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UP A RISING CREEK WITHOUT A PADDLE: A SURVEY OF LEGAL PROTECTION FOR CLIMATE MIGRANTS

Kaitlin Groundwater

I. INTRODUCTION

Society is eager to help refugees fleeing war-torn regions, but there is a growing group of migrants who do not illicit the same desire to provide aid or have similar legal protections: those forced to leave their homes due to the effects of climate change.¹ Climate change causes a host of problems, including extreme weather events, rising sea levels, diminished food sources, degradation of natural resources, and increased frequency of disease.² Humans naturally respond to such vicissitudes in their natural environment by migration.³ They leave their homes in search of viable food sources, clean water, and/or available housing, which is no longer available to them due to extreme weather events or the slow-onset effects of climate change.⁴

The global community recognizes the occurrence of human movement in response to climate change and predicts such movement will continue to grow.⁵ For example, the United Nations Office of the High Commissioner, an office charged with protecting human rights, highlighted in its April 2018 report the profound impact that climate change has on human mobility, stating “it is clear that climate change substantially contributes to human rights harms and related human movement.”⁶ The Intergovernmental Panel on Climate Change (IPCC), a body of the United Nations charged with collecting and analyzing all global science on climate change, made similar findings.⁷ The IPCC

¹ See John Podesta, *The Climate Crisis, Migration, and Refugees*, THE BROOKINGS INST., (Jul. 25, 2019), <https://www.brookings.edu/research/the-climate-crisis-migration-and-refugees/>.

² *Id.*

³ Jane McAdam, *Climate Change Displacement and International Law: Complementary Protection Standards*, U.N. HIGH COMM’R FOR REFUGEES [UNHCR], at 4, PPLA/2011/03 (May 2011).

⁴ See Podesta, *supra* note 1.

⁵ *Id.*

⁶ See U.N. Hum. Rts. Council [UNHRC], *Addressing Human Rights Protection Gaps in the Context of Migration and Displacement of Persons Across International Borders Resulting from the Adverse Effects of Climate Change and Supporting the Adaptation and Mitigation Plans of Developing Countries to Bridge the Protection Gaps*, at 4, U.N. Doc. A/HRC/38/21 (Apr. 23, 2018).

⁷ See Pachauri et al., Intergovernmental Panel on Climate Change [IPCC], *Climate Change 2014 Synthesis Report*, at 71 (2015), https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf.

report identified displacement associated with extreme weather events as a key global risk and predicted that “with increasing climate risks, displacement is more likely to involve permanent migration.”⁸

The increased probability of migration due to climate change has also been recognized by the United States.⁹ In 2021, President Biden signed Executive Order (E.O.) 14013, which called for a report on “climate change and its impact on migration.”¹⁰ The White House Report found that extreme weather events and weather-related conflicts are the top two causes of annual human migration, resulting in 30 million people leaving their home countries per year.¹¹

The White House Report indicated that extreme weather and the resulting human movement will only get worse.¹² Natural disasters, for example, are already on the rise, with “the annual number of natural disasters growing from 200 to 400 over a 20 year stretch.”¹³ However, the White House Report revealed that “[e]xisting legal instruments to protect displaced individuals are limited in scope and do not readily lend themselves to protect those individuals displaced by the impacts of climate change.”¹⁴ International legal instruments equipped to handle climate migration are equally sparse.¹⁵ The United Nations High Commission for Refugees has yet to grant refugee status to individuals “displaced by weather events stemming from climate change.”¹⁶

Human migration due to climate change is likely to increase as natural disasters grow in frequency.¹⁷ However, there is a significant legal void in the area of climate migration, both in the United States and globally.¹⁸ Without legally enforceable provisions supporting those displaced as a result of climate change, people will be forced to migrate “with little legal protection.”¹⁹

⁸ *Id.*

⁹ See generally WHITE HOUSE, REPORT ON THE IMPACT OF CLIMATE CHANGE ON MIGRATION (Oct. 2021).

¹⁰ *Id.* at 4.

¹¹ *Id.* at 7.

¹² *Id.* at 4.

¹³ McAdam, *supra* note 3, at 46.

¹⁴ WHITE HOUSE, *supra* note 9, at 6.

¹⁵ See Podesta, *supra* note 1.

¹⁶ *Id.*

¹⁷ See WHITE HOUSE, *supra* note 9, at 4.

¹⁸ See Podesta, *supra* note 1.

¹⁹ *Id.*

This comment will, in Part II, explore climate change and how it impacts human migration. It will then survey the current international landscape of legal protections for cross-border climate migrants, a group of individuals that is growing in size around the world. Part III will navigate two avenues for legal protections under United States and international law for cross-border climate migrants. The first avenue utilizes an exception to the Immigration and Nationality Act that allows Temporary Protected Status (TPS) to apply to certain individuals that do not currently reside in the United States. The second avenue stems from international human rights law and requires the United States and other participating nations to change their interpretation of one's right to life under the International Covenant on Civil and Political Rights (ICCPR) to include protection from environmental threats. Those forced from their homes due to the most severe effects of climate change. Finally, Part IV concludes that if the United States and the world wish to provide greater legal protection to those fleeing the effects of climate change, the existing pathways in United States and international human rights laws can be leveraged to do so.

II. BACKGROUND

A. *Climate Change and Its Impact on Human Migration*

The Earth is warming at a pace that is “unprecedented over decades to millennia.”²⁰ These changes are clear, and their existence cannot be doubted.²¹ Such a dramatic change in the global climate has created a host of environmental issues.²² The ocean is acidifying due to increased uptake of carbon dioxide (CO₂), annual precipitation has increased in the Northern Hemisphere, global ice sheets and glaciers are melting at an increasing rate, and the sea level is rising at a rate “larger than the mean rate during the previous two millennia.”²³ Accompanying these changes is a significant increase in extreme weather events, with the annual occurrences of natural disasters doubling over a recent 20 year period.²⁴

With more frequent extreme weather events, warmer temperatures, and increased rainfall, come a number of problems that

²⁰ IPCC, *supra* note 7, at 2.

²¹ See WHITE HOUSE, *supra* note 9, at 4.

²² See *id.*

²³ IPCC, *supra* note 7, at 4.

²⁴ McAdam *supra*, note 3, at 46.

impact the habitability of a region or country.²⁵ Food insecurity is a likely result of climate change, especially in areas already threatened by hunger.²⁶ Warmer temperatures and increased rainfall make it more difficult to grow certain crops, meaning many farmers will struggle to produce their normal food sources.²⁷ Furthermore, “it can be anticipated that food access and utilization will be affected indirectly via collateral effects on household and individual incomes, and food utilization could be impaired by loss of access to drinking water and damage to health.”²⁸ Diminished living conditions are also expected as global temperatures rise.²⁹ For example, in Southern Madagascar, Namibia, South Africa, and Angola, drought is already affecting cattle farms, causing agricultural losses.³⁰ These environmental changes are accompanied by numerous serious health risks.³¹ The World Health Organization (WHO) identified many “climate-sensitive health risks,” including water-borne illnesses, respiratory illnesses, vector-borne diseases, zoonoses, lack of access to safe drinking water, malnutrition, and more.³²

With such threats to health and home, it is natural that individuals will migrate to avoid such harm, both within their home countries and across national borders.³³ Climate change and resulting extreme weather events mostly cause internal displacement.³⁴ Individuals leave their region and migrate to an area within their home country that is either less affected by a natural disaster or provides greater economic opportunity.³⁵ Internal displacement due to climate change is already occurring in massive quantities.³⁶ Between 2008 and 2016, an

²⁵ See Tim Wheeler & Joachim Von Braum, *Climate Change Impacts on Global Food Security*, 341 SCIENCE 510, (Aug. 2, 2013), <https://www.science.org/doi/full/10.1126/science.1239402#core-R15>; see U.N. HUM. RTS. OFF. OF THE HIGH COMM’R [OHCHR], “*I lost friends, relatives, our house*”, (Jul. 26, 2022), <https://www.ohchr.org/en/stories/2022/07/i-lost-friends-relatives-our-house>.

²⁶ See Wheeler, *supra* note 25, at 508, 511.

²⁷ *Id.* at 511.

²⁸ *Id.* at 508.

²⁹ See OHCHR, *supra* note 25.

³⁰ *Id.*

³¹ See Andy Craggs, *Climate Change and Health*, WORLD HEALTH ORG. (Oct. 30, 2021), <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health>.

³² *Id.*

³³ See UNHRC, *supra* note 6, at 5.

³⁴ See WHITE HOUSE, *supra* note 9, at 4.

³⁵ See McAdam, *supra* note 3, at 11.

³⁶ See Podesta, *supra* note 1, at 3.

average of 21.7 million people per year were internally displaced following weather-related natural disasters.³⁷

External migration is more difficult to track, and as a result, it remains unknown how many individuals migrate across borders each year because of climate change.³⁸ The lack of data is largely due to the relative complexity of cross-border migration related to movement within a single country, also including other factors such as political conflict and economic instability contributing to the decision to migrate.³⁹ For example, Haiti is particularly vulnerable to cross-border migration since it has experienced drastic weather events like hurricanes and earthquakes during a period of severe economic instability.⁴⁰ Central American countries such as Guatemala, Honduras, and El Salvador are also at risk of climate migration due to the threat of hurricanes and subsequent crop failures, combined with political and economic instability.⁴¹ African nations that are experiencing crop failures due to the effects of climate change, including Namibia, Angola, and South Africa, are also vulnerable to cross-border migration, considering their accompanying civil instability.⁴² In each case, it is difficult to determine the role climate factors play compared to the economic and political factors in one's decision to migrate.⁴³

Ultimately, experts predict that an “accelerating trend of global displacement related to climate impacts is increasing cross-border movements, . . . particularly where climate change interacts with conflict and violence.”⁴⁴ Though complex, a higher risk of climate-related migration can be inferred from the existence of environmental and civil instability, as seen in much of Central America, Caribbean Island nations, Pacific Islands, and many African nations.⁴⁵

Migration due to climate change also happens at different speeds. Gradual changes to the environment spur “slow-onset

³⁷ See UNHRC, *supra* note 6, at 3.

³⁸ *Id.*

³⁹ See *id.* at 4; see generally WHITE HOUSE, *supra* note 9, at 4.

⁴⁰ See Designation of Haiti for Temporary Protected Status, 86 Fed. Reg. 41,867 (Aug. 3, 2021).

⁴¹ Mary Speck, *How Climate Change Catalyzes More Migration in Central America*, U.S. INSTITUTE FOR PEACE (Sept. 21, 2022), <https://www.usip.org/publications/2022/09/how-climate-change-catalyzes-more-migration-central-america>.

⁴² OHCHR, *supra* note 25.

⁴³ See WHITE HOUSE, *supra* note 9, at 4.

⁴⁴ *Id.*

⁴⁵ See generally OHCHR, *supra* note 25.

movements.”⁴⁶ This gradual build up to migration results from rising sea levels, increasing temperatures, ocean acidification, glacial retreat and related impacts, land and forest degradation, or loss of biodiversity and desertification.⁴⁷ Rapid migration, on the other hand, involves immediate evacuation caused by dramatic natural disasters like hurricanes, earthquakes, and floods.⁴⁸ These environmental changes initiate the movement of individuals to new areas where they inevitably face the legal implications of such movement.

B. *International Legal Landscape of Climate Migration*

International refugee law and international human rights law are each possible avenues for legal protection for environmental migrants.⁴⁹ International refugee law provides scant legal protection for cross-border climate migrants.⁵⁰ Climate migrants are fleeing some form of harm, such as disease, diminished living conditions, or loss of economic opportunity.⁵¹ As a result, many call these individuals “climate refugees” and look to refugee law for a possible avenue for asylum.⁵² However, migration due to climate change does not fit within the internationally accepted definition of “refugee.”⁵³ The United Nations 1951 Refugee Convention and its 1967 Protocol (“Refugee Convention”) outline the internationally agreed upon requirements for an individual to be legally considered a refugee.⁵⁴ 114 nations are bound by this Refugee Convention, including the United States.⁵⁵

To be considered a refugee, the Refugee Convention requires that an individual: (1) has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion;” (2) has left his or her home country; and (3) is unwilling to return to that country because of this fear of persecution.⁵⁶

⁴⁶ McAdam, *supra* note 3, at 56.

⁴⁷ *See id.* at 16, 54.

⁴⁸ *Id.* at 11, 56.

⁴⁹ *See* Anxhela Mile, *Protecting Climate Migrants: A Gap in International Asylum Law*, EARTH REFUGE (Jan. 7, 2021), <https://earthrefuge.org/protecting-climate-migrants-a-gap-in-international-asylum-law/>.

⁵⁰ *Id.*

⁵¹ *See generally* OHCHR, *supra* note 25.

⁵² Mile, *supra* note 49.

⁵³ *See e.g. id.*

⁵⁴ McAdam, *supra* note 3, at 12.

⁵⁵ U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 6.

⁵⁶ *Id.* at art. 1 (stating a refugee is someone who is unable or unwilling to return to their country of origin owing to a “well-founded fear of being persecuted for reasons

While the Refugee Convention does not define “well-founded fear,” its application to specific circumstances where refugee status was granted provides context as to the term’s meaning. For example, a well-founded fear was recognized when an ethnic Kurd who was part of an Anti-Islamic regime feared torture if he or she returned to Iran.⁵⁷ Fear of persecution has been found in two additional instances. First, when a female child faced possible genital mutilation if she returned to Somalia, and second, when a child faced potential discrimination upon return to Russia due to his parents’ sexual orientation.⁵⁸

Cross-border migration due to climate change could, only under very rare and unique circumstances, be considered persecution by the United Nations.⁵⁹ Such a rare circumstance might arise based on migration resulting from a government’s outright denial of protection from the effects of climate change.⁶⁰ A fear of persecution may also be derived from migration caused by an armed conflict deemed to stem from an effect of climate change, such as food shortages or land disputes due to local sea-level rise.⁶¹

While the possibility of migration stemming from a recognized form of persecution is rare, it is not impossible.⁶² The IPCC recognizes a minor link between climate change and armed conflict.⁶³ The IPCC’s

of race, religion, nationality, membership of a particular social group, or political opinion...”).

⁵⁷ U.N. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 750/2016**, **, ¶ 4.11, 8.8, U.N. Doc. CAT/C/63/D/750/2016 (May 25, 2018).

⁵⁸ U.N. Convention on the Rights of the Child, *Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 3/2016***, ***, ¶11.3, 12, U.N. Doc. CRC/C/77/D/3/2016* (Mar. 8, 2018); U.N. Convention on the Rights of the Child, *Views adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 51/2018***, ***, ¶ 8.4, 12.6, U.N. Doc. CRC/C/86/D/51/2018* (Mar. 12, 2021).

⁵⁹ See McAdam, *supra* note 3, at 13.

⁶⁰ *Id.*

⁶¹ *See id.*

⁶² See Christopher B. Field et. al., *Climate Change 2014: Impacts, Adaptation, Vulnerability Summary for Policymakers*, IPCC, at 20 (2014), https://www.ipcc.ch/site/assets/uploads/2018/03/ar5_wgII_spm_en-1.pdf.

⁶³ *Id.* (stating “[c]limate change can indirectly increase risks of violent conflicts in the form of civil war and inter-group violence by amplifying well-documented drivers of these conflicts such as poverty and economic shocks (medium confidence). Multiple lines of evidence relate climate variability to these forms of conflict.”).

fifth assessment report (AR5) explains that “[c]limate change can indirectly increase risks of violent conflicts in the form of civil war and inter-group violence by amplifying well-documented sources of these conflicts, like poverty and economic shocks.”⁶⁴

The lack of a living persecutor is another factor that makes it difficult to define climate change effects as a form of persecution.⁶⁵ Typically, when an individual or group has refugee status, it is based on the identification of a persecutor in the form of a rival social group, a government, or other individual(s).⁶⁶ This was demonstrated in the case of the Kurd who was granted refugee status because of fear of persecution by a government controlled by a rival ethnic group.⁶⁷ Environmental or climate-related asylum seekers cannot point to a government, political leader, or social group as a potential persecutor.⁶⁸ Here, the fear of returning to their home country is caused by the physical environment.⁶⁹ It is often a drought, hurricane, lack of food, or other similar circumstance that is the driving force behind climate migration.⁷⁰ Without a persecutor, it will be difficult for a climate migrant seeking asylum to be granted relief under current international refugee law.⁷¹

International human rights law, while not a traditional avenue for climate-related asylum, provides greater promise for cross-border climate migrants.⁷² The Refugee Convention, an international agreement on asylum and the rights of refugees, established the principle of non-refoulement, which could possibly be leveraged to aid climate migrants.⁷³ The term “refouler” means to return, and is used to describe the deportation of refugees to their home territories.⁷⁴ Article 33(1) of the Refugee Convention states that a country cannot return refugees to any territory where their “life or freedom” would be at risk as a result of “race, religion, nationality, membership of a particular social group, or

⁶⁴ *Id.*

⁶⁵ McAdam, *supra* note 3, at 12.

⁶⁶ See U.N. Convention Relating to the Status of Refugees, *supra* note 55, at art. 1.

⁶⁷ McAdam, *supra* note 3, at 12.

⁶⁸ *Id.* at 12.

⁶⁹ See *id.*

⁷⁰ See *id.* at 11.

⁷¹ See *id.* at 13–14.

⁷² See Podesta, *supra* note 1.

⁷³ UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, ¶ 9 (Jan. 26, 2007) <https://www.unhcr.org/4d9486929.pdf>.

⁷⁴ *Id.* at ¶ 5.

political opinion.”⁷⁵ Therefore, under the principle of non-refoulement, a country is prohibited from deporting an asylum seeker if he or she would be at risk of persecution upon return.⁷⁶

Obligations to not extradite a refugee have also been inferred from other international treaties, like the United Nations Human Rights Committee’s ICCPR.⁷⁷ Article 6 of the ICCPR states in subsection 1, “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”⁷⁸ The right to life under the ICCPR only protects individuals from circumstances that would cause early death or would inhibit one’s ability to live with dignity but is not intended to be viewed narrowly.⁷⁹ Under the agreement, participating nations are required to refrain from any type of harm, either by act or omission, which would compromise this right to life.⁸⁰

Additionally, Article 7 of the ICCPR asserts an individual’s right to be free from torture or inhuman treatment.⁸¹ The article states, “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁸² If one can show that return to their home country would lead to death or interfere with their right not to face torture or inhuman treatment, then they may be granted asylum under the ICCPR.⁸³

Similar to refugee law, the principle of non-refoulement and the requirements under Articles 6 and 7 of the ICCPR mandate some

⁷⁵ *Id.*

⁷⁶ *Id.* at ¶ 9.

⁷⁷ UNHRC, General Comment No. 31, UN Doc CCPR/C/21/Rev. 1/Add. 13, 29 March 2004.

⁷⁸ International Covenant on Civil and Political Rights, art. 6, Dec. 19, 1966, 999 U.N.T.S. 171, 174.

⁷⁹ UNHRC, General Comment No. 36 on the Right to Life (art. 6), UN Doc. CCPR/C/GC/36, 30 October 2018, online: <https://digitalibrary.un.org/record/3884724?ln=en>. (stating “The right to life is a right that should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity. Article 6 of the Covenant guarantees this right for all human beings, without distinction of any kind, including for persons suspected or convicted of even the most serious crimes.”).

⁸⁰ *See id.*

⁸¹ International Covenant on Civil and Political Rights, *supra* note 78, at 175.

⁸² *Id.*

⁸³ *See* G.A. Res. 39/46, at 2 (Dec. 10, 1984).

showing of persecution for an individual to be granted asylum.⁸⁴ This requirement provides a difficult hurdle for climate migrants to overcome.⁸⁵ Climate migrants are unlikely to be able to demonstrate persecution, because they are not being forced out of their country by an individual, but rather by a force of nature.⁸⁶

The international community, however, is showing a greater willingness to stretch the boundaries of human rights law to possibly accept climate migrants facing severe consequences upon return to their home territory under the principle of non-refoulement and a right to life.⁸⁷ A recent case before the United Nations Human Rights Committee (UNHRC), *Ioane Teitiota v. New Zealand*, indicates the beginning of this shift.⁸⁸ In this 2020 case, Ioane Teitiota, a Kiribati national, sued New Zealand after the country denied him refugee status and ordered his removal to Kiribati.⁸⁹ Teitiota claimed that he was forced to leave his home on the island of Tarawa in Kiribati and migrate to New Zealand because of environmental degradation caused by climate change.⁹⁰ He detailed the scarcity of freshwater, the erosion of habitable land, and resulting overcrowding, concluding that the country is “an untenable and violent environment for the author and his family. . . [and that h]is right to life was violated.”⁹¹

Testimony by Teitiota’s wife and environmental experts painted a picture of the bleak outlook for the family upon return to Kiribati.⁹² Teitiota’s wife testified that she was worried for the “health

⁸⁴ *Asylum & The Rights of Refugees*, INT’L JUST. RES. CTR., <https://ijrcenter.org/refugee-law/>.

⁸⁵ See McAdam, *supra* note 3, at 12.

⁸⁶ *Id.*

⁸⁷ See UNHRC, Views adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2728/2016, ¶ 2.1 (Jan. 7, 2020) <https://www.unhcr.org/4d9486929.pdf> (stating “The situation in Tarawa has become increasingly unstable and precarious due to sea level rise caused by global warming. Fresh water has become scarce because of saltwater contamination and overcrowding on Tarawa. Attempts to combat sea level rise have largely been ineffective. Inhabitable land on Tarawa has eroded, resulting in a housing crisis and land disputes that have caused numerous fatalities. Kiribati has thus become an untenable and violent environment for the author and his family. . . [and h]is right to life was violated.”).

⁸⁸ Simon Behrman and Avidan Kent, *The Teitiota Case and the limitations of the Human Rights Framework*, 75 QIL 25 (2020).

⁸⁹ See UNHRC, *supra* note 87, at ¶ 1.1.

⁹⁰ See *Id.* at ¶ 2.1.

⁹¹ *Id.*

⁹² *Id.* at ¶ 2.4–2.6.

and well-being” of her family upon their return.⁹³ She indicated the “land was eroding due to the effects of sea level rise,” that “the drinking water was contaminated with salt,” and that “crops were dying.”⁹⁴ She even relayed stories she heard about children dying from drinking contaminated drinking water, and her fear that her children could encounter the same fate.⁹⁵ Her assertions were supported by expert testimony.⁹⁶ For example, a doctoral candidate conducting research on the effect of climate change in Kiribati testified to the island nation’s “poor and infertile” soil, lack of clean drinking water, submerging of previously habitable land, and frequent breaching of sea walls due to large, unprecedented storms.⁹⁷

Teitiota ultimately did not win his case because the tribunal found that imminent death was unlikely under Teitiota’s circumstances, but the UNHRC made an important holding that signifies an expansion of international notions of non-refoulement.⁹⁸ The UNHRC conclude[d] that the life-threatening effects of climate change could create conditions in which returning a migrant to such an environment would violate their right to life and trigger a non-refoulement obligation.⁹⁹ The tribunal also explained that in order for non-refoulement obligations to apply to a climate migrant, the threat to life must be imminent, meaning “the risk to life, must be, at least, likely to occur.”¹⁰⁰ Therefore, if the tribunal found that under Teitiota’s circumstances, death was imminent, it is likely it would have found non-refoulement obligations to apply.¹⁰¹ While the requirement of an imminent threat to life excludes many climate migrants, especially those responding to gradual changes, this case marks an international shift towards recognizing non-refoulement obligations for a small group of climate migrants.¹⁰²

Another international case signals the global shift in attitudes towards applying the principle of non-refoulement to grant asylum to climate migrants.¹⁰³ In 2020, a French court in Bordeaux upheld asylum for a Bangladeshi man on the grounds that his right to life would be

⁹³ *Id.* at ¶ 2.6.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See UNHRC, *supra* note 87, at ¶¶ 2.4–2.5.

⁹⁷ *Id.* at ¶ 2.4.

⁹⁸ UNHRC, *supra* note 87, at ¶ 2.9.

⁹⁹ *Id.* at ¶ 9.11.

¹⁰⁰ *Id.* at ¶ 2.9.

¹⁰¹ *Id.*

¹⁰² Podesta, *supra*, note 1.

¹⁰³ Coeur Administrative d’Appel [CAA] [Administrative Court of Appeal] Bordeaux, 2e chambre, Dec. 18, 2020, No. 20BX02193 (Fr.).

threatened by his removal from France to his home country.¹⁰⁴ The man entered France in 2011, and was denied asylum in 2013.¹⁰⁵ However, he obtained a temporary residence permit due to his health issues, which expired in 2017.¹⁰⁶ He was denied any additional residence time and ultimately appealed his removal to the Bordeaux court.¹⁰⁷

The Bordeaux court ruled that deportation to Bangladesh, with its incredibly poor air quality, would put him at great risk of death due to respiratory failure caused by his preexisting asthma.¹⁰⁸ This condition was likely to be dangerously exacerbated by the air quality in Bangladesh, which is attributable to climate change.¹⁰⁹ The court applied the principle of non-refoulement to grant asylum to this man, who, because of the effects of climate change, faced an imminent threat to his life if he were sent back to his home country.¹¹⁰ These two cases signify a shift in international human rights law towards including the direct causes of climate migration under the 1951 Refugee Convention’s principle of non-refoulement and ICCPR’s right to life.¹¹¹

C. *United States Legal Landscape of Climate Migration*

While bodies such as the United Nations and countries like France are beginning to shift towards providing greater legal protections to climate migrants, the United States has made no such policy changes.¹¹² The United States has, over time, abandoned almost all of its policies allowing asylum for natural disaster victims and now offers minimal routes to asylum for climate migrants under both United States law and its international agreements.¹¹³

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *See id.*

¹⁰⁹ Coeur Administrative d’Appel, Bordeaux, 2e chambre, Dec. 18, 2020, No. 20BX02193 (Fr.).

¹¹⁰ *Id.*

¹¹¹ United Nations High Commissioner for Refugees, *supra* note 74.

¹¹² *See* Refugee Relief Act of 1953, § 2(a) (expired 1956) (explaining that a refugee is “any person in a country or area which is neither Communist nor Communist-dominated, who because of persecution, fear of persecution, *natural calamity*, or military operations is out of his usual place of abode and unable to return thereto, who has not been firmly resettled, and who is in urgent need of assistance for the essentials of life or for transportation.”).

¹¹³ *See* Anya Howko-Johnson, *The Crisis of the Century: How the United States Can Protect Climate Migrants*, COUNCIL ON FOREIGN RELATIONS (Aug. 26, 2022) <https://www.cfr.org/blog/crisis-century-how-united-states-can-protect-climate-migrants>.

The United States previously provided a clear path to asylum for climate migrants.¹¹⁴ One example is the Refugee Relief Act of 1953 (“the RRA”), which was passed to bring more southern European immigrants to the United States.¹¹⁵ Section 2(a) of the RRA defined a refugee as a person who has left their home and is unable to return due to “persecution, fear of persecution, *natural calamity*, or military operations.”¹¹⁶ The RRA, therefore, provided asylum to individuals who were forced to migrate due to natural disasters and extreme weather events.¹¹⁷ However, the natural calamities provision was short lived because the RRA was only intended to last from 1953 to 1956.¹¹⁸ When the law expired in 1956, it was not renewed by Congress.¹¹⁹

The Immigration and Nationality Act also previously extended asylum to those fleeing natural disasters.¹²⁰ Prior to 1980, section 203(a)(7) of the Immigration and Nationality Act “provided a quota for persons fleeing persecution in certain countries or from natural calamities.”¹²¹ However, Congress eliminated the term “natural calamities” from the refugee definition with the Refugee Act of 1980 to align closer with the United Nations’ definition, which similarly omits the term.¹²²

TPS is a contemporary method to provide asylum to foreign nationals in emergency situations, like natural disasters, but it involves serious roadblocks for most climate migrants.¹²³ The Immigration Act of 1990 authorizes the Department of Homeland Security to provide “temporary immigration status . . . to nationals of specifically designated

¹¹⁴ Andrew Glass, Eisenhower signs Refugee Relief Act, Aug. 7, 1953, POLITICO (Aug. 7, 2018) <https://www.politico.com/story/2018/08/07/this-day-in-politics-aug-7-1953-760670>.

¹¹⁵ Frank Auerbach, *The Refugee Relief Program: A Challenge to Voluntary Social Agencies*, 35 *Families in Society*, 337, 337 (1954).

¹¹⁶ Refugee Relief Act of 1953, *supra* note 112.

¹¹⁷ *See id.*

¹¹⁸ U.S. Citizenship and Immigration Services, Refugee Timeline (2021), <https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/refugee-timeline>.

¹¹⁹ *See* Janet L. Parker, *Victims of Natural Disasters in U.S. Refugee Law and Policy*, 3 *Mich. J. Int'l L.* 137, 138 (1982).

¹²⁰ *Id.* at 137.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *See* American Immigration Council [AIC], Temporary Protected Status: An Overview (September 2022) https://www.americanimmigrationcouncil.org/sites/default/files/research/temporary_protected_status_an_overview_0.pdf.

countries.”¹²⁴ These nationals are extended this status because of natural disasters, violent conflict, or other extreme circumstances that would prevent them from returning to their home countries.¹²⁵ However, TPS only applies to individuals already in the United States who “have continuously resided in the United States since a date specified by the Secretary of Homeland Security.”¹²⁶

The United States designated Haiti for TPS on August 3, 2021, to last for 18 months.¹²⁷ Under this designation, Haitian nationals and “individuals having no nationality who last habitually resided in Haiti,” and who “have continuously resided in the United States since July 29, 2021, and who have been continuously physically present in the United States since August 2021” were authorized to apply for TPS.¹²⁸ The United States Citizenship and Immigration Services explained its decision to designate Haiti for TPS, stating “the effects of the COVID-19 pandemic—combined with economic instability, civil unrest, and recurring shocks linked to natural disasters including droughts, earthquakes, floods and hurricanes, have led to increased food insecurity and other humanitarian needs throughout the country.”¹²⁹

The Immigration Act of 1990’s requirement that an individual is presently residing in the United States to qualify for TPS does not help most climate migrants.¹³⁰ This is especially true for those migrating due to rapid onset changes, who are often residing in their home country, rather than the United States, when a natural disaster triggers their migration.¹³¹ For example, those in Haiti as of August 2021 who hoped to flee the unstable conditions in the aftermath of the hurricanes would not be provided asylum in the United States.¹³²

However, a small exception exists that allows TPS eligibility for a select few individuals not currently residing in the United States.¹³³ A bill amending section 244(a) of the Immigration and Nationality Act, which provides for TPS in the United States, includes a small exception

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Designation of Haiti for Temporary Protected Status, *supra* note 40, at 41,868.

¹²⁸ *Id.* at 41,863.

¹²⁹ *Id.* at 41,867.

¹³⁰ *See id.*

¹³¹ *See* McAdam, *supra* note 3, at 56.

¹³² *See* Designation of Haiti for Temporary Protected Status, *supra* note 40, at 41,863.

¹³³ *See* H.R. 2064, 117th Cong. (1st Sess. 2021).

to provide status to those not currently in the United States.¹³⁴ Subsection 2 states that an alien is eligible for TPS if they meet three requirements:

- (1) they must apply from and currently reside outside of the United States;
- (2) they must have been continually present in the United States for a period of at least three years prior to the date of their removal from the United States; and
- (3) on the date of their removal from the United States they must have been eligible for TPS.¹³⁵

As a result, a very narrow group of climate migrants who resided in the United States in the past could be eligible for TPS if their home country is designated for this status by the Department of Homeland Security.¹³⁶

The United States' current interpretation of international refugee law and international human rights law does not offer legal protection for climate migrants.¹³⁷ As a member of the United Nations and a signatory of both the 1951 Refugee Convention and the ICCPR, the United States is encouraged to uphold the requirements of these international agreements.¹³⁸ The requirements of these agreements include: (1) designating individuals fleeing persecution as refugees; and (2) applying the principle of non-refoulement and the right to life to provide asylum to those who would be under threat of imminent persecution or death upon return to their home country.¹³⁹ However, the United States has adopted its own interpretation of how climate change fits within these rights.¹⁴⁰ The 2021 White House Report explained that

¹³⁴ *See id.*

¹³⁵ *See id.* at 4 (stating in subsection 2 that “[A]n alien shall be eligible for adjustment of status if the alien was removed or voluntarily departed from the United States on or after September 25, 2016, if the alien, (A) applies from abroad; (B) was continuously physically present in the United States for a period of not less than 3 years before the date of removal or departure; (C) had temporary protected status on such date, or was otherwise eligible, on such date, for temporary protected status notwithstanding subsections (c)(1)(A)(iv) and (c)(3)(C) of section 244 of the Immigration and Nationality Act (8 U.S.C. 1254a). . . .”).

¹³⁶ *See id.*

¹³⁷ *See* THE WHITE HOUSE, *supra* note 9 at 19; *see also* AMERICAN IMMIGRATION COUNCIL, *supra*, note 123, at 1.

¹³⁸ *See* International Covenant on Civil and Political Rights, 16 Dec. 1966, 104 Stat. 4978, 999 U.N.T.S. 280. (The United States then incorporated the Refugee Convention into law with the 1990 Refugee Act),

¹³⁹ *See supra*, note 81, at ¶ 9; *see also supra*, note 55 at 3, 30.

¹⁴⁰ *See* THE WHITE HOUSE, *supra* note 9, at 19.

it would not apply the principles of non-refoulement under Articles 6 or 7 of ICCPR, but rather continue with the traditional treatment of refugees under the 1951 Refugee Convention, which only grants refugee status for fear of persecution.¹⁴¹ The 2021 White House Report emphasized that it did not anticipate expanding its legal protections to reach those fleeing the effects of climate change.¹⁴²

The United States has not engaged in a shift towards including the direst forms of climate migration under human rights law, as seen in other parts of the world.¹⁴³ Rather, the United States has focused its efforts on curbing the underlying cause of displacement, climate change, and the need for migration after extreme weather events.¹⁴⁴ The 2021 White House Report proscribed efforts such as increased forecasting of extreme weather events and crop conditions, resilience programming to help at-risk countries adapt to the possible effects of climate change, and humanitarian assistance following natural disasters.¹⁴⁵ Ultimately, the policy of the United States focuses on minimizing the need to grant asylum to climate migrants, rather than providing legal protections to such migrants, both through its own statutes and through its obligations under international agreements.¹⁴⁶

III. ARGUMENT

¹⁴¹ *See id.*

¹⁴² *See id.* (stating “The United States interprets its *non-refoulement* obligations strictly according to the relevant 1951 Refugee Convention (and its 1967 Protocol) and Convention Against Torture (CAT) provisions. It does not accept that the International Covenant on Civil and Political Rights (ICCPR), to which the United States is party, includes obligations prohibiting *refoulement*, nor does it interpret the Article 6 prohibition on the arbitrary deprivation of life to encompass a positive duty to protect life in the face of all possible external threats. The United States does not consider its international human rights obligations to require extending international protection to individuals fleeing the impacts of climate change. However, as a matter of policy, the United States does have a national interest in creating a new legal pathway for individualized humanitarian protection in the United States for individuals who establish that they are fleeing serious, credible threats to their life or physical integrity, including as a result of the direct or indirect impacts of climate change. This new legal pathway should be additive to and in no way infringe upon or detract from existing protection pathways to the United States, including asylum and refugee resettlement.”).

¹⁴³ *See id.*

¹⁴⁴ *See id.* at 12.

¹⁴⁵ *See id.*

¹⁴⁶ *See* THE WHITE HOUSE, *supra* note 9, at 5-6.

Climate change is not going away.¹⁴⁷ The effects of climate change are anticipated to worsen, increasing the likelihood of climate migration from countries experiencing civil and environmental instability.¹⁴⁸ Should the United States and other nations decide to expand legal protections for climate migrants in addition to curbing the causes of migration, avenues exist under current United States and international law to do so. Such frameworks would allow these nations to protect their interests in “safe, orderly, and humane migration management, regional stability, and sustainable economic growth and development” while also maintaining practical immigration levels.¹⁴⁹ One potential source of legal protection exists first in United States law, through leveraging current options for granting TPS to climate migrants. Another possible solution exists in international human rights law, through adopting a broader interpretation of the right to life under the IPCC.

A. Possible Legal Protections Under Current United States Law

A narrow route to asylum for cross-border migration already exists in United States immigration law. The exception under section 244(a) the Immigration Act to provide TPS to certain individuals not residing in the United States could be leveraged to aid those displaced by climate change.¹⁵⁰ Under this exception, individuals are eligible for TPS who apply from abroad, have resided in the United States for at least three years in the past, and who, at the time of leaving the United States, were eligible for TPS.¹⁵¹ Technically, an individual who left the United States and returned to their home country that is designated for TPS, can then apply for TPS if a natural disaster or other drastic climate related event makes their home country uninhabitable.¹⁵²

The TPS solution would require the Department of Homeland security to designate TPS to those countries vulnerable to the most drastic effects of climate change. Countries most vulnerable to migration from rapid onset climate migration are also experiencing other vulnerabilities that often contribute to a designation of TPS.¹⁵³ Experts observe that climate change “add[s] to existing problems and

¹⁴⁷ See generally UNHRC, *supra* note 6.

¹⁴⁸ See Pachauri et al., *supra*, note 7, at 16,73.

¹⁴⁹ THE WHITE HOUSE, *supra* note 9, at 17.

¹⁵⁰ See H.R. 2064, *supra* note 133.

¹⁵¹ *Id.*

¹⁵² See *id.*

¹⁵³ See Designation of Haiti for Temporary Protected Status, *supra* note 40, at 41,864.

compound[s] existing threats.”¹⁵⁴ One expert in Kiribati explained “climate change overlays pre-existing pressures—overcrowding, unemployment, environmental and development concerns— which means that it may provide a ‘tipping point’ that would not have been reached in its absence.”¹⁵⁵ There is already evidence that countries such as Haiti, Guatemala, Honduras, El Salvador, and others are at risk of climate migration.¹⁵⁶ Risk of slow-onset effects of climate change combined with political, civil, or economic instability is a simple indicator that a country is at risk of climate migration.¹⁵⁷ As a result, the United States could identify countries nearing a tipping point and designate them for TPS before any extreme weather events that would initiate migration. Under this structure, should a natural disaster arise, those who already have ties in the United States through previous residency could return and avoid the negative impacts of the disaster.¹⁵⁸

Leveraging TPS to accommodate certain climate migrants, however, is an incredibly narrow solution. It requires the Department of Homeland Security to adopt a proactive policy for TPS designations aimed at addressing climate migration before the need occurs. The 2021 White House Report emphasized this limitation, concluding that TPS is not a “permanent solution” for those who are displaced from their home as a result of climate change.¹⁵⁹ Should the effects of a natural disaster or other effects of climate change become less severe or resolved, the United States can revoke this status and climate migrants can safely return home.

¹⁵⁴ McAdam, *supra* note 3, at 9.

¹⁵⁵ *Id.*

¹⁵⁶ Speck, *supra* note 41.

¹⁵⁷ See White House Report, *supra* note 9, at 4.

¹⁵⁸ See H.R. 2064, *supra* note 133.

¹⁵⁹ THE WHITE HOUSE, *supra* note 9, at 18-9 (stating “Following designation of a country for TPS, eligible nationals who are already in the United States when the designation goes into effect and apply for the status may be granted TPS, and as a result, temporary protection from removal. Although the TPS criteria may accommodate the provision of protection to foreign nationals facing the impacts of climate change-related events in their country of origin, this protection is limited. More specifically, TPS does not protect individuals who arrive after the date of designation, making it likely to exclude many of those forced to flee because of the disaster or event that is the basis for a TPS designation. The TPS statute also requires that a foreign government officially request TPS designation in cases of environmental disaster, which limits its application for nationals of countries without sufficient government will or capacity to request TPS. Furthermore, as a temporary status, the intent of TPS is not to provide a permanent solution for individuals unable to return home because of the long-term impacts of climate change.”).

B. Possible Legal Protections Utilizing a Different Interpretation of International Human Rights Law

Another solution addressing the lack of legal protections for climate migrants potentially lies in utilizing a different interpretation of obligations under international treaties and the “right to life.” The United States and much of the world do not currently interpret the ICCPR to allow non-refoulement obligations to apply to climate migrants, nor do they interpret “the Article 6 prohibition on the arbitrary deprivation of life to encompass a positive duty to protect life” against climate threats.¹⁶⁰ The policy in the United States relies on a strict interpretation of the text of these international agreements.¹⁶¹ Under this policy, the United States provides minimal legal protection for climate migrants, focusing rather on addressing the root cause of climate change and resulting migration.¹⁶²

However, the 2021 White House Report indicates the Biden administration’s desire to be part of the progress toward expanding legal protection to these individuals.¹⁶³ The administration recognizes climate change as a driving force of migration and stresses the need for greater support for climate migrants, stating:

Migration can be a warranted adaptation strategy, yet little assistance is dedicated for planned and voluntary migration. Current assistance focuses on fixed locations, missing opportunities to invest in human capacity, assets and safety nets that are mobile and can support people when they migrate. Supporting migration and investing in mobile social protection and cash options are relatively nascent areas of work and the USG can become a technical leader by investing in pilot projects, research, and ultimately moving to scale.¹⁶⁴

Should the United States wish to change its policies to provide broader legal protection to climate migrants, it could adjust its interpretation of their obligations under international agreements such as

¹⁶⁰ *Id.* at 19.

¹⁶¹ *Id.*

¹⁶² *Id.* at 10.

¹⁶³ *Id.* at 4.

¹⁶⁴ *Id.* at 16.

the ICCPR. Article 6 of the ICCPR does not detail what this right to life entails, whether it is simply a right to biological life or the ability to conduct one’s life with dignity.¹⁶⁵ As a result, nations are required to interpret the meaning of this clause.¹⁶⁶ One option is to read the right to life under the ICCPR to extend the right by applying a different canon of interpretation to the text of the agreement. It could replace a strict reading of the language of Article 6 of the ICCPR with an ordinary meaning interpretation. This canon of construction instructs that “unless otherwise defined, words will be interpreted taking their ordinary meaning.”¹⁶⁷

An example of the application of the ordinary meaning canon appears in the United States Supreme Court case *Perrin v. United States*, where the Court grappled with the meaning of the term “bribery” as used in a statute.¹⁶⁸ Bribery at common-law meant only public corruption-related crimes, however, over time the term came to be understood to also apply to private crimes.¹⁶⁹ The Court used the ordinary meaning canon to find that Congress intended the ordinary meaning of the term “bribery” to apply, rather than the common-law meaning that limited the term to only apply to public crimes.¹⁷⁰ To determine what the ordinary meaning of a term is, courts use several sources, such as contemporary dictionaries¹⁷¹ and context given to a term from its “surroundings.”¹⁷²

Here, the ordinary meaning of the term *life* in Article 6 of the ICCPR includes a biological quality of life and a substantive quality of life.¹⁷³ Merriam-Webster defines *life* as both “the quality that distinguishes a vital and functional being from a dead body,” and “the sequence of physical and mental experiences that make up the existence of an individual.”¹⁷⁴ Hence, to live means to both be biologically alive, but also to function: to eat, have shelter, and walk the earth.¹⁷⁵ Context

¹⁶⁵ White House Report, *supra* note 9.

¹⁶⁶ *Id.* at 9.

¹⁶⁷ *Perrin v. United States*, 444 U.S. 37, 42 (1979) (citing *Burns v. Alcala*, 420 U.S. 575, 580–81 (1975)).

¹⁶⁸ *See id.*

¹⁶⁹ *Id.* at 43.

¹⁷⁰ *Id.*

¹⁷¹ *Kouichi Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 567–69 (2012).

¹⁷² *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 457 (looking to both “domestic and international presumption[s] of organizational liability in tort actions” to evaluate the meaning of the term “individual”).

¹⁷³ *See, e.g., Life, Merriam-Webster’s Dictionary* (11th ed. 2019); *see Life, Black’s Law Dictionary* (11th ed. 2019).

¹⁷⁴ *Life, Merriam-Webster’s Dictionary* (11th ed. 2019).

¹⁷⁵ *Id.*

also supports this dual notion of the term *life*.¹⁷⁶ For example, in the international context, the *Ioane Teitiota v. New Zealand* tribunal hinted at a right to life free from the negative effects of climate change on an individual's well-being, which indicates an accepted definition of *life* that extends beyond biological life.¹⁷⁷

Thus, the ordinary meaning of *life* encompasses the notion that one cannot live if their home is under water, if their land provides them no food, or if toxicity cause by a weather event would cause death.¹⁷⁸ *Life* as interpreted by its ordinary meaning would allow nations that choose to apply principles of non-refoulement to a growing group of individuals who, as a result of sea level rise or an extreme weather event, simply cannot live in their home nation.

On the other hand, a United States court has not yet used the ordinary meaning canon to interpret any provision of the ICCPR. Applying the ordinary meaning cannon to interpret the right to life to apply to the principle of non-refoulement would, therefore, be a novel approach. Such an approach would likely need an underlying policy initiative to take hold. However, the current policy of the United States is to focus on curbing climate change itself, rather than manage any migration resulting from the effects of climate change.¹⁷⁹

IV. CONCLUSION

Global warming, rising sea levels, extreme weather events, disease, and diminished living conditions are forcing individuals to migrate.¹⁸⁰ While migration caused by persecution affords significant international legal protection, individuals fleeing their homes because of the effects of climate change are afforded little to no legal protection.¹⁸¹ The latter case is significantly more common since only under rare circumstances could one say their climate related migration is the result of persecution.¹⁸² The persecutor driving climate migration is most often not a person, but rather an environmental occurrence.¹⁸³ International refugee law does not currently afford asylum protections to climate migrants, due to this lack of showing of a "well-founded fear of

¹⁷⁶ See UNHRC, *supra* note 87, at ¶ 9.5.

¹⁷⁷ *Id.* at 9.11-12.

¹⁷⁸ UNHRC, *supra* note 87, at ¶ 9.11.

¹⁷⁹ The White House Report, *supra* note 9, at 4.

¹⁸⁰ UNHRC, *supra* note 87.

¹⁸¹ *Id.*

¹⁸² The White House Report, *supra* note 9, at 17.

¹⁸³ *Id.*

persecution.”¹⁸⁴ However, there is a growing international trend indicating that human rights law, under the principle of non-refoulement, may be a growing avenue to asylum for climate migrants.¹⁸⁵

United States law has equally minimal protections to provide asylum to migrants under both its ability to grant TPS to migrants and its obligations under international agreements.¹⁸⁶ Despite these current limitations, there is potential for the United States to leverage its ability to grant TPS to countries at the greatest risk of negative climate effects and migration. Additionally, the United States and other nations possess the ability under international agreements to reinterpret the right of life as it relates to the principle of non-refoulement.¹⁸⁷ By implementing these solutions, nations will be able to both address their humanitarian interests in assisting foreign nationals undergoing dire threats to their health and well-being, and also to safeguard their national security interests by helping manage migration.¹⁸⁸

¹⁸⁴ *Id.*

¹⁸⁵ *See* The White House Report, *supra* note 9.

¹⁸⁶ *Id.* at 19.

¹⁸⁷ *See id.*

¹⁸⁸ *Id.* at 16.

