justice.govt.nz/courts/court-of-appeal> (last visited Apr. 4, 2015), archived at <http://perma.cc/8Y9Y-KSMB>. “Matters appealed to the High Court from a District Court and certain tribunals can be taken to the Court of Appeal with leave if a second appeal is warranted.” *Id.*

⁵⁸ See *Teitiota*, NZHC 3125, at ¶ 45; cf. Tara Brady, *World’s First Climate Change Refugee: Pacific Islander Asks New Zealand for Asylum as He Claims His Home Will Be Engulfed By Rising Seas*, DAILY MAIL (Oct. 17, 2013), <http://www.dailymail.co.uk/news/article-2464282/Climate-change-refugee-Pacific-Islander-asks-New-Zealand-asylum.html>, archived at <http://perma.cc/8HTF-3UWM> (describing Teitiota’s appeal to the High Court as a claim to be the world’s first climate change refugee).

Ioane Teitiota, a native of Kiribati, was born on a low-lying atoll located north of Tarawa.⁵⁹ Like many residents of outlying atolls, he moved to the capital city after high school in search of opportunity.⁶⁰ Unsuccessful in his search for work, he subsisted instead through fishing and farming.⁶¹ His brother-in-law, who worked in a local government agency in South Tarawa, provided him and his wife with supplemental financial support.⁶² Teitiota saw few prospects for his family in Kiribati and immigrated to New Zealand in 2007 with his wife.⁶³ After overstaying their work permits, they remained in New Zealand without legal status.⁶⁴ Their three children were born in New Zealand, but are not birthright citizens because of a 2005 amendment to the Citizenship Act 1977.⁶⁵ Arguing that rising sea level and environmental degradation forced them to leave Kiribati, Teitiota applied for refugee status under section 129 of New Zealand's Immigration Act 2009 and was promptly denied.⁶⁶ His appeal to the Immigration and Protection Tribunal was similarly dismissed.⁶⁷ He and his lawyer persisted, and arguments for his application for leave to appeal to the High Court of New Zealand were heard on October 16, 2013.⁶⁸

⁵⁹ See *Teitiota*, NZHC 3125, at 1; *AF (Kiribati) v Refugee Status Branch (RSB) of the Dep't of Labour* [2013] NZIPT 800413, ¶ 23.

⁶⁰ See *AF*, NZIPT 800413, ¶ 23; MCADAM, *supra* note 5, at 124.

⁶¹ See *AF*, NZIPT 800413, ¶¶ 23, 28.

⁶² See *id.* ¶¶ 28, 32.

⁶³ See *Teitiota*, NZHC 3125, ¶ 19.

⁶⁴ See *id.* Teitiota's first attorney failed to advise him that by overstaying his work permit for more than forty-five days, he was ineligible to apply for another visa in New Zealand. See O'Brien, *supra* note 4.

⁶⁵ *Teitiota*, NZHC 3125, ¶ 19, 6 n.10; see Citizenship Act 1977, § 6, 1977 S.N.Z. 61 (N.Z.) (amended 2005). Under the Citizenship Amendment Act 2005, an individual born on or after January 1, 2006, can only be a citizen by birth if at least one of the individual's parents is a New Zealand citizen or permanent resident. Citizenship Act 1977, § 6(1)(b), 1977 S.N.Z. 61; *Teitiota*, NZHC 3125, at ¶ 19 n.10. All of Teitiota's children were born after 2007 and do not meet this requirement. *Teitiota*, NZHC 3125 ¶ 19 n.10. Prior to this amendment, all persons born in New Zealand on or after January 1, 1949, were birthright citizens. *Id.*

⁶⁶ See *AF*, NZIPT 800413, ¶¶ 1–2, 76; *Teitiota*, NZHC 3125, ¶¶ 15–16. Teitiota's application for protected person status under section 131 of the Immigration Act 2009 was similarly denied. *AF*, NZIPT 800413, ¶¶ 1–2, 96.

⁶⁷ See *id.* ¶¶ 1, 98. Established by the New Zealand Immigration Act of 2009, the Immigration and Protection Tribunal is an independent body that hears appeals regarding residence class visas, deportation, and refugee claims. N.Z. MINISTRY JUSTICE, <http://www.justice.govt.nz/tribunals/immigration-protection-tribunal> (last visited Apr. 4, 2015), archived at <http://perma.cc/HE5X-ABZR>.

⁶⁸ See *Teitiota*, NZHC 3125, at 1. Section 245 of the Immigration Act 2009 permits a party to apply to the High Court for leave to appeal on the ground that the Tribunal's decision was erroneous on questions of law. *Id.* ¶ 35.

The High Court was tasked with determining whether Teitiota met the legal criteria to be recognized as a refugee under New Zealand law.⁶⁹ New Zealand defines refugee in accordance with Article 1A(2) of the 1951 Geneva Convention Relating to the Status of Refugees (Refugee Convention) and the associated 1967 Protocol, as a person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁷⁰

Refugee status confers not only legal status to remain in the host country and a promise to not be forcibly returned to the country of origin, but also certain legal rights.⁷¹ Parties to the Refugee Convention typically provide refugees with access to courts, education, work authorization, and travel documents.⁷²

1. Identifying a Persecutor

An initial challenge for Teitiota was that the cause of his displacement—climate change—was not human.⁷³ The Refugee Convention requires an identifiable, human actor to cause the harm.⁷⁴ In addition, the persecutor must

⁶⁹ See *id.* ¶¶ 12–16, 40. Teitiota also asked the High Court to consider claims related to his children. *Id.* ¶ 40. These were dismissed because they were not questions of law appropriate for the High Court’s jurisdiction. *Id.* ¶¶ 59–62.

⁷⁰ Geneva Convention Relating to the Status of Refugees art. 1, Jul. 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees art. 1, opened for signature Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; see *Teitiota*, NZHC 3125, ¶ 4. New Zealand defines “persecution” as “the sustained or systematic violation of basic human rights demonstrative of a failure of state protection.” *Teitiota*, NZHC 3125, ¶ 8.

⁷¹ See U.N. High Comm’r for Refugees, Introductory Note to Convention and Protocol Relating to the Status of Refugees 1, 3 (Aug. 2007), available at <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>, archived at <http://perma.cc/BBV4-FDUR> [hereinafter Introductory Note]. The prohibition against expelling a refugee to a country where his or her life or freedom would be threatened on account of one of the five protected grounds is referred to as the *non-refoulement* obligation. GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 117 (2d ed. 1996).

⁷² See Introductory Note, *supra* note 71, at 1, 3.

⁷³ See *AF (Kiribati) v Refugee Status Branch (RSB) of the Dep’t of Labour* [2013] NZIPT 800413, ¶¶ 54–55; *Teitiota v Chief Exec. of the Ministry of Bus., Innovation & Emp’t* [2014] NZCA 173, ¶ 24 (referencing Teitiota’s statement that “I do not fear persecution except for the persecution of mother nature.”).

⁷⁴ See Refugee Convention, *supra* note 70, art. 1.

be a government actor or a non-state actor that the government is unwilling or unable to control.⁷⁵

It is difficult to fit climate change into the persecutor mold.⁷⁶ For environmental migrants, it is unlikely that their home governments will have abandoned them to the throes of climate change; in fact, governments are likely to assist them in coping with the impacts.⁷⁷ Teitiota conceded that the government of Kiribati was taking measures to adapt to climate change, such as purchasing additional territory and building sea walls.⁷⁸ Nonetheless, he argued that the government was “powerless to stop sea-level rise” and was thus unwilling or unable to deal with climate change.⁷⁹ In addition, there was an absence of state protection in response to Kiribati’s overpopulation, a secondary act of indirect human agency.⁸⁰ These arguments did not bring Teitiota under the Refugee Convention, however, because he failed to present any evidence that the government of Kiribati did not “take adequate steps to protect him from such harm”⁸¹

Significantly, Teitiota also identified the international community—particularly the industrialized states—as a persecutor, responsible for causing two centuries of carbon emissions that contributed to rising seas and changing weather patterns.⁸² Rejecting this argument, the High Court found that the international community simply lacked any element of motivation to harm low-lying states like Kiribati.⁸³

2. Well-Founded Fear

The Refugee Convention also requires that the fear of persecution is well-founded.⁸⁴ The standard for well-founded fear, articulated in *Chan v. Minister for Immigration and Ethnic Affairs*, is entirely objective and requires “‘a real chance’ . . . as distinct from a remote chance, of persecution occurring

⁷⁵ See *id.*; Mayer, *supra* note 1, at 381.

⁷⁶ See MCADAM, *supra* note 5, at 45.

⁷⁷ Wyman, *supra* note 16, at 179; see generally Jessica Lucia Frattaroli, Note, *A State's Duty to Prepare, Warn, and Mitigate Natural Disaster Damages*, 37 B.C. INT'L & COMP. L. REV. 173, 173 (2014) (exploring whether a state has a duty to prepare for, warn of, and mitigate natural disaster damages).

⁷⁸ See AF, NZIPT 800413, ¶ 30. “Indeed, the Tuvaluan and I-Kiribati governments remain willing to protect their citizens, although the extent of their ability to do so over time is unclear.” MCADAM, *supra* note 5, at 45.

⁷⁹ See AF, NZIPT 800413, ¶¶ 30, 51.

⁸⁰ See *Ioane Teitiota v Chief Exec. of the Ministry of Bus., Innovation & Emp't* [2013] NZHC 3125, ¶ 46.

⁸¹ AF, NZIPT 800413, ¶ 75.

⁸² See *Teitiota*, NZHC 3125, ¶¶ 46, 55, 57; MCADAM, *supra* note 5, at 41–42.

⁸³ Cf. *Teitiota*, NZHC 3125, ¶ 55 (incorporating the Australia Refugee Review Tribunal’s reasoning that high carbon emitters are not persecutors under the Refugee Convention).

⁸⁴ See Refugee Convention, *supra* note 70, art. 1.

...⁸⁵ To bolster his fear of persecution, Teitiota presented ample evidence of the effects of climate change in Kiribati.⁸⁶ The Tribunal accepted Teitiota's evidence "in its entirety," but did not find evidence that his fear of future persecution was objectively well-founded.⁸⁷ If Teitiota and his family returned to Kiribati, their lives would not be in jeopardy and his brother-in-law would be able to provide his family with continued support.⁸⁸ Although their standard of living would be less than what they experienced in New Zealand, there was no evidence that Teitiota would face any physical danger in Kiribati or be unable to provide his family with food or water.⁸⁹

3. The Five Protected Grounds

Refugee status is limited to those who face persecution "for reasons of race, religion, nationality, membership of a particular social group, or political opinion."⁹⁰ Another fundamental difficulty Teitiota encountered was that the environmental impacts from climate change are largely indiscriminate and do not differentiate on account of one of the five Refugee Convention grounds.⁹¹ The effects of environmental degradation are felt by the entire population of Kiribati, rather than by Teitiota individually.⁹² Although the Tribunal acknowledged that "the environmental degradation caused by both slow and sudden-onset natural disasters" in Kiribati is a "sad reality," that reality did not bring Teitiota's experience within the scope of the Refugee Convention.⁹³

The High Court did recognize that "there is a complex inter-relationship between natural disasters, environmental degradation and human vulnerability," and that climate change could, in another case, produce a "tenable pathway" to protection under the Refugee Convention.⁹⁴ In fact, the Tribunal explicitly rejected a presumption against applicability of the Refugee Conven-

⁸⁵ *Chan Yee Kin v Minister for Immigration & Ethnic Affairs* (1992) 169 CLR 379 (Austral.); see *AF*, NZIPT 800413, ¶ 53.

⁸⁶ See *AF*, NZIPT 800413, ¶¶ 5–35. The Tribunal accepted evidence from the 2007 NAPA; John Corcoran, an expert on the economic and cultural impacts of climate change on the population of Kiribati; Teitiota; and his wife. *Id.*

⁸⁷ See *id.* ¶¶ 38, 53, 72–74.

⁸⁸ See *id.* ¶ 74.

⁸⁹ See *id.* ¶¶ 73–74.

⁹⁰ See Refugee Convention, *supra* note 70, art. 1.

⁹¹ See *Ioane Teitiota v Chief Exec. of the Ministry of Bus., Innovation & Emp't* [2013] NZHC 3125, ¶¶ 26, 28.

⁹² See *id.* ¶ 30; *AF*, NZIPT 800413, ¶ 75.

⁹³ *AF*, NZIPT 800413, ¶ 75. Sudden-onset disasters include "flooding, cyclones, storm surges, water-logging, salinity intrusion, and riverbank erosion," and slow-onset disasters include "processes like coastal erosion (predominantly through rising seas, but also hydrological dynamics) and land loss." MCADAM, *supra* note 5, at 163.

⁹⁴ *Teitiota*, NZHC 3125, ¶ 27; see also *AF*, NZIPT 800413, ¶ 55.

tion to those displaced by climate change.⁹⁵ The Tribunal emphasized that the particular facts must be examined on a case-by-case basis.⁹⁶ For example, refugee protection may be available if environmental issues gave rise to armed conflict targeting a particular segment of the population or to politicized humanitarian relief that discriminated against a particular social group.⁹⁷ As long as a convention ground exists contemporaneously with environmental degradation, “the Refugee Convention . . . does not require that persecution be the sole, or even the main, reason for the displacement; it only requires that there is persecution.”⁹⁸

4. Outside the Country

Furthermore, refugee status is limited to those who have crossed international borders, disqualifying internal migrants.⁹⁹ Empirical evidence shows that most of the world’s climate-induced displacement will be internal—those affected will remain within the borders of their home country.¹⁰⁰ Although Teitiota qualifies as someone outside the country of his nationality, the I-Kiribati who remain within national borders would necessarily be precluded from seeking refugee status in the first place.¹⁰¹

In addition to his claim under the Refugee Convention, Teitiota also submitted that he had a right to protection in New Zealand under the Guiding Principles on Internal Displacement as an internally displaced person (IDP).¹⁰² Developed by the UNHCR in 1998, the Guiding Principles were created to protect and assist those internally displaced by environmental disasters.¹⁰³ Principle 15 provides that IDPs have:

⁹⁵ See *AF*, NZIPT 800413, ¶ 64.

⁹⁶ See *id.*

⁹⁷ *Teitiota*, NZHC 3125, ¶ 27.

⁹⁸ Mayer, *supra* note 1, at 369.

⁹⁹ See Jane McAdam, *Climate Change, Displacement and the Role of International Law and Policy*, in INTERNATIONAL DIALOGUE ON MIGRATION 2011 THE FUTURE OF MIGRATION: BUILDING CAPACITIES FOR CHANGE INTERSESSIONAL WORKSHOP ON CLIMATE CHANGE, ENVIRONMENTAL DEGRADATION AND MIGRATION 2 (2011), available at <https://www.iom.int/jahia/webdav/shared/shared/mainsite/microsites/IDM/workshops/climate-change-2011/SessionIII-Paper-McAdam-Session.pdf>, archived at <https://perma.cc/KDZ2-9DRX>.

¹⁰⁰ See McAnaney, *supra* note 7, at 1178.

¹⁰¹ See Refugee Convention, *supra* note 70, art. 1; *Teitiota*, NZHC 3125, ¶ 24.

¹⁰² See *Teitiota*, NZHC 3125, ¶ 23; *AF (Kiribati) v Refugee Status Branch (RSB) of the Dep’t of Labour* [2013] NZIPT 800413, ¶ 45; Representative of the Secretary-General, Report on the Guiding Principles on Internal Displacement, Delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/1998/53/Add.2, at 1 (Feb. 11, 1998) [hereinafter Guiding Principles].

¹⁰³ See U.N. UNIV., CLIMATE CHANGE AND MIGRATION: RETHINKING POLICIES FOR ADAPTATION AND DISASTER RISK REDUCTION 57 (Michelle Leighton et al. eds., 2011), available at <https://www.ehs.unu.edu/file/get/8468>, archived at <https://perma.cc/P7SJ-LUYD>; Robert McLeman, *Climate Change, Migration and Critical International Security Considerations*, 42 IOM MIGRA-

- (a) The right to seek safety in another part of the country;
- (b) The right to leave their country;
- (c) The right to seek asylum in another country; and
- (d) The right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.¹⁰⁴

Although they are formally recognized by many international organizations and appear in a number of international agreements, the Guiding Principles, as a soft-law instrument, are not binding under international law.¹⁰⁵

Dismissing Teitiota's argument that he was entitled to protection as an IDP, both the Tribunal and the High Court stated that the Guiding Principles do not apply once an individual has crossed international borders.¹⁰⁶ Furthermore, the Refugee Convention by definition does not apply to IDPs simply because they are not "outside their country of nationality."¹⁰⁷ The Tribunal also pointed out that even if Teitiota had migrated within Kiribati instead of to New Zealand, he would not have been an IDP.¹⁰⁸ Although there was "some degree of compulsion in his decision to migrate," Teitiota's move was "a voluntary adaptive migration" and not "forced" as required by the Guiding Principles.¹⁰⁹

5. The Result

Although the High Court called Teitiota's arguments "[n]ovel and optimistic," they were ultimately "unconvincing."¹¹⁰ The High Court refused leave to appeal and affirmed the decision of the Tribunal.¹¹¹ The court expressed concern that deciding in favor of Teitiota would open the floodgates to millions of others facing similar hardships caused by climate change.¹¹² The High Court emphasized that the legislature, not the court, is tasked with determining whether to alter the scope of the Refugee Convention.¹¹³

TION RES. SERIES 1, 31 (2011), available at <http://publications.iom.int/bookstore/free/MRS42.pdf>, archived at <http://perma.cc/R66N-QDGM>.

¹⁰⁴ See Guiding Principles, *supra* note 102, at 8.

¹⁰⁵ See Human Mobility, *supra* note 15, at 4; McLeman, *supra* note 103, at 32. Although IDPs are entitled to receive protection and humanitarian assistance from state authorities under the Guiding Principles, the UNHCR has limited IDP protection to those "who, if they had breached an international border, would be refugees." Mayer, *supra* note 1, at 380.

¹⁰⁶ See *Teitiota*, NZHC 3125, ¶ 23; *AF*, NZIPT 800413, ¶ 46.

¹⁰⁷ See *Teitiota*, NZHC 3125, ¶ 24; *AF*, NZIPT 800413, ¶¶ 45–49.

¹⁰⁸ See *AF*, NZIPT 800413, ¶ 49.

¹⁰⁹ *Id.*

¹¹⁰ *Teitiota*, NZHC 3125, ¶ 51.

¹¹¹ *Id.* ¶¶ 63–64.

¹¹² See *id.* ¶ 51.

¹¹³ See *id.*

The High Court ultimately characterized Teitiota not as a “climate change refugee,” but as a “sociological refugee” who sought to “better his life by escaping the perceived results of climate change”¹¹⁴ The Refugee Convention did not apply to him and is not well suited to protect environmental migrants generally.¹¹⁵

The High Court did consider, however, that environmental degradation in Kiribati raised humanitarian concerns for Teitiota and his three New Zealand-born children.¹¹⁶ In New Zealand, an immigrant may be permitted to stay if “there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand” and permitting the immigrant to stay “would not in all the circumstances be contrary to the public interest[.]”¹¹⁷ The court acknowledged that unfortunately, Teitiota was precluded from evoking humanitarian grounds as he had overstayed his work permit.¹¹⁸ This leaves open the question of whether a migrant who is legally present in New Zealand could invoke humanitarian grounds in another case.¹¹⁹ New Zealand currently does not have humanitarian visas specifically available to persons displaced by climate change, but has “expressed its commitment to ‘respond to climatic disasters in the Pacific and manage changes as they arise.’”¹²⁰

¹¹⁴ See *id.* ¶ 54.

¹¹⁵ See *id.*; Wyman, *supra* note 16, at 177–79. According to legislative history and interpretative guides, drafters of the Convention “recognized natural calamities as major causes of human migration and purposefully declined to extend refugee status to the victims of such events.” U.N. High Comm’r for Refugees et al., Joint Submission: Forced Displacement in the Context of Climate Change: Challenges for States Under International Law, at 9 (May 20, 2009), available at <http://unfccc.int/resource/docs/2009/smsn/igo/049.pdf>, archived at <http://perma.cc/LF8W-TFL9> [hereinafter Forced Displacement]; Jeanhee Hong, Note, *Refugees of the 21st Century: Environmental Injustice*, 10 CORNELL J.L. & PUB. POL’Y 323, 332 (2001). But see Maria Stavropoulou, *Drowned in Definitions?*, 31 FORCED MIGRATION REV. 1, 11–12 (2008), available at <http://www.fmreview.org/FMRpdfs/FMR31/11-12.pdf>, archived at <http://perma.cc/236N-UQAH> (advancing the position that “[t]here is nothing inherent in the ordinary meaning of the word ‘refugee’ that would suggest that people fleeing flooded homes . . . should not be considered as refugees.”).

¹¹⁶ See *Teitiota*, NZHC 3125, ¶ 42.

¹¹⁷ Section 207 of the Immigration Act 2009 (N.Z.). Under international human rights law, humanitarian protection obligations that are more expansive than the refugee category are referred to as “complementary protections.” Jane McAdam, *The Emerging New Zealand Jurisprudence on Climate Change, Disasters and Displacement*, 3 MIGRATION STUDIES 131, 135 (2015).

¹¹⁸ See *Teitiota*, NZHC 3125, ¶ 43.

¹¹⁹ Cf. *id.* ¶¶ 43–44.

¹²⁰ MCADAM, *supra* note 5, at 116.

6. The Second Application for Leave to Appeal

Teitiota and his lawyer refused to accept defeat.¹²¹ On January 30, 2014, two months after the High Court denied leave, Teitiota applied for leave to appeal with the Court of Appeal of New Zealand.¹²² Under section 245 of the Immigration Act 2009, a party may appeal to the Court of Appeal on a question of law when the High Court refuses leave.¹²³ Although the focus of the appeal should be on the decision of the Tribunal below, rather than the judgment of the High Court, the Court of Appeal relied heavily on the High Court's reasoning.¹²⁴ The Court of Appeal endorsed the High Court's decision and similarly declined leave on all six proposed questions of law.¹²⁵ Expressing sympathy for the people of Kiribati and emphasizing that "[n]o-one should read this judgment as downplaying the importance of climate change[,]” the Court of Appeal ultimately concluded that the Refugee Convention “is quite simply not the solution to Kiribati's problem.”¹²⁶

B. The Climate-Induced Migrant

Despite years of discourse, there is still no formal legal definition of who constitutes a climate-induced migrant.¹²⁷ The International Organization for Migration (IOM), the leading inter-governmental organization in the field of migration, has chosen to define environmental migrants broadly, as:

[p]ersons or groups of persons who, for compelling reasons of sudden or progressive change in the environment that adversely affects their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad.¹²⁸

¹²¹ See *Teitiota v Chief Exec. of the Ministry of Bus., Innovation & Emp't* [2014] NZCA 173,

¶ 1.

¹²² *Id.*

¹²³ *Id.* ¶ 3.

¹²⁴ *Id.* ¶¶ 4, 25, 28, 31, 35. The Court of Appeal also commended the Tribunal's decision, describing it as “admirably well structured, carefully reasoned and comprehensive” *Id.* ¶ 7.

¹²⁵ See *id.* ¶¶ 25, 28, 31, 35, 36, 42.

¹²⁶ *Id.* ¶¶ 21, 40, 41.

¹²⁷ See Mayer, *supra* note 1, 367–68. The first definition of environmental migrants was introduced in 1985. Human Mobility, *supra* note 15, at 3 n.6.

¹²⁸ INT'L ORG. FOR MIGRATION, MIGRATION, ENVIRONMENT AND CLIMATE CHANGE: ASSESSING THE EVIDENCE 19 (Frank Laczko et al. eds., 2009), available at http://publications.iom.int/bookstore/free/migration_and_environment.pdf, archived at <http://perma.cc/N8SD-TFQF>. According to its website, the IOM “works to help ensure the orderly and humane management of migration, to promote international cooperation on migration issues, to assist in the search for practical solutions to migration problems and to provide humanitarian assistance to migrants in

The phenomenon is difficult to quantify.¹²⁹ Experts have criticized the methods used to approximate the number of environmental migrants worldwide, particularly the oft-cited 200 million figure.¹³⁰ Estimates are “heroic extrapolations” that attempt to quantify internal and external displacement, both temporary and permanent in nature.¹³¹ Furthermore, the relatively slow onset of climate change makes it difficult to distinguish between voluntary and forced migration.¹³²

An inherent difficulty in seeking effective responses to climate-induced migration is the extremely broad scope of the concept.¹³³ This Note does not hope to develop solutions for all situations of environmental displacement, but instead focuses on best strategies for the Pacific region.

C. The International Legal Framework

As *Teitiota* illustrates, under current law persons displaced from their home country due to climate change have no right to remain permanently in another country.¹³⁴ Although many states have existing temporary protection schemes, persons who are permanently and externally displaced by climate change unquestionably face a protection gap in the law.¹³⁵ Those who immigrate to another state without legal permission face an uncertain future without access to basic rights necessary for survival such as work authorization, healthcare, or social services.¹³⁶ Given that the poorest and least-developed

need, including refugees and internally displaced people.” IOM, <http://www.iom.int/cms/about-iom> (last visited Apr. 4, 2015), archived at <http://perma.cc/9TPD-PQJW>.

¹²⁹ See Gov’t Office for Sci., London, *Final Project Report*, in FORESIGHT: MIGRATION AND GLOBAL ENVIRONMENTAL CHANGE 11 (2011), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/287717/11-1116-migration-and-global-environmental-change.pdf, archived at <https://perma.cc/K35A-HTRQ>.

¹³⁰ See *id.*; Biermann & Boas, *supra* note 3, at 68.

¹³¹ McAnaney, *supra* note 7, at 1178; Forced Displacement, *supra* note 115, at 3. Walter Kälin has categorized five types of climate-induced displacement: “(i) *Sudden-onset disasters* such as flooding . . . (ii) *Slow-onset environmental degradation*’ due, for example, to sea level rise, ‘droughts and desertification . . . (iii) So-called ‘sinking’ small island states’ . . . (iv) [G]overnmental designation of ‘areas as high-risk zones too dangerous for human habitation . . .’ and ‘(v) [U]nrest seriously disturbing public order, violence or even armed conflict’ due to growing resource scarcity.” Wyman, *supra* note 16, at 171 (emphasis added).

¹³² See ROGER ZETTER, PROTECTING ENVIRONMENTALLY DISPLACED PEOPLE: DEVELOPING THE CAPACITY OF LEGAL AND NORMATIVE FRAMEWORKS 4 (2011), available at <http://www.unhcr.org/4da2b6189.pdf>, archived at <http://perma.cc/W7GX-PXDJ>.

¹³³ See MCADAM, *supra* note 5, at 268 (discussing the many forms of climate-related movement and the difficulty of finding a single response).

¹³⁴ See *Ioane Teitiota v Chief Exec. of the Ministry of Bus., Innovation & Emp’t* [2013] NZHC 3125, ¶¶ 41–62; Wyman, *supra* note 16, at 177.

¹³⁵ See MCADAM, *supra* note 5, at 100–03; Zetter, *supra* note 132, at 4.

¹³⁶ See MCADAM, *supra* note 5, at 121.

nations are most vulnerable to climate-induced migration, many states will reach a point when domestic solutions will simply not be enough.¹³⁷

In light of national insufficiencies, there has been much debate over what responsibility the international community has to fill this gap.¹³⁸ The primary justification for international involvement is a positivist argument based on treaty obligations.¹³⁹ In 1992, the UN negotiated an international environmental treaty at the United Nations Conference on Environment and Development (UNCED).¹⁴⁰ The resulting United Nations Framework Convention on Climate Change (UNFCCC) provides that “developed country Parties . . . shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects.”¹⁴¹ The UNFCCC and other international climate change laws do not directly address the needs of climate-induced migrants, however, because they only focus on adaptation and mitigation efforts.¹⁴² For citizens of small island states, the mounting concern is what protection will be available once they can no longer adapt to climate change and must instead flee their home countries.¹⁴³

1. Multilateral Responses

Recent years have seen an increasing willingness to address climate-induced migration through international responses.¹⁴⁴ Several proposals have surfaced, ranging from binding multilateral instruments to policy recommendations.¹⁴⁵ Bolstering these efforts, statements by multilateral bodies express a commitment to addressing the protection gap.¹⁴⁶ In 2010, the Ad Hoc Working Group on Long-term Cooperative Action under the UNFCCC negotiated

¹³⁷ See Mayer, *supra* note 1, at 374–75.

¹³⁸ See MCADAM, *supra* note 5, at 90.

¹³⁹ See Mayer, *supra* note 1, at 375. Positivism is defined as “the theory that laws are to be understood as social rules, valid because they are enacted by authority or derive logically from existing decisions, and that ideal or moral considerations (e.g., that a rule is unjust) should not limit the scope or operation of the law.” NEW OXFORD DICTIONARY, *supra* note 21, at 1332. Other arguments justifying the need for an international legal framework to address climate change migration include humanitarian, fairness, and realist approaches. See Mayer, *supra* note 1, at 375.

¹⁴⁰ See UNFCCC, <http://www.cop19.gov.pl/unfccc> (last visited Apr. 4, 2015), archived at <http://perma.cc/QLV5-ABH3>.

¹⁴¹ United Nations Framework Convention on Climate Change, art 4.4, May 9, 1992, 1771 U.N.T.S. 107 (1992) [hereinafter UNFCCC].

¹⁴² See Mayer, *supra* note 1, at 379.

¹⁴³ See *id.*

¹⁴⁴ See Closing Remarks, *supra* note 9, at 2; Forced Displacement, *supra* note 115, at 1.

¹⁴⁵ See Marissa S. Knodel, Note, *Wet Feet Marching: Climate Justice and Sustainable Development for Climate Displaced Nations in the South Pacific*, 14 VT. J. ENVTL. L. 127, 153–60 (2012).

¹⁴⁶ See Closing Remarks, *supra* note 9, at 2.

the Cancun Adaptation Framework.¹⁴⁷ This framework was the first UN-FCCC instrument that explicitly recognized climate migration.¹⁴⁸ Paragraph 14(f) invites parties to adapt “[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels[.]”¹⁴⁹ Underlying the Cancun Adaptation Framework is the understanding that the current international legal framework remains inadequate to protect climate-induced migrants.¹⁵⁰

The following year, a set of ten recommendations—the Nansen Principles—were developed at the Nansen Conference on Climate Change and Displacement in the 21st Century.¹⁵¹ The Nansen Principles, particularly Principle IX, address the protection gap that exists for externally displaced individuals and the need for international action.¹⁵² In response, the Nansen Initiative was launched in October 2012, spearheaded by Norway and Switzerland.¹⁵³ The goal of the Initiative is to develop consensus among interested states about how to address cross-border displacement most effectively.¹⁵⁴ Whereas the Nansen Principles focused on the sudden-onset events, the Nansen Initiative also addressed the slow-onset impacts of climate change that lead to forced displacement.¹⁵⁵

The UNHCR has also called for “collaborative approaches and partnerships based on principles of international cooperation and burden- and responsibility-sharing” in addressing climate change.¹⁵⁶ It has recognized that when states are unable to meet the basic needs of their citizens, international humanitarian organizations have a responsibility to step in.¹⁵⁷ In February

¹⁴⁷ See United Nations Framework Convention on Climate Change, Cancun, Mex., Nov. 29–Dec. 10, 2010, *Report of the Conference of the Parties on its Sixteenth Session*, at 1, U.N. Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011) [hereinafter Cancun Adaptation Framework].

¹⁴⁸ See Mayer, *supra* note 1, at 379.

¹⁴⁹ Cancun Adaptation Framework, *supra* note 147, ¶ 14(f).

¹⁵⁰ Cf Human Mobility, *supra* note 15, at 2 (calling attention to a need for additional strategies and actions to address human mobility).

¹⁵¹ *The Nansen Principles*, in THE NANSEN CONFERENCE: CLIMATE CHANGE AND DISPLACEMENT IN THE 21ST CENTURY 5 (2011), available at <http://www.unhcr.org/4ea969729.pdf>, archived at <http://perma.cc/GAF6-5T7T> [hereinafter *Nansen*]; see Walter Kälin, *From the Nansen Principle to the Nansen Initiative*, 41 FORCED MIGRATION REV. 48, 48 (2012).

¹⁵² See Kälin, *supra* note 151, at 48. Principle IX states that “[a] more coherent and consistent approach at the international level is needed to meet the protection needs of people displaced externally owing to sudden-onset disasters. States, working in conjunction with UNHCR and other relevant stakeholders, could develop a guiding framework or instrument in this regard.” *Nansen*, *supra* note 151, at 5.

¹⁵³ See Kälin, *supra* note 151, at 49.

¹⁵⁴ See *id.*

¹⁵⁵ See Human Mobility, *supra* note 15, at 3; Kälin, *supra* note 151, at 48–49.

¹⁵⁶ Summary Deliberations, *supra* note 1, at ¶ 43.

¹⁵⁷ See U.N. HIGH COMMISSIONER FOR REFUGEES, THE STATE OF THE WORLD’S REFUGEES: HUMAN DISPLACEMENT IN THE NEW MILLENNIUM 89–103 (Nada Merheb et al. eds., 2006).

2011, the UNHCR hosted the Bellagio Deliberations, a series of expert roundtables on climate change and displacement.¹⁵⁸ Both the Bellagio Deliberations and the Nansen Initiative emphasize that regional responses to climate change displacement are vital and recognize that the international community has a role in assisting and coordinating these regional efforts.¹⁵⁹

2. Regional Responses

Regional intergovernmental organizations have led the effort in developing instruments to address climate change in the Pacific.¹⁶⁰ For example, leaders of the Pacific Islands Forum convened in 2005 to endorse the Pacific Islands Framework for Action on Climate Change (PIFACC).¹⁶¹ The PIFACC seeks to increase the resilience of the Pacific Island Countries and Territories (PICT) to the impacts of climate change by raising awareness of the issues and guiding the implementation of practical adaptation measures.¹⁶² In 2008, the Pacific Islands Forum endorsed the first climate change declaration in the region.¹⁶³ The Niue Declaration on Climate Change was designed to bridge the different regional initiatives in the Pacific.¹⁶⁴ It focused on requesting action from the international community and specifically encouraged “Development Partners to increase their technical and financial support for climate change action on adaptation, mitigation and, if necessary, relocation[.]”¹⁶⁵ The Niue Declaration also reflected the Pacific region’s focus on retaining its

¹⁵⁸ See Summary of Deliberations, *supra* note 1, at 1; MCADAM, *supra* note 5, at 234.

¹⁵⁹ See MCADAM, *supra* note 5, at 234–35; Nansen, *supra* note 151, at 18–19; Summary of Deliberations, *supra* note 1, ¶ 38.

¹⁶⁰ See e.g., SECRETARIAT OF THE PAC. REGIONAL ENV’T PROGRAMME, PACIFIC ISLANDS FRAMEWORK FOR ACTION ON CLIMATE CHANGE 2006–2015, at 3–4 (2d ed. 2011), available at <http://www.sprep.org/attachments/Publications/PIFACC-ref.pdf>, archived at <http://perma.cc/WC/D9-QZK4> [hereinafter PIFACC]; PAC. ISLANDS F., THE NIUE DECLARATION ON CLIMATE CHANGE, ANNEX B 24, available at http://www.sprep.org/att/irc/ecopies/pacific_region/463.pdf, archived at <http://perma.cc/7NKT-T6YD> [hereinafter NIUE DECLARATION]; see also Knodel, *supra* note 145, at 159.

¹⁶¹ See PIFACC, *supra* note 160, at 5. Formed in 1971, the Pacific Islands Forum aims to enhance cooperation between its sixteen member states, which include Kiribati, New Zealand, and Australia. PAC. ISLANDS F. SECRETARIAT, <http://www.forumsec.org/pages.cfm/about-us/> (last visited Apr. 4, 2015), archived at <http://perma.cc/6XZN-KZKG>.

¹⁶² See PIFACC, *supra* note 160, at 3–4.

¹⁶³ See Tangata Vainerere, *Pacific Island Forum Leaders Endorse the Niue Declaration on Climate Change*, SECRETARIAT OF THE PAC. COMMUNITY (Aug. 26, 2008), http://www.spc.int/ppapd/index.php?option=com_content&task=view&id=131&Itemid=1, archived at <http://perma.cc/7YPJ-T9M4>.

¹⁶⁴ See Erik Kwa, *Climate Change and Indigenous Peoples in the South Pacific: The Need for Regional and Local Strategies*, in CLIMATE LAW AND DEVELOPING COUNTRIES: LEGAL AND POLICY CHALLENGES FOR THE WORLD ECONOMY 102, 115 (Benjamin J. Richardson et al. eds., 2009).

¹⁶⁵ See NIUE DECLARATION, *supra* note 160, at 24.

“social and cultural identity, and the desire of Pacific peoples to continue to live in their own countries, where possible.”¹⁶⁶

Another regional body, the Secretariat of the Pacific Regional Environment Programme (SPREP), hosts an annual Pacific Climate Change Roundtable (PCCR) to coordinate dialogue between the PICT and global stakeholders in the area of climate change.¹⁶⁷ In 2007, SPREP formed the Pacific Alliance for Sustainability Program in partnership with the Global Environment Facility, an organization that provides grants to developing countries for climate change projects.¹⁶⁸ Since then, the alliance has secured forty-five million dollars for climate change adaptation and mitigation projects in the Pacific.¹⁶⁹

In November 2010, Kiribati hosted leaders from twelve countries and adopted the Ambo Declaration.¹⁷⁰ The Ambo Declaration expressed “[a]larm at the impacts of the climate change crisis already being felt . . . especially the immediate threat to the livelihood and survival of the most vulnerable States[.]”¹⁷¹ The parties emphasized their support for “the development and implementation of strategies and actions directed at protecting people displaced within or across borders as a result of adverse effects arising from climate change extreme events[.]”¹⁷²

There are also initiatives that specifically provide citizens of Kiribati and other Pacific islands with opportunities to migrate.¹⁷³ These programs are tra-

¹⁶⁶ See Vainerere, *supra* note 163.

¹⁶⁷ See Nanette Wootton, *SPREP Gears Up for 2013 Pacific Climate Change Roundtable*, SPREP (May 20, 2013), <http://pacificvoyagers.org/sprep-gears-up-for-2013-pacific-climate-change-roundtable>, archived at <http://perma.cc/N8RD-89NW>. The SPREP was established in 1982 to be an intergovernmental organization that seeks to protect and ensure the sustainable development of the region. See SPREP, <http://www.sprep.org/about-us> (last visited Apr. 4, 2015), archived at <http://perma.cc/YM8R-GK3L>; South Pacific Regional Environment Programme (SPREP), U.S. DEP’T OF STATE, <http://2001-2009.state.gov/g/oes/ocns/rsp/cta/12179.htm> (last visited Apr. 4, 2015), archived at <http://perma.cc/68ES-73GJ>. Its twenty-six members include PICT countries as well as Australia, New Zealand, France, the United Kingdom, and the United States. See *Reflections on the 24th SPREP Meeting*, SPREP (Sept. 27, 2013), <http://www.sprep.org/general-news/reflections-on-the-24th-sprep-meeting>, archived at <http://perma.cc/6DQY-HLPQ>; *The Pacific Environment Information Network (PEIN)*, SPREP, <http://www.sprep.org/Pacific-Environment-Information-Network/pacific-environment-information-network-pein-country-profiles-directory>, archived at <https://perma.cc/U4SN-2NG9>. The SPREP functions in conjunction with the Pacific Islands Forum to support the objectives of the PIFACC and the Niue Declaration. See Vainerere, *supra* note 166; Wootton, *supra*.

¹⁶⁸ See Knodel, *supra* note 145, at 159.

¹⁶⁹ *Id.*

¹⁷⁰ MCADAM, *supra* note 5, at 233. The countries present to adopt the Ambo Declaration were Australia, Brazil, China, Cuba, Fiji, Japan, Kiribati, Maldives, Marshall Islands, New Zealand, Solomon Islands, and Tonga. *Id.*

¹⁷¹ Tarawa Climate Change Conference, *Ambo Declaration*, ¶1 (Nov. 10, 2010), available at http://www.climate.gov.ki/wp-content/uploads/2012/12/AMBO_DECLARATION-10th-November-2010.pdf, archived at <http://perma.cc/EXY8-9DX5> [hereinafter *Ambo Declaration*].

¹⁷² *Id.* ¶ 15.

¹⁷³ MCADAM, *supra* note 5, at 115–17.

ditional immigration schemes, however, and were not designed with a mind towards international obligations to protect Pacific peoples from climate change displacement.¹⁷⁴ Australia, for example, has aid programs to train nurses and horticultural workers in Kiribati to aid their transition into the Australian workforce.¹⁷⁵ In 2002, New Zealand created the Pacific Access Category (PAC), which offers seventy-five places a year to migrants from Kiribati, in order to “promote economic development in Pacific island States[.]”¹⁷⁶ To be eligible to register for PAC, citizens must meet age, employment, English language, health, and character requirements.¹⁷⁷

D. Legal Obligations Under Customary International Law

Absent formal instruments creating legal rights for climate-induced migrants, another possible source of protection lies in custom.¹⁷⁸ Customary international law is legally binding, created through the pattern and practice of states over time and motivated by *opinio juris*—a sense of legal obligation.¹⁷⁹ Whether *opinio juris* has formed is determined by assessing, among other things, legislation, case law, and statements on behalf of the government.¹⁸⁰ There is no required number of states that must engage in a practice before it becomes custom.¹⁸¹ In fact, custom can form at a regional level and become binding for only states in that region.¹⁸² Hence, the practice of “specifically affected states” is of particular significance.¹⁸³ Just as a series of harms can rise to the level of persecution under refugee law, a series of actions by Pacific states to protect environmentally displaced individuals could rise to the level of regional custom.¹⁸⁴

¹⁷⁴ *Id.* at 115.

¹⁷⁵ *Id.* at 206.

¹⁷⁶ *Id.* at 115, 205. PAC also provides an annual quota for natives of Tuvalu and Tonga. *Id.* at 115.

¹⁷⁷ See IMMIGRATION N.Z., *Pacific Access Category Registration Form (INZ 1092)*, available at <http://www.immigration.govt.nz/NR/rdonlyres/ED57FC7A-ABA8-4096-A423-E634F63908D8/0/INZ1092WEBfinal.pdf>, archived at <http://perma.cc/AFW2-KCZA>.

¹⁷⁸ See Manasi Raveendran, Note, *Plight of the Boat People: How to Determine State Obligations to Asylum Seekers*, 87 NOTRE DAME L. REV. 1277, 1294 (2012); Wyman, *supra* note 16, at 177; see also Statute of the International Court of Justice art. 38(1), June 26, 1945, 33 U.N.T.S. 993 (establishing that the International Court of Justice can apply both customary international law and international conventions).

¹⁷⁹ See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 6–12 (7th ed. 2008).

¹⁸⁰ See *id.* at 8–10.

¹⁸¹ See *id.* at 108–10.

¹⁸² See *Asylum Case* (Colom. v. Peru), 1950 I.C.J. 266, 276–77 (Nov. 20) (recognizing custom that applies only to states of a certain region).

¹⁸³ See William Thomas Worster, *The Evolving Definition of the Refugee in Contemporary International Law*, 30 BERKELEY J. INT’L L. 94, 108–09 (2012).

¹⁸⁴ See BROWNLIE, *supra* note 179, 8–10; GOODWIN-GILL, *supra* note 71, at 134–37; MCADAM, *supra* note 5, at 98.

It remains a source of controversy whether states have obligations under custom to protect individuals who fall outside the Refugee Convention.¹⁸⁵ A number of scholars contend that the principle of *non-refoulement*, which prohibits the forced return of individuals to countries in which they are at risk of serious human rights violations, has developed into a customary international norm.¹⁸⁶ Some extend this further, supporting the idea that the prohibition on *refoulement* has risen to the level of a *jus cogens* norm.¹⁸⁷ Meanwhile, others criticize such contentions as “wishful legal thinking” and argue that refugee protections do not exist under customary international law.¹⁸⁸ Even if recognized as custom, it remains to be seen whether the *non-refoulement* obligation would offer protection to individuals fleeing climate change.¹⁸⁹

III. ANALYSIS

A. The Repercussions of Teitiota’s Failed Claim

Ioane Teitiota and his attorney tested the limits of international refugee law, only to learn that current law offers no protection.¹⁹⁰ The definition of refugee as provided in the Refugee Convention could not be extended to include a person fleeing the dangers of climate change when those dangers were not caused by at least one of the five enumerated grounds.¹⁹¹ Furthermore, the persecutor was not, as required by the Convention, the Kiribati government or a non-state actor the government was unable or unwilling to

¹⁸⁵ See GOODWIN-GILL, *supra* note 71, 105–07.

¹⁸⁶ See *id.* at 117, 135.

¹⁸⁷ See *id.* at 129; Report of United Nations High Commissioner for Refugees, 40 U.N. GAOR, Supp. No. 12 at 6, U.N. Doc.A/40/12 (1985) (“Due to its repeated reaffirmation at the universal, regional and national levels, the principle of *non-refoulement* has now come to be characterized as a peremptory norm of international law”); Cartagena Declaration on Refugees, Annual Report of the Inter-American Commission on Human Rights art. 5, Nov. 22, 1984, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, available at <http://www.unhcr.org/45dc19084.html>, archived at <http://perma.cc/4XDT-482E> (*Non-refoulement* is “a cornerstone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*.”). The Vienna Convention on the Law of Treaties defines *jus cogens* as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.” Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

¹⁸⁸ See Worster, *supra* note 183, at 105–06.

¹⁸⁹ See Summary of Deliberations, *supra* note 1, ¶ 10 (“In the present context, the most relevant rights are the prohibition on return to a real risk of arbitrary deprivation of life, or to inhuman or degrading treatment. It remains to be seen whether flight from the impacts of climate change could meet the threshold set in existing human rights jurisprudence.”).

¹⁹⁰ See *Ioane Teitiota v Chief Exec. of the Ministry of Bus., Innovation & Emp’t* [2013] NZHC 3125, ¶¶ 40–63.

¹⁹¹ See *id.* ¶ 63; *AF (Kiribati) v Refugee Status Branch (RSB) of the Dep’t of Labour* [2013] NZIPT 800413, ¶ 56.

control.¹⁹² To accept, as Teitiota argued, that the international community was an indirect human actor causing sea level rise would “completely reverse the traditional refugee paradigm.”¹⁹³ Teitiota was seeking refuge in the very place he deemed to be a persecutor.¹⁹⁴ Nor did he face a well-founded fear of future persecution if he and his family returned to Kiribati, because he would not suffer any sustained or systematic violation of his basic human rights.¹⁹⁵

Although many similar claims had failed before, Teitiota’s case was the first to fail after being litigated in the High Court and the Court of Appeal.¹⁹⁶ In New Zealand, there is no automatic right to appeal a Tribunal decision; the court may choose in its discretion to consider a question of law that is of sufficient “general or public importance.”¹⁹⁷ Thus, by dismissing Teitiota’s two applications for leave, both the High Court and the Court of Appeal deemed the question of whether Kiribati migrants could obtain legal status in New Zealand as lacking in national importance.¹⁹⁸ The High Court likely realized that the number of people claiming to be “climate change refugees” would only increase as sea level continues to rise.¹⁹⁹ *Teitiota* served as a test case, setting a significant precedent that applicants fleeing the impacts of climate change would likely be unsuccessful.²⁰⁰ The strong rejection of leave comes as a disappointment not only for Teitiota and his family, but also for all Pacific islanders hoping to remain in New Zealand.²⁰¹

1. Can the International Community Be a Persecutor?

The government of Kiribati is certainly not the cause of rising sea levels or environmental degradation.²⁰² As Teitiota conceded, the Kiribati government was more than willing to explore innovations and adaptation measures to combat climate change.²⁰³ Absent government action, inability or unwill-

¹⁹² See *Teitiota*, NZHC 3125, ¶ 55; MCADAM, *supra* note 5, at 44.

¹⁹³ See *Teitiota*, NZHC 3125, ¶¶ 55, 57; *Teitiota v Chief Exec. of the Ministry of Bus., Innovation & Emp’t* [2014] NZCA 173, ¶ 40.

¹⁹⁴ See *Teitiota*, NZHC 3125, ¶¶ 55, 57.

¹⁹⁵ See *id.* ¶ 54.

¹⁹⁶ See Brady, *supra* note 58.

¹⁹⁷ See *Teitiota*, NZHC 3125, ¶¶ 34–35, 37–38; *Teitiota*, NZCA 173, ¶ 3; see also Section 245(3) of the Immigration Act (N.Z.).

¹⁹⁸ See *Teitiota*, NZHC 3125, ¶¶ 36–38; *Teitiota*, NZCA 173, ¶¶ 26, 39, 42 (“[W]e would not consider the question was of such general or public importance as to justify leave to appeal.”).

¹⁹⁹ See Summary of Deliberations, *supra* note 1, ¶ 2; O’Brien, *supra* note 4.

²⁰⁰ Cf. *Teitiota*, NZHC 3125, ¶¶ 40, 54; *Teitiota*, NZCA 173, ¶ 39, 42.

²⁰¹ See Saroja Coelho, *People are Dying as a Result of Climate Change*, DEUTSCHE WELLE (Nov. 27, 2013), <http://www.dw.de/people-are-dying-as-a-result-of-climate-change/a-17257574>, archived at <http://perma.cc/M8LV-QRGS>; O’Brien, *supra* note 4.

²⁰² See MCADAM, *supra* note 5, at 45.

²⁰³ See *AF (Kiribati) v Refugee Status Branch (RSB) of the Dep’t of Labour* [2013] NZIPT 800413, ¶ 30; MCADAM, *supra* note 5, at 137. “[P]eople do not have a sense of the State’s role in their daily life. Most daily activities revolve around the church and traditional community structures,

ingness, it is difficult to identify a human agent that causes the harms associated with climate change.²⁰⁴ Teitiota attempted to surmount this hurdle by claiming that the international community, by emitting the greenhouse gases associated with climate change, was the human agent.²⁰⁵ This argument reflects the sentiments of President Tong, who called upon “those countries which have reaped benefits from the destruction of the environment to assist those who now have to pay the price of these irreversible processes.”²⁰⁶ He went so far as to say that the actions by greenhouse gas emitters “to secure benefits at the cost of others could only be compared to an act of terrorism—eco-terrorism if you wish.”²⁰⁷

The prospect of industrialized nations having obligations to compensate developing nations for their production of greenhouse gas emissions is not new.²⁰⁸ In 2002, Tuvalu, a neighboring Pacific state, threatened to bring suit in the International Court of Justice (ICJ) against the United States for failing to reduce greenhouse gas emissions and endangering Tuvalu’s survival.²⁰⁹ In 2011, Palau, another small Pacific island, called upon the United Nations General Assembly to seek an ICJ Advisory Opinion regarding state responsibility for transboundary harms caused by greenhouse gas emissions.²¹⁰

and the government’s influence and impact on their lives is minimal to almost non-existent.” MCADAM, *supra* note 5, at 156 (internal quotations omitted).

²⁰⁴ See Refugee Convention, *supra* note 70, art. 1; Protocol Relating to the Status of Refugees, *supra* note 70, art. 1; MCADAM, *supra* note 5, at 45.

²⁰⁵ See Teitiota, NZHC 3125, ¶¶ 46, 55, 57.

²⁰⁶ Kiribati Accuses Polluting Countries of ‘Eco-Terrorism,’ AGENCE FRANCE-PRESSE (Jan. 13, 2005), <http://www.spacedaily.com/2005/050113083110.lc5jiprp.html>, archived at <http://perma.cc/AMX8-CLL6>.

²⁰⁷ *Id.*

²⁰⁸ See SIOBHÁN MCINERNEY-LANKFORD ET AL., HUMAN RIGHTS AND CLIMATE CHANGE: A REVIEW OF THE INTERNATIONAL LEGAL DIMENSIONS 53 (2011) (introducing the polluter pays principle).

²⁰⁹ See Rebecca Elizabeth Jacobs, *Treading Deep Waters: Substantive Law Issues in Tuvalu’s Threat to Sue the United States in the International Court of Justice*, 14 PAC. RIM L. & POL’Y J. 103, 105 (2005). The Kyoto Protocol laid out guidelines for reductions of greenhouse gases and repercussions for those countries refusing to follow the guidelines. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (1998) [hereinafter Kyoto Protocol].

²¹⁰ See Douglas A. Kysar, *Climate Change and the International Court of Justice 2* (Yale Law School, Public Law Research Paper No. 315, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309943, archived at <http://perma.cc/N3UT-XBK5>; Palau Seeks UN World Court Opinion on Damage Caused by Greenhouse Gases, UN NEWS CENTRE (Sept. 22, 2011), <http://www.un.org/apps/news/story.asp?NewsID=39710#.VQ3ShUZ0ID0>, archived at <http://perma.cc/VXN9-NFZL>. Palau’s request to the General Assembly did not receive majority support from member states and has since languished. Jaspreet Kindra, *Island Nation Takes on the World’s Polluters*, IRIN (Feb. 3, 2014), <http://www.irinnews.org/report/99578/island-nation-takes-on-the-world-s-polluters>, archived at <http://perma.cc/D5XA-L9EE>. Palau’s president has since stated that “[w]e made this request knowing fully well that the big countries of the world, who happen to be the big emitters, are actually the whole foundation of the United Nations.” *Id.* An advisory opinion

Although the link between industrialized nations and climate change is well established, claims against these nations for failure to regulate greenhouse gas emissions are unlikely to succeed in domestic courts because of sovereign immunity.²¹¹ Since all states have contributed to emissions, it would be extremely difficult to quantify the harm caused by any one particular state.²¹² Although some have suggested that this harm could be calculated in proportion to the emissions of each state, such a “polluter pays” system would “treat humans like carbon particles that can be traded” and “be detrimental to the interests of both the countries of origins and possible countries of admission and refuge.”²¹³ Moreover, these emissions do not necessarily violate international law.²¹⁴ Although many international instruments reference a right to a healthy environment, they do not create a legally cognizable right to be free from climate change.²¹⁵

2. Could Teitiota Have Demonstrated Persecution Based on a Convention Ground?

Teitiota’s case illustrates the difficulty of characterizing climate change displacement as persecution on account of one of the five Refugee Convention grounds.²¹⁶ The New Zealand Immigration Service has emphasized, both in Teitiota’s case and earlier appeals, that the environmental and economic impacts of climate change are indiscriminate.²¹⁷ Although the impacts of climate change are disproportionately felt in resource-poor countries, this particularized impact is not due to the characteristics or beliefs of their inhabitants.²¹⁸

Teitiota did not attempt to argue, as others have in the past, that he faced persecution as a member of a particular social group under the Refugee Con-

is a non-binding judgment from the ICJ. See Statute of the International Court of Justice, arts. 65–68, 59, Stat. 1062, T.S. No. 993 (1945).

²¹¹ See MCADAM, *supra* note 5, at 92; Eric A. Posner, *Climate Change and International Human Rights Litigation: A Critical Appraisal*, 155 U. PA. L. REV. 1925, 1927 (2007).

²¹² See MCADAM, *supra* note 5, at 97.

²¹³ *Id.*

²¹⁴ See Posner, *supra* note 211, at 1930–31.

²¹⁵ See *id.* Neither the Universal Declaration on Human Rights nor the International Covenant on Civil and Political Rights contain an explicit right to environmental quality. Justice Susan Glazebrook, *Human Rights and the Environment*, 40 VICT. U. WELLINGTON L. REV. 293, 294 (2009).

²¹⁶ See *AF (Kiribati) v Refugee Status Branch (RSB) of the Dep’t of Labour* [2013] NZIPT 800413, ¶ 56.

²¹⁷ See *id.* ¶¶ 56, 67; *Refugee Appeal Nos. 72189–72195/2000* [2000] Refugee Status Appeals Authority 1, ¶ 13 (N.Z.), available at <http://www.refworld.org/docid/4d08cf7f2.html>, archived at <http://perma.cc/4QQE-PZ26>.

²¹⁸ See MCADAM, *supra* note 5, at 46; Regan, *supra* note 15, at 271–72.

vention.²¹⁹ The omission of this argument was likely a deliberate one on the part of Teitiota’s attorney, as such a claim would have been difficult if not impossible to establish.²²⁰ Refugee law requires that such a group be “connected by a fundamental, immutable characteristic other than the risk of persecution itself.”²²¹ Thus, the shared risk of climate change faced by all I-Kiribati could not constitute the unifying characteristic of a particular social group.²²²

Even if he could have identified such a characteristic—his lack of economic opportunity, for example—he would also have needed to demonstrate that the Kiribati government had marginalized that group.²²³ Several years before, the New Zealand Refugee Status Appeals Authority heard a claim from a family of seven Tuvaluan citizens based on the environmental and economic difficulties they faced as members of a lower socio-economic group.²²⁴ They argued that the Tuvalu government, by failing to improve their living conditions, had been unwilling to protect their particular social group.²²⁵ Their claim failed because there was simply no evidence that the government had treated them any differently from their countrymen.²²⁶ Although the circumstances Teitiota faced in Kiribati were bleak, a claim that he was a member of a particular social group would certainly have been denied.²²⁷

3. Are Future Claims Under the Refugee Convention Entirely Precluded?

Although Teitiota’s claim ultimately failed, the High Court did not hold that Refugee Convention protections could never be extended to climate-induced migrants.²²⁸ This leaves open the possibility that future claims brought by individuals fleeing climate change might prove successful.²²⁹ Moving for-

²¹⁹ See *Ioane Teitiota v Chief Exec. of the Ministry of Bus., Innovation & Emp’t* [2013] NZHC 3125, ¶ 40 (omitting an argument that Teitiota faced persecution as a member of a particular social group); *Refugee Appeal Nos. 72189–72195/2000*, Refugee Status Appeals Authority ¶ 14.

²²⁰ See MCADAM, *supra* note 5, at 46.

²²¹ See *id.*

²²² See *id.*

²²³ See *id.* at 44, 46–47.

²²⁴ See *Refugee Appeal Nos. 72189–72195/2000*, Refugee Status Appeals Authority ¶¶ 2, 4.

²²⁵ See *id.* ¶¶ 9, 14.

²²⁶ See *id.* ¶ 14. “Rather, the appellants are unfortunate victims, like all other Tuvaluan citizens, of the forces of nature leading to the erosion of coastland and the family property being partially submerged at high tide.” *Id.* ¶ 13.

²²⁷ See *id.* ¶¶ 12–17; *Ioane Teitiota v Chief Exec. of the Ministry of Bus., Innovation & Emp’t* [2013] NZHC 3125, ¶¶ 18–19.

²²⁸ See *Teitiota*, NZHC 3125, ¶ 27 (exploring possible scenarios where environmental issues could lead to protection under the Refugee Convention).

²²⁹ See *id.*; *AF (Kiribati) v Refugee Status Branch (RSB) of the Dep’t of Labour* [2013] NZIPT 800413, ¶ 64 (rejecting a presumption of non-applicability for climate-induced migrants).

ward, it is possible that an asylum seeker who is fleeing a situation similar to Teitiota's could be granted refugee protection if harm resulting from any of the five stipulated convention grounds exists contemporaneously with climate change.²³⁰ For example, sufficient grounds for relief may arise where government policies contribute to environmental destruction and harm particular social groups that depend on subsistence agriculture.²³¹

Nevertheless, the possibility left open by the High Court is a narrow one.²³² Relief under the Refugee Convention is limited to states with governments that have caused, either directly or indirectly, the suffering of a group of people on account of race, religion, nationality, political opinion, or membership in a particular social group.²³³ Kiribati and other states facing climate change should certainly not aspire to such a draconian option for relief.²³⁴

4. Could the Definition of "Refugee" Be Expanded by Law?

In *Teitiota*, the High Court expressly stated that expanding the definition of refugee is not a job for the judiciary and could not occur absent legislative action.²³⁵ The court thereby acknowledged that New Zealand could grant refugee status to asylum seekers outside the scope of the Refugee Convention if it broadened the definition of refugee by law.²³⁶ Although the Refugee Convention's textual definition of refugee has not changed, some states have already chosen to expand the definition through legislation.²³⁷ For example, the Swedish Aliens Act specifically extends asylum protection to those displaced by an environmental disaster.²³⁸ That provision is limited, however, and only intended to apply to people displaced by sudden disasters.²³⁹ Even if New Zealand were to adopt such a provision, it would not extend protection to people displaced by slow-onset changes like sea level rise.²⁴⁰

²³⁰ See *Teitiota*, NZHC 3125, ¶¶ 7, 27; *AF*, NZIPT 800413, ¶ 64; McAdam, *supra* note 117, at 138.

²³¹ See *Teitiota*, NZHC 3125, ¶ 27; McADAM, *supra* note 5, at 47–48.

²³² See *Teitiota*, NZHC 3125, ¶ 27; *AF*, NZIPT 800413, ¶ 64; McADAM, *supra* note 5, at 47–48.

²³³ See Refugee Convention, *supra* note 70, art. 1.

²³⁴ Cf. *Teitiota*, NZHC 3125, ¶ 27 (considering the possibility of armed conflict and targeted discrimination); McADAM, *supra* note 5, at 47–48 (considering the possibility of government induced famine and a government refusing to accept disaster aid).

²³⁵ See *Teitiota*, NZHC 3125, ¶ 51.

²³⁶ See *id.*

²³⁷ See GOODWIN-GILL, *supra* note 71, at 21–25; McADAM, *supra* note 5, at 9; Forced Displacement, *supra* note 115, at 11–13.

²³⁸ See Aliens Act (2005:716), ch. 4 § 2(3) (Swed.), available at <http://www.government.se/content/1/c6/06/61/22/bfb61014.pdf>, archived at <http://perma.cc/ZZU4-ES9S>; Forced Displacement, *supra* note 115, at 12.

²³⁹ See McADAM, *supra* note 5, at 104.

²⁴⁰ See *id.* at 104–05.

Approximately seventy to eighty nation states have adopted regional or multilateral treaties that expand the definition of “refugee” beyond the Refugee Convention.²⁴¹ The 1969 Organisation of African Unity Convention Governing Specific Aspects of Refugee Problems in Africa includes persons fleeing “events seriously disturbing public order” in its expanded definitions of refugee.²⁴² The 1984 Cartagena Declaration on Refugees in Latin America includes in its definition of refugee “persons who have fled their country, because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances seriously disturbing public order.”²⁴³

Whether refugee protection could actually be stretched far enough to apply to climate-induced migrants, however, has yet to be seen.²⁴⁴ A sudden-onset natural disaster may trigger protection under Swedish law or qualify as a circumstance “seriously disturbing public order” under one of the regional treaties.²⁴⁵ An asylum seeker fleeing a slow-onset phenomenon, however, such as the sea-level rise in Kiribati would be unlikely to meet even an expanded definition of refugee.²⁴⁶

Moreover, these regions are unlikely destinations for people fleeing island states in the Pacific.²⁴⁷ Unfortunately for Teitiota and others like him, Australia and New Zealand are not parties to these regional agreements.²⁴⁸ Despite years of advocacy and continued litigation, legislatures in New Zealand and Australia have made no indication of plans to alter the traditional definition of refugee.²⁴⁹ In a claim similar to Teitiota’s, a Kiribati national submitted to Australia’s Refugee Review Tribunal that Australia should fol-

²⁴¹ See Raveendran, *supra* note 178, at 1307.

²⁴² 1969 OAU Convention on Refugee Problems in Africa art. 1(2), June 20, 1974, U.N.T.S. 14, 691, available at <http://www.unhcr.org/45dc1a682.html>, archived at <http://perma.cc/VV5E-7Z4G> [hereinafter OAU Convention]; see Summary of Deliberations, *supra* note 1, ¶ 9.

²⁴³ Cartagena Declaration on Refugees, *supra* note 187, art. 3.

²⁴⁴ See Summary of Deliberations, *supra* note 1, ¶ 9.

²⁴⁵ See Cartagena Declaration, *supra* note 187, art. 3; OAU Convention, *supra* note 242, art. 1(2); MCADAM, *supra* note 5, at 104–05.

²⁴⁶ See MCADAM, *supra* note 5, at 104–05.

²⁴⁷ Cf. *id.* at 101 (explaining that TPS schemes in the United States have little relevance to the I-Kiribati because the United States “is not a common destination country . . . and many of the worst affected would lack the means to travel there in the first place”); Biermann & Boas, *supra* note 3, at 72–73 (explaining that the two regional conventions cover the African continent and Latin America, but omitting mention of the Pacific region). Notably, the African continent and Latin America tend to be sending states rather than receiving states for refugees. *Refugee Population by Country or Territory of Origin*, WORLD BANK, <http://data.worldbank.org/indicator/SM.POP.REFG.OR/countries?display=map> (last visited Mar. 30, 2015), archived at <http://perma.cc/S9F9-X3BM>.

²⁴⁸ Cf. Cartagena Declaration, *supra* note 187, at 3–8; OAU Convention, *supra* note 242, at 10.

²⁴⁹ See *Ioane Teitiota v Chief Exec. of the Ministry of Bus., Innovation & Emp’t* [2013] NZHC 3125, ¶ 63; 0907346 [2009] RRTA 1168 1, ¶ 53 (Austl.), available at <http://www.unhcr.org/refworld/docid/4b8fdd952.html> (last visited Apr. 4, 2015), archived at <http://perma.cc/EF4Y-7PQQ>.

low the lead of other jurisdictions that have allowed people fleeing environmental problems to seek asylum.²⁵⁰ In response, the Tribunal said that “[w]hile it may be true that these developments have occurred elsewhere in consideration of human flight, the Tribunal is bound to apply the law as it currently stands in Australia.”²⁵¹ Although Teitiota did not make this argument in New Zealand, it is likely that the Tribunal and High Court would have responded similarly.²⁵² Teitiota’s attorney “candidly submitted . . . that he had been unable to find any New Zealand, Australian, Canadian, United Kingdom, United States, or European authority which had extended the protection of the Refugee Convention to a person adversely affected by climate change.”²⁵³

The Refugee Convention—even when stretched to its broadest scope—is unlikely to be an effective legal instrument for those fleeing climate change.²⁵⁴ For Teitiota and other Pacific islanders fleeing their homes, international refugee law is too confining as a mechanism for protection because it only confers rights to individuals who have crossed an international border and meet all the enumerated criteria.²⁵⁵ For the majority of people facing sea level rise, other methods of protection need to be developed.²⁵⁶

5. The Limitations of Judicial Responses

More broadly, litigation is simply not a feasible option for most climate change-displaced persons.²⁵⁷ Not only is litigation a lengthy process with no guarantee of relief, it requires significant financial resources.²⁵⁸ Although Teitiota had access to an attorney who specializes in human rights law, that level of representation is scarce and costly to attain.²⁵⁹ Even if litigation were to be

²⁵⁰ See 0907346, RRTA 1168, ¶ 53 (referencing mechanisms in the Swedish Aliens Act and the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa).

²⁵¹ *Id.*

²⁵² See *id.*; *Teitiota*, NZHC 3125, ¶ 40 (omitting an argument that New Zealand should follow the lead of other states and expand the scope of refugee protection).

²⁵³ *Teitiota*, NZHC 3125, ¶ 45.

²⁵⁴ See Sumudu Atapattu, *supra* note 2, at 617. Defenders of a narrowly tailored Refugee Convention emphasize that asylum status should be viewed as a scarce resource; in order to preserve political support for refugees, the status should be reserved for only victims of persecution. See David A. Martin, *The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource* (1991) in IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 804, 804–06 (Aleinikoff et al. eds., 7th ed. 2012). Defining refugee too broadly would open the floodgates, raise concerns about fraud and abuse, and generate opposition. *Id.*

²⁵⁵ See MCADAM, *supra* note 5, at 268.

²⁵⁶ See *id.*

²⁵⁷ See Knodel, *supra* note 145, at 162–63.

²⁵⁸ See *id.*

²⁵⁹ See Tony Abbott, *Man Seeks Refugee Status in New Zealand Over Global Warming; Pacific Islander Claims Rising Sea Levels Have Made it Too Dangerous to Go Home*, WALL ST. J.

successful, the legal weight of a judicial holding is not unqualified.²⁶⁰ As refugee law expert Jane McAdam points out, “[w]hile judicial interpretations may lead to broadened interpretations of the law, they are reliant on good test cases, cogent legal arguments by counsel for expansion, and acceptance by Parliament (which may be able to legislate to overturn the implications of the decision for the future).”²⁶¹ Courts can interpret the law with an eye towards changed circumstances and policies, but they should not be relied upon to provide protection to climate-induced migrants.²⁶² Given the limited scope of the Refugee Convention and the limited reach of litigation, many states that grapple with climate change have instead focused their attention on alternative legal instruments.²⁶³

B. What Legal Options Remain?

The case of *Teitiota* highlights that current international laws have proven inadequate in responding to and protecting the I-Kiribati who wish to leave their “sinking” home.²⁶⁴ Despite efforts to adapt to climate change on the part of local governments, the needs of environmentally displaced persons in the Pacific will continue to go unmet.²⁶⁵ Kiribati’s President Tong has pleaded that “[t]here is no way we can do it on our own, and I think that we deserve and we demand that the international community come to the party.”²⁶⁶ Although there are existing international mechanisms for individuals fleeing natural disasters, those protections are often temporary and do not extend to “disaster in slow motion,” such as the slow-onset consequences of sea level rise.²⁶⁷ The relative slowness of climate change impacts in the Pacific gives individual states and the international community the rare opportunity to plan their responses to displacement preemptively.²⁶⁸ Proposed solutions to

(Oct. 15, 2013), <http://online.wsj.com/news/articles/SB10001424052702304106704579136561870305846>, archived at <http://perma.cc/4Q6T-9Z95>.

²⁶⁰ See MCADAM, *supra* note 5, at 54.

²⁶¹ *Id.*

²⁶² See *id.* at 268.

²⁶³ See *Ioane Teitiota v Chief Exec. of the Ministry of Bus., Innovation & Emp’t* [2013] NZHC 3125, ¶ 63; MCADAM, *supra* note 5, at 54, 268–69.

²⁶⁴ See *Teitiota*, NZHC 3125, ¶ 63; Koko Warner, *Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations*, U.N. HIGH COMMISSIONER FOR REFUGEES: LEGAL & PROTECTION POL’Y RES. SERIES 19 (May 2011), available at <http://www.unhcr.org/4df9cc309.html>, archived at <http://perma.cc/BUU3-JAMC>.

²⁶⁵ See Adam Morton, *Land of the Rising Sea*, SYDNEY MORNING HERALD (Nov. 21, 2009), <http://www.smh.com.au/environment/land-of-the-rising-sea-20091120-iqub.html>, archived at <http://perma.cc/HY93-4VYJ>.

²⁶⁶ See *id.*

²⁶⁷ See *Guiding Principles*, *supra* note 102, at 8; MCADAM, *supra* note 5, at 236, 266.

²⁶⁸ See MCADAM, *supra* note 5, at 269.

address climate-prompted migration are wide-ranging.²⁶⁹ The following section evaluates the effectiveness of each of these proposals.

1. Discretionary Grounds at a National Level

The High Court in *Teitiota* expressly acknowledged humanitarian protection as another avenue for relief.²⁷⁰ Although eligibility requirements differ from state to state, many states already offer humanitarian mechanisms to remain.²⁷¹ This form of relief is often discretionary, and the rights provided may be temporary or otherwise limited.²⁷² Protection on humanitarian or compassionate grounds may take into account how long a person has been in the country or be triggered only after a failed asylum application, as is the law in Australia.²⁷³ In some states, discretionary humanitarian relief has been specifically extended to people fleeing environmental disasters.²⁷⁴

In New Zealand, the Immigration Act allows a person to remain in the state if there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be deported, and it would not be contrary to the public interest to permit the person to remain.²⁷⁵ Unfortunately, that avenue was unavailable to Teitiota and his family because overstaying their prior visas precluded them from obtaining an immigration permit on humanitarian grounds.²⁷⁶ By acknowledging the “plight” of environmental degradation in Kiribati and the “predicament” faced by Teitiota and his family, the High Court left open the possibility that it would have granted Teitiota humanitarian relief had he been eligible.²⁷⁷ Despite the High Court’s nod to humanitarian concerns, discretionary protection would have been unlikely; had the High Court reached the issue, it would have been simi-

²⁶⁹ See Knodel, *supra* note 145, at 153–60; McAnaney, *supra* note 7, at 1174.

²⁷⁰ See *Ioane Teitiota v Chief Exec. of the Ministry of Bus., Innovation & Emp’t* [2013] NZHC 3125, ¶ 43.

²⁷¹ See MCADAM, *supra* note 5, at 112.

²⁷² See *id.*

²⁷³ See Jane McAdam, *Climate Change Displacement and International Law: Complementary Protection Standards*, U.N. HIGH COMMISSIONER FOR REFUGEES: LEGAL & PROTECTION POL’Y RES. SERIES 44 n.286 (May 2011), available at <http://www.unhcr.org/4dff16e99.html>, archived at <http://perma.cc/UH8N-99Y3>.

²⁷⁴ See 0907346 [2009] RRTA 1168 1, ¶ 44 (Austl.), available at <http://www.unhcr.org/refworld/docid/4b8fdd952.html> (last visited Apr. 4, 2015), archived at <http://perma.cc/EF4Y-7PQQ>; MCADAM, *supra* note 5, at 112 (discussing domestic humanitarian schemes in Finland and Sweden).

²⁷⁵ Section 207 of the Immigration Act 2009 (N.Z.); McAdam, *supra* note 273, at 44 n.286.

²⁷⁶ See *Ioane Teitiota v Chief Exec. of the Ministry of Bus., Innovation & Emp’t* [2013] NZHC 3125, ¶ 43.

²⁷⁷ See *id.* ¶ 42.

larly concerned that granting relief to Teitiota would incentivize a flood of migrants fleeing Kiribati and similarly situated nations.²⁷⁸

2. Multilateral Responses

Over twenty years have passed since the UNFCCC was signed into action, but no binding agreement exists to reduce greenhouse gas emissions.²⁷⁹ Whether the international community has a duty to respond continues to be widely debated.²⁸⁰ The UNFCCC plays an important and vital role in this debate.²⁸¹ By acknowledging that states need to share this responsibility, the UNFCCC has acted as a catalyst for developed nations to extend protections to developing nations.²⁸² It calls on developed nations, as the largest emitters of greenhouse gases and thus the primary drivers of climate change, to “take the lead in combating climate change and the adverse effects thereof.”²⁸³ Spearheading this effort requires not only reducing emissions, but also providing financial and technical support to developing nations.²⁸⁴

Significantly, the 2010 Cancun Adaptation Framework specifically recognized an international obligation to respond to climate-induced migration.²⁸⁵ Prior to this framework, the UNFCCC had not recognized migration as a rational adaptation strategy.²⁸⁶ Doing so demonstrated a more compre-

²⁷⁸ See *id.* ¶¶ 42, 51. Notably, the Tribunal in 2014 allowed a Tuvaluan family to remain in New Zealand based on humanitarian and discretionary grounds, but explicitly denied relief under the Refugee Convention. See *AD (Tuvalu)* [2014] NZIPT 501370 (upholding humanitarian claim based on strong family ties); *AC (Tuvalu)* [2014] NZIPT 800517–520 (denying refugee and human rights claim). The Tribunal's decision in the Tuvaluan case was “wholly discretionary” and therefore lacking in “precedential weight[.]” McAdam, *supra* note 117, at 137.

²⁷⁹ See U.N. GAOR, 66th Sess., 16th plen. Mtg., at 27, U.N. Doc. A/66/PV.16 (Sept. 23, 2011). Although the Lima Accord purports to be the first global agreement to flight climate change signed by every country in the world, it does not contain a legally binding requirement that states cut their emissions by any particular amount. Carol Davenport, *A Climate Accord Based on Global Peer Pressure*, N.Y. TIMES (Dec. 14, 2014), <http://www.nytimes.com/2014/12/15/world/americas/lima-climate-deal.html>, archived at <http://perma.cc/8KCM-7DSP>; see also Erik Voeten, *How the Lima Accord May Nudge Countries to Do Better on Climate Change (But Won't Solve the Problem)*, WASH. POST (Dec. 14, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/12/14/how-lima-accord-may-nudge-countries-to-do-better-on-climate-change-but-wont-solve-problem/>, archived at <http://perma.cc/LFR7-2CVA>.

²⁸⁰ See MCADAM, *supra* note 5, at 90.

²⁸¹ See *id.* at 230.

²⁸² See Warner, *supra* note 264, at 17; see also UNFCCC, *supra* note 141, art. 2.

²⁸³ See UNFCCC, *supra* note 141, art. 3.

²⁸⁴ See *id.* arts. 4, 5 (“The developed country Parties and other developed Parties included in Annex II shall take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention.”).

²⁸⁵ See MCADAM, *supra* note 5, at 232.

²⁸⁶ See *id.*

hensive understanding of climate change and its impacts.²⁸⁷ Anecdotal evidence suggests that since the Cancun Adaptation Framework was negotiated, more funding has been channeled towards developing mechanisms for relocation and migration.²⁸⁸

Despite these advancements, non-binding multinational agreements will continue to have limited impact because compliance is entirely voluntary.²⁸⁹ States are not required to develop migration schemes or offer protection to individuals displaced by climate change, and thus face no legal repercussions when they do not.²⁹⁰ Absent mandatory compliance, these initiatives are simply aspirational statements.²⁹¹ Moving forward, it remains unlikely that multilateral negotiations will lead to a binding international agreement on climate change displacement.²⁹² The voices of developed nations continue to overshadow the voices of Pacific island nations like Kiribati.²⁹³ Phillip Muller, the Marshall Islands ambassador to the United Nations, has stated that “[a]t the current negotiating sessions and climate change meetings, nobody is truly addressing the legal and human rights effects of climate change.”²⁹⁴

Furthermore, the UNFCCC’s reputation has been tarnished by a “history of inaction” and a “reluctance to incorporate human rights issues.”²⁹⁵ Although the Cancun Adaptation Framework has the potential to chart a new course towards migration programs, the UNFCCC has traditionally focused on prevention and mitigation rather than adaptation.²⁹⁶ This lack of progress is understandable, given the complex and multifaceted nature of climate-induced migration and the impossibility of finding a one-size-fits-all solution.²⁹⁷ An international forum like the UNFCCC is poorly-suited to comprehensively address all these needs and lacks the expertise and the operational capacity to implement timely and durable responses.²⁹⁸ Nevertheless, international climate change dialogues and negotiations, such as the Nansen Initiative and the Bellagio Deliberations, will continue to be vital for drawing attention to the need for sharing responsibility and securing financing for the adaptation programs of developing nations.²⁹⁹

²⁸⁷ *See id.*

²⁸⁸ *See id.*

²⁸⁹ *See id.*; Knodel, *supra* note 145, at 135.

²⁹⁰ *See* MCADAM, *supra* note 5, at 232.

²⁹¹ *See* Knodel, *supra* note 145, at 135.

²⁹² *See* Williams, *supra* note 51, at 517–18 (discussing difficulties in reaching a binding global agreement).

²⁹³ *See* Knodel, *supra* note 145, at 135.

²⁹⁴ Friedman, *supra* note 4.

²⁹⁵ Knodel, *supra* note 145, at 135–36.

²⁹⁶ *See id.*

²⁹⁷ *See* MCADAM, *supra* note 5, at 230, 268.

²⁹⁸ *See id.* at 230, 236.

²⁹⁹ *See id.* at 230.

3. Regional Instruments

Regional agreements have proven to be better suited to addressing the needs of climate change displacement.³⁰⁰ Unlike top-down international initiatives, which risk being viewed as impositions by outsiders rather than improvements, regional adaptation schemes involve and empower local communities.³⁰¹ They are better able to develop strategies that comport to the needs and capacities of the parties involved, and thus have stronger support and commitment from those parties.³⁰² In addition, they are able to take advantage of political and economic relationships between states.³⁰³ Building on existing ties supports the development of coordinated and complementary national strategies, which is crucial to the future success of migration schemes.³⁰⁴

Efforts by the Pacific Islands Forum and SPREP illustrate the advantages of regional level action.³⁰⁵ They have been effective at bringing together regional leaders and pinpointing the specific needs of their parties, such as improving technology, education, and information exchange.³⁰⁶ SPREP initiatives have proven to be particularly successful.³⁰⁷ Since its creation, there have been innovative advancements in “ecosystem management, waste and pollution management, environmental governance, and communications education and knowledge.”³⁰⁸ Initiatives led by SPREP have successfully raised funds for climate change adaptation and mitigation.³⁰⁹

Despite these advancements, other regional initiatives in the Pacific have been described as “sporadic and noncommittal.”³¹⁰ For example, although the PIFACC provides the PICT and their global partners with a policy framework, the instrument does not create binding rights and obligations under international law.³¹¹ In fact, the PIFACC midterm review showed that awareness of the framework was low and a lack of monitoring and reporting procedures made it difficult to measure its success.³¹² Similarly, the Niue Declaration has called for greater international intervention, yet its power to actually influence

³⁰⁰ See Williams, *supra* note 51, at 518.

³⁰¹ See MCADAM, *supra* note 5, at 268–69.

³⁰² See Williams, *supra* note 51, at 518.

³⁰³ See *id.*

³⁰⁴ See *id.*; MCADAM, *supra* note 5, at 236.

³⁰⁵ See PIFACC, *supra* note 160, at 3–4; MCADAM, *supra* note 5, at 233 (recognizing that the Niue Declaration emphasized “the importance of retaining the Pacific’s social and cultural identity”); Knodel, *supra* note 145, at 137, 159–60 (highlighting successful regional initiatives).

³⁰⁶ See PIFACC, *supra* note 160, at 3–4; Knodel, *supra* note 145, at 159.

³⁰⁷ See Knodel, *supra* note 145, at 159.

³⁰⁸ *Id.*

³⁰⁹ See *id.* (discussing successful initiatives such as the Pacific Alliance for Sustainability program and the Pacific Environment Information Network).

³¹⁰ See Kwa, *supra* note 164, at 118.

³¹¹ See PIFACC, *supra* note 160, at 6; Knodel, *supra* note 145, at 137.

³¹² See PIFACC, *supra* note 160, at 6.

international climate negotiations is quite limited.³¹³ The future success of the PIFACC and the Niue Declaration depend on the implementation of national climate change initiatives and the support—financial, institutional, and technological—of international development partners.³¹⁴ Thus far, both have been lacking.³¹⁵

Although the success level of regional programs in the Pacific is varied, these regional approaches are essential to increasing the adaptive capacity in the region.³¹⁶ They increase access to resources and help ensure that regional adaptation measures are coordinated and complementary.³¹⁷

C. Protection Through Regional Customary Law

Although *Teitiota* demonstrates that the Pacific region currently lacks legislation and case law granting legal protection to climate-induced migrants, it is possible that state practice could eventually lead to the development of a regional custom.³¹⁸ Absent the rollout of unprecedented adaptation strategies, the plight of the Pacific island states will only worsen with time.³¹⁹ Eventually, there could be no territory to which refugee seekers would be able to return.³²⁰ Once that eventuality is reached, the requirements to establish an *opinio juris* would be a low threshold to surpass since the very survival of the Pacific islands would be at stake.³²¹

It is arguable that New Zealand and Australia, through geography and history, have greater responsibility than the rest of the international community for people displaced from the Pacific islands.³²² Unlike Kiribati, they are thinly populated and could potentially accommodate diverse uses of their territory.³²³ Australia and New Zealand have already begun addressing the reset-

³¹³ See Knodel, *supra* note 145, at 137.

³¹⁴ See Kwa, *supra* note 164, at 115–16, 118–19.

³¹⁵ See *id.*

³¹⁶ See PIFACC, *supra* note 160, at 6; Knodel, *supra* note 145, at 137, 159–60; Williams, *supra* note 51, at 518.

³¹⁷ See MCADAM, *supra* note 5, at 236; Williams, *supra* note 51, at 518.

³¹⁸ See *Asylum Case* (Colom. v. Peru), 1950 I.C.J. 266, 276–77 (Nov. 20); *Ioane Teitiota v Chief Exec. of the Ministry of Bus., Innovation & Emp't* [2013] NZHC 3125, ¶¶ 26, 51; Williams, *supra* note 51, at 521–22.

³¹⁹ See McLean, *supra* note 17, at 689.

³²⁰ See Lagan, *supra* note 25.

³²¹ See BROWNIE, *supra* note 179, at 8–10; Jacobs, *supra* note 209, at 104.

³²² See MCADAM, *supra* note 5, at 206 (describing the historical White Australia policy, which led to the exploitation of Pacific labor through forced recruitment); *cf. id.* at 149 n.191 (analogizing the relationship between Haiti and the Africa Union to the relationship between the PICT, New Zealand, and Australia). Following the 2010 Haitian earthquake, the African Union was reported to be considering a proposal to create a new State for them in Africa, citing ‘a sense of duty and memory and solidarity’ given that Haitians are descendants of African slaves. *Id.*

³²³ See *New Zealand in the OECD*, STAT. N.Z., http://www.stats.govt.nz/browse_for_stats/government_finance/central_government/nz-in-the-oecd/population.aspx (last visited Apr. 4, 2015),

tlement needs of neighboring states through traditional migration schemes, such as PAC in New Zealand and Australian-led training programs.³²⁴ Both states are members of regional cooperation organizations, such as the Pacific Islands Forum and SPREP, and are involved in the implementation of the agreements they create, such as PIFACC and the Niue Declaration.³²⁵ Moving forward, the continued strengthening of these regional initiatives could signal the emergence of a new pattern and practice, eventually leading to the formation of binding custom.³²⁶ A bottom-up approach to the creation of legal protection is preferable to a top-down relocation policy imposed upon vulnerable states in that it can reflect the region's unique needs and capabilities.³²⁷

This style of lawmaking will, however, be lengthy.³²⁸ The governments of Australia and New Zealand have been explicit in their state practices regarding environmental migration from Pacific nations.³²⁹ Australia's Labor Party denied that it has a unilateral obligation to protect climate-induced migrants, instead calling for a collaborative international approach with other nations.³³⁰ In 2009, a spokesperson for the Climate Change Minister stated that "permanent migration may eventually be the only option for some people. The issue will need to be dealt with by regional governments."³³¹ The Department of Foreign Affairs and Trade has stated that the government was not considering "the possibility of forced re-location from Pacific island countries such as Kiribati and Tuvalu[.]"³³² In 2008, the New Zealand government announced that it "has a proven history of providing assistance where needed in the Pacific, and that our approach to environmentally displaced persons would be consistent with this."³³³ Teitiota's failed claim indicates, however, that this assistance has not stretched very far.³³⁴

archived at <http://perma.cc/9GV3-N5DS>; *Australia Population 2014*, POPULATION REV., <http://worldpopulationreview.com/countries/australia-population/> (last visited Apr. 4, 2015), archived at <http://perma.cc/F3NH-RBKS>.

³²⁴ See MCADAM, *supra* note 5, at 205–06.

³²⁵ See *About Us*, PAC. ISLANDS F. SECRETARIAT, <http://www.forumsec.org/pages.cfm/about-us/> (last visited Apr. 4, 2015), archived at <http://perma.cc/YE7D-GPC7>; *The Pacific Environment Information Network (PEIN)*, *supra* note 167; PIFACC, *supra* note 160, at 5; NIUE DECLARATION, *supra* note 160, at 24.

³²⁶ See PIFACC, *supra* note 160, at 5; NIUE DECLARATION, *supra* note 160, at 24; Williams, *supra* note 51, at 521–22.

³²⁷ See MCADAM, *supra* note 5, at 118; Williams, *supra* note 51, at 518.

³²⁸ See Williams, *supra* note 51, at 518.

³²⁹ See MCADAM, *supra* note 5, at 106, 117.

³³⁰ See *id.* at 106.

³³¹ Morton, *supra* note 265.

³³² MCADAM, *supra* note 5, at 125 (internal quotations omitted).

³³³ *Id.* at 117.

³³⁴ See *Ioane Teitiota v Chief Exec. of the Ministry of Bus., Innovation & Emp't* [2013] NZHC 3125, ¶ 63; MCADAM, *supra* note 5, at 117.

These statements indicate that the governments are attuned to the needs of the neighboring islands, but have not accepted unilateral responsibility to address their needs.³³⁵ Although an interesting thought experiment, waiting for a regional custom to develop is reactive and not a viable means to address environmental migration from island states.³³⁶ States must develop preemptive solutions long before such a regional custom crystallizes.³³⁷

CONCLUSION

Among the multifaceted impacts of climate change, human migration has become an escalating concern. The troubling fact is that for people like Ioane Teitiota, leaving home also means leaving behind basic legal rights. The Refugee Convention does not extend to climate-induced migrants, and current international laws offer inadequate protection to people fleeing their island homes. Litigation to fit climate-induced migrants within the refugee mold have thus far failed, and the prospect of expanding the definition of refugee in the neighboring Pacific states of New Zealand and Australia seems unlikely.

Rather than concentrating on litigating claims under the Refugee Convention, states responding to displacement should focus on alternative legal and policy instruments. In the Pacific, the slow onset of climate change impacts provides an unique opportunity for responses to be planned. States must take advantage of the time they have now to develop and implement effective strategies for migration. Moving forward, a combination of national, regional, and international legal and policy responses working in coordination will be the most effective approach. International efforts, although limited in capacity, are crucial to drawing attention to climate change displacement and reaffirming that the international community has a responsibility to respond. International assistance is necessary, and must be informed by local knowledge and priorities in order to be effective. Regional efforts are best-suited to enlighten international discourse, as they help identify specific needs and funnel financial and technical support to where it is most needed. By enhancing their bonds with global partners and stakeholders through regional agreements, states in the Pacific region will be more successful at adapting to climate change and mitigating its harmful effects.

³³⁵ Cf. MCADAM, *supra* note 5, at 106, 117 (discussing approaches by the governments of New Zealand and Australia to forced relocation from PICT).

³³⁶ See INT'L ORG. FOR MIGRATION, *supra* note 12, at 34; Warner, *supra* note 264, at 15; Williams, *supra* note 51, at 521–22.

³³⁷ See *Asylum Case*, 1950 I.C.J. 276–77; INT'L ORG. FOR MIGRATION, *supra* note 12, at 34; Warner, *supra* note 264, at 15; Williams, *supra* note 51, at 521–22.