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## Climate Change and International Law: A Case for Expanding the Definition of "Refugees" to Accommodate Climate Migrants

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**NOTE**

**CLIMATE CHANGE AND INTERNATIONAL LAW:  
A CASE FOR EXPANDING THE DEFINITION OF  
“REFUGEES” TO ACCOMMODATE CLIMATE  
MIGRANTS**

*Jenny Han\* and Amanda Kuras\*\**

*The United Nations’ strict definition of “refugee” prevents individuals who are forced to migrate — often due to effects caused by climate change — from claiming the legal protections afforded to those lawfully classified as refugees. This restrictive definition represents a failure of current international law in responding to one of the world’s most pressing existential threats. The effects of climate change, including global warming, extreme weather and rising sea levels, displace millions of individuals worldwide. However, because climate change has only recently become recognized as a serious global and existential issue, international law has not yet responded to the threat. In this Note, the case will be made for expanding the definition of the term “refugee” to provide legally binding protections and tools for individuals who are affected by climate change. First, the current definition of a “refugee” will be deconstructed and an explanation will be given for why this definition leaves out climate migrants. We will use the case of *Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation, and Employment in New Zealand* as an example of how the current definition — and its application in international law — excludes climate migrants. A case that adopts a broader interpretation of refugee law will be discussed to compare the plight of climate migrants to refugees and to highlight the similarities between the two, specifically concerning the term “persecution” — one of the categories which classifies an individual as a refugee. Finally, the argument will be made that the rigid*

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*and outdated definition of “refugee” unjustly excludes climate refugees who are facing human rights violations as a direct result of climate change. These cases could then potentially be used as justification for expanding the term “refugee” to include climate migrants.*

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I. INTRODUCTION: POLITICAL REFUGEES

The 1951 United Nations *Convention and Protocol Relating to the Status of Refugees* defines a refugee as a person who:

As a result of events occurring before 1 January, 1951, and 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.<sup>249</sup>

This convention occurred more than 30 years after World War I — when the international community first began to seriously consider and establish new legal instruments to protect persecuted individuals. During this period, many countries voluntarily issued travel documents to those they considered refugees. In addition, the 1933 *Convention Relating to the International Status of Refugees* (a precursor to the 1951 Convention) forbade the expulsion of refugees and protected their civil rights, although few states signed onto this treaty.<sup>250</sup> In 1969, 18 years after the Convention, a multinational treaty, adopted by the United Nations after World War II with 144 signatories, not only defined the term “refugee,” but also provided a legal framework for refugees of war who were affected by events before 1951. Later, the 1967 Protocol Relating to the Status of Refugees extended refugee protection to people affected by events after 1951 as conflicts arose in colonized nations struggling for independence.<sup>251</sup> Already in the early history of international refugee law, there were precedents established for altering the law in response to changing global circumstances and events.

II. CLIMATE MIGRANTS

<sup>249</sup> See *United Nations Convention Relating to the Status of Refugees*, art. I (1961).

<sup>250</sup> See Agnes Hurwitz, *The Collective Responsibility of States to Protect Refugees*, 10-11 (2009).

<sup>251</sup> *Id.* at 14; Protocol Relating to the Status of Refugees (1967).

Because widespread recognition of climate change as a pressing global issue is a recent development, international refugee law has not yet adjusted to the realities of climate migration. Currently, millions of people around the world are displaced because of sudden climate-related events, such as natural disasters. Additionally, people are now beginning to witness the effects of slow-onset events related to climate change, such as ocean acidification, global warming, and rising sea levels. The effect of rising sea levels is most evident and impactful in the Pacific Islands, which have seen a dramatic decrease in size as the sea level rises by 12 millimeters per year in the Western Pacific Ocean.<sup>252</sup> As a result, experts predict that 48 islands will be completely submerged by the year 2100 due to climate change.<sup>253</sup> Due to the combination of slow and sudden-onset events, scientists also predicted that by 2050 there will be 143 million more climate migrants from Latin America, Sub-Saharan Africa, and Southeast Asia alone.<sup>254</sup> The indirect effects of climate change can also cause instability and insecurity due to overcrowding into urban areas and increased scarcity of resources. For example, in a 2017 study, which analyzed the number of asylum applicants to the European Union from 103 source countries, it was found that climate change is often tied to persecution and war: as temperatures deviate from the optimal temperature for agriculture, people compete for scarcer resources.<sup>255</sup> As temperature increases, asylum applications, under the current refugee definition, also increase at an accelerated pace.<sup>256</sup> This study predicts that by 2100, asylum applications as a result of conflict and persecution induced by climate change will rise by 28%.<sup>257</sup>

Despite the limitations of current international refugee law in responding to the impending climate migrant crisis, very little action to modify international law has been taken. Most legal scholars agree that the current rigid definition of a "refugee" put forth by the 1951 Refugee Convention does not include climate refugees.<sup>258</sup> Additionally, it is difficult for climate migrants to prove that they meet the requirement of persecution, as well as the requirement of being a member of a particular social group. While the effects of climate change are certainly harmful, they do not legally constitute

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<sup>252</sup> See John Podesta, *The Climate Crisis, Migration, and Refugees*, BROOKINGS, 25 July 2019, <<https://www.brookings.edu/research/the-climate-crisis-migration-and-refugees>>.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> See Anouch Missirian & Wolfram Schlenker, *Asylum Applications Respond to Temperature Fluctuations*, 358 *SCIENCE* 1610–1614 (2017).

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> See Abdikarim Ali, *Climate-Induced Migrants, International Law, and Human Rights, an Assessment*, UNIVERSITY OF OTTAWA, 41-42 (2015).

persecution. As a result, one major challenge is identifying the “persecutor.” But the persecutor isn’t a particular state or organization, but rather nature itself — and perhaps the international community which contributes to climate change. In addition, even if the effects of climate change are classified as persecution, international law specifies that the persecution must occur on the basis of religion, race, nationality, political opinion, or membership in a particular social group.<sup>259</sup> While climate change may affect certain groups more than others, it still affects a wide and diverse range of people. This fact makes it difficult to find one fundamental characteristic that defines and/or identifies the particular social group affected by climate change.<sup>260</sup>

International law does not currently recognize climate migrants as refugees, as exhibited by the 2015 case of *Ioane Teitiota v. Chief Executive of the Ministry of Business, Innovation and Employment* in the Supreme Court of New Zealand.<sup>261</sup> In this landmark case, the first climate refugee application was rejected.<sup>262</sup> According to the case, Ioana Teitiota and his wife moved to New Zealand with a permit, leaving the disappearing island of Kiribati in the Pacific Ocean.<sup>263</sup> After residing there for three years, the couple’s permits expired in 2010 and they remained in New Zealand unlawfully.<sup>264</sup> At the time of the case, the family also had three children who were not considered citizens of New Zealand.<sup>265</sup> After being stopped at a traffic light, Mr. Teitiota applied for refugee status by claiming that his homeland, Kiribati, was disappearing due to rising sea levels.<sup>266</sup> A Refugee and Protection Officer rejected Mr. Teitiota’s refugee application.<sup>267</sup> Following this decision, Teitiota appealed to the Immigration and Protection Tribunal, which dismissed the appeal, holding that Teitiota was not a refugee under the definition set by the 1951 Refugee Convention.<sup>268</sup> Specifically, the Tribunal noted that the act of persecution required “human agency” and that the effects of climate change were not faced by a particular social group, but

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<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> See *Ioane Teitiota v. Chief Executive of the Ministry of Business, Innovation and Employment*, 107, SUP. CT. OF NEW ZEALAND (2015).

<sup>262</sup> *Id.*

<sup>263</sup> See *Ioane Teitiota*, *supra* note 13.

<sup>264</sup> See *AF (Kiribati)*, No. 800413, NEW ZEALAND: IMMIGRATION AND PROTECTION TRIBUNAL, 25 Jun. 2013, <[https://www.refworld.org/cases,NZ\\_IPT,5dad6b754.html](https://www.refworld.org/cases,NZ_IPT,5dad6b754.html)>.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

rather the general population of Kiribati.<sup>269</sup> Teitiota appealed to several other courts for leave to appeal until he finally reached the Supreme Court, which dismissed his application for leave to appeal.<sup>270</sup> This case clearly illustrates the exclusive nature of the 1951 Refugee Convention's definition of "refugee." Although the New Zealand courts recognized and accepted many of Teitiota's claims about the dangerous effects of climate change on residents of Kiribati, they were legally incapable of granting Teitiota and his family refugee status due to the restrictive nature of the term's definition.

III. POTENTIAL TO EXPAND THE DEFINITION OF POLITICAL REFUGEE:  
REFUGEE APPEAL NO. 71427/99 IN THE NEW ZEALAND REFUGEE STATUS  
APPEALS AUTHORITY

In this decision by the New Zealand Refugee Status Appeals Authority, the definition of "persecution" is closely tied with human rights violations. The appellant in this case was a woman from the Islamic Republic of Iran, who was consistently abused and harassed by her first husband, a high official in the Pasdaran, a branch of the Iranian Armed Forces, whose political power and connections enabled him to deprive her (and her son) of their human rights.<sup>271</sup> At the time of the case, the appellant's second husband was imprisoned in Iran for his role in adding false details to the appellant's passport to help her escape.<sup>272</sup> The appellant, furthermore, had notice from her mother that her first husband had acquired a warrant for her arrest. In this case, the Appeals Authority ruled against the decision of the Refugee Status Branch of the New Zealand Immigration Service, which had denied the appellant's refugee status application.<sup>273</sup>

The decision focused on the question of whether the appellant faced persecution. This involved an exploration of the meaning of the term persecution. The Appeals Authority clarified that the definition of persecution they adopted differed from the dictionary definition of persecution in its emphasis on the *possible effect* of persecution on the victim, rather than the persecutor's *intent*.<sup>274</sup> Thus, the persecutor's intent matters less than the victim's well-founded fear of potential persecution. This is a central point for climate migrants because it allows for the proper

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<sup>269</sup> *Id.*

<sup>270</sup> *See*, Ioane Teitiota, *supra* note 13.

<sup>271</sup> *See*, *Refugee Appeal*, 71427/99, NEW ZEALAND REFUGEE STATUS APPEALS AUTHORITY, 16 Aug. 2000, <[https://www.refworld.org/cases,NZL\\_RSAA,3ae6b7400.html](https://www.refworld.org/cases,NZL_RSAA,3ae6b7400.html)>.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

identification of persecutors as the international community that contributes to climate change, a group with human agency.<sup>275</sup> Even though the countries that primarily contribute to climate change may not harbor malicious intent toward climate migrants, climate migrants are still affected by and fear the persecuting effects of climate change that these countries cause.

Following this initial clarification, the Appeals Authority then continued to define persecution as the “sustained or systemic violation of human rights demonstrative of a failure of state protection.”<sup>276</sup> This definition reflects the principle of surrogacy, given by James Hathaway, as well as the close relationship between persecution and violation of human rights.<sup>277</sup> The human rights mentioned in the definition of persecution are the “core norms of international human rights law,” which include the International Bill of Rights in the Universal Declaration of Human Rights.<sup>278</sup> In fact, the 1951 Refugee Convention evolved from Article 14 of this Declaration, which granted the right to seek and enjoy asylum in other countries.<sup>279</sup> Thus, the relationship between persecution and human rights violations is enshrined both in court cases as well as multiple United Nations documents. The definition of persecution given by Professor Hathaway, and supported by the New Zealand Appeals Authority, also reflects the principle of surrogacy. This formulates the idea of national state protection as central to the question of refugee status. According to the principle of surrogacy, refugee law is called upon when a citizen’s home state *fails* to adequately protect the human rights of that citizen, and the refugee legal framework defines the roles and obligations of the international community to offer surrogate protection. Ultimately, the purpose of refugee law is to ensure every person’s human rights, even when their state fails to protect those rights. This failure of protection does not have to be the result of a state’s unwillingness to protect — it could also be a result of the state’s inability to protect the human rights of its citizens. Thus, one way of aligning the effects of climate change with persecution is through a discussion of human rights violations caused by climate change.

The Universal Declaration of Human Rights includes two rights that climate change violates: the right to a standard of living adequate for health and the right to a standard of living adequate for housing.<sup>280</sup> First is an

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<sup>275</sup> See Ali, *supra* note 10, at 42.

<sup>276</sup> See *Refugee Appeal*, *supra* note 23.

<sup>277</sup> See *Canada (Attorney General) v. Ward*, 2 S.C.R. 689 (1993). See also: James Hathaway, *The Law of Refugee Status* (1991).

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> See *United Nations Universal Declaration of Human Rights*, art. 25 (1948).

investigation into the effects of climate change on health. Climate change and global warming have been shown to create the ideal environment for insects like mosquitoes, which can carry vector-borne diseases such as the Zika virus or malaria, that thrive in warmer environments.<sup>281</sup> The higher temperatures associated with global warming can also cause various heat-related health issues, putting individuals at a heightened risk of heat stroke, exhaustion, cardiovascular issues, and kidney problems.<sup>282</sup> Air pollution, and specifically fine particulate matter pollution, can cause various respiratory illnesses such as asthma, as well as cardiovascular diseases.<sup>283</sup> Moreover, sea-level rise can cause flooding, which exposes coastline populations to contaminated floodwaters which bring disease. Finally, extreme weather events in general (such as hurricanes) threaten and harm public safety.<sup>284</sup> Although many of these health issues will affect countries worldwide, the most devastating impacts that demand surrogate protection from the international community may be more concentrated. For example, island nations may be more susceptible to contaminated floodwaters. Continued research into the direct effects of climate change on public health, as well as further investigation of what an adequate standard of health legally entails, will be necessary in the future.

Second is the threat that climate change poses to a standard of living adequate for housing. The most obvious effect of climate change on housing is its erasure of livable space in small island nations, such as Kiribati, through rising sea levels. For people living on the coastline, the only realistic option available may be to move further inland, but this will eventually cause overcrowding and congestion, which can then negatively affect public health. Unfortunately, islands like Tuvalu, Kiribati, and the Marshall Islands could be completely consumed by rising seas; they contribute very little to global emissions but disproportionately experience its effects.<sup>285</sup> If these island nations disappear, their inhabitants must find ways to relocate to other countries. At this point, it would be impossible for their nation to protect them. Refugee law must then be properly equipped and prepared to step in and offer surrogate protection against this violation of the human right to a standard of living adequate for housing.

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<sup>281</sup> See Samantha Harrington, *How climate change threatens public health*, YALE CLIMATE CONNECTIONS, 2019, <<https://www.yaleclimateconnections.org/2019/08/how-climate-change-threatens-public-health/>>.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> See Harrington, *supra* note 33.

<sup>285</sup> See Justin Worland, *How Leaders of Sinking Countries are Fighting Climate Change. Here's What the Rest of the World Can Learn*, TIME, 2019, <<https://time.com/longform/sinking-islands-climate-change/>>.

## IV. CONCLUSION

The United Nations' dated definition of a refugee, established in 1951, has failed to evolve and develop with global issues. Many people who are forced to migrate from their native country due to the impact of climate change are not able to make this necessary move, or remain in a safer country permanently, due to restrictions in immigration law. As the case of *Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment* demonstrates, the current definition and interpretation of a refugee does not allow climate migrants to claim refugee status. Through an analysis of the decision in *Refugee Appeal No. 71427/99* in New Zealand — in which the applicant was granted refugee status based on the evident violation of her human rights — the similarities between the situations of refugees and climate migrants, can be seen. The aforementioned case, which adopted a broader definition of the term “persecution,” was used to tie refugee law to human rights in order to demonstrate how it also applies to climate migrants, who experience human rights violations that cannot be protected by their home nations. Although climate migrants might not face deliberately malicious persecution, they do face the devastating threat of anthropogenic climate change. Climate migrants deported back to their native country will have their rights and their lives endangered. Thus, this Note shows that adopting a broader definition of the term “persecution” can justify the acceptance of refugee applications from climate migrants.

Although arguments can be made to include climate migrants into the current definition of refugee, a more effective approach would be a direct alteration of the definition currently used. Even with a broader definition of the term “persecution,” it can still be difficult to prove that the persecution from climate change is a result of the categories recognized by the United Nations, including race, religion, nationality, political opinion, or membership of a particular social group. If the definition of “refugee” is changed and extended to include the fear of persecution from climate change related damage and disasters, climate migrants will be more easily integrated into refugee status, thus saving millions of lives around the world.

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