

Climate Change and Migration: Climate Change Induced Migration in International Law and the Human Right to a Sustainable Environment

Carina Karnicar*

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* Carina Karnicar is a graduate student at the University of Vienna, the Diplomatic Academy of Vienna and the Technical University of Vienna focusing on climate change adaptation and mitigation and topics of international environmental law. This paper is an extended version of an essay submitted as part of a seminar on environmental security to the Diplomatic Academy of Vienna.



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I. Introduction

Scientific certainty on the acute and threatening implications of climate change has grown in recent decades. Increasing temperatures are leading to extreme weather phenomena, stress on water resources and geographical expansion of diseases. This trend will likely continue and exacerbate these conditions.¹ Droughts, floods, sea-level rise, and other direct and indirect results of climate change are substantially threatening lives and livelihoods as traditional means of agriculture become harder or even impossible to sustain.² These precarious circumstances in turn give rise to migration and displacements as habitats are becoming hostile to life. Although the definition of a refugee as outlined in the Geneva Refugee Convention of 1951³ does not include climate change as a reason for flight and thus renders the status of affected persons uncertain, the term climate refugee or “environmental refugee” has not only become common in media and academic articles⁴ but was also used by former United

¹ IPCC, ‘Sixth Assessment Report’ (2021) <<https://www.ipcc.ch/report/ar6/wg1/>> accessed 13 January 2024.

² Oliver Ruppel, ‘Intersections of Law and Cooperative Global Climate Governance – Challenges in the Anthropocene’, in Ruppel, Roschmann, and Ruppel-Schlichting, *Climate Change: International Law and Global Governance: Volume I: Legal Responses and Global Responsibility* (Baden-Baden, 2013) 29 (57).

³ The Refugee Convention 1951.

⁴ National Geographic, ‘Environmental Refugee’ (*education.nationalgeographic.org* 2023) <<https://education.nationalgeographic.org/resource/environmental-refugee/>> accessed 13 January 2024; Diane Bates, ‘Environmental Refugees? Classifying Human Migrations Caused by Environmental Change’ (2002) 23 *Population and Environment* 465 (465 ff) <<https://www.jstor.org/stable/27503806>>; Tim McDonnell, ‘NPR Choice Page’ (*Npr.org* 2019) <<https://www.npr.org/sections/goatsandsoda/2018/06/20/621782275/the-refugees-that-the-world-barely-pays-attention-to>> accessed 13 January 2024.

Nations Secretary-General Ban Ki-moon, who included the term “environmental refugees” in his speech to the United Nations Security Council on the Impact of Climate Change on International Peace and Security in 2011.⁵ However, designating people displaced due to environmental damage as climate refugees or refugees in general lacks legal footing.

Legal scholars including Walter Kälin, Victoria Mence, Alex Parrinder, and Christian Roschmann, have described interlinkages of climate change induced hardships with human rights violations. But while the destruction of arable land, water resources, and air quality can be directly connected to the human rights to life, property, and health, this connection has not yet found its way into codified international law.⁶ Several framework conventions and international agreements have been concluded in the years since environmental issues were first raised on an international level at the 1972 Stockholm Convention. However, so far none of them have established clear guidelines on human rights in face of climate change nor addressed specific policy options tackling environmentally induced migration.⁷ Referring to the broader global environmental changes and damages resulting from climate change, this situation poses the question: Is there a human right to a clean, healthy, and sustainable environment? If so, people whose environment has become unsuitable to sustain them and their lives – with little to no responsibility in that process attributed to them – could be entitled to one that is clean, healthy, and sustainable somewhere else. In order to successfully link climate change induced migration with human rights, an answer to this question would provide a way forward.

A. Human Right to a Clean, Healthy and Sustainable Environment

On October 8th, 2021, the Human Rights Council recognized in a resolution “the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights.”⁸ The Council referred in its resolution

⁵ Ban Ki-moon, ‘Opening Remarks at Press Encounter after Security Council Meeting on the Impact of Climate Change on International Peace and Security | United Nations Secretary-General’ (20 July 2011) <<https://www.un.org/sg/en/content/sg/speeches/2011-07-20/opening-remarks-press-encounter-after-security-council-meeting-impact>> accessed 13 January 2024.

⁶ Ruppel, ‘Intersections’, 29 (63).

⁷ Christian Roschmann and others, ‘Climate Change and Human Rights’, Ruppel, Roschmann, and Ruppel-Schlichting, *Climate Change: International Law and Global Governance: Volume I: Legal Responses and Global Responsibility* (Baden-Baden, 2013) 203 (215 ff) <<http://www.jstor.org/stable/j.ctv941w8s.12>> accessed 15 May 2023.

⁸ Human Rights Council, ‘The Human Right to a Clean, Healthy and Sustainable Environment, HRC/RES/48/13’ (18 October 2022).

to several human rights instruments, declarations stemming from negotiations on the environment and climate change as well as the Sustainable Development Goals for 2030. It also referred the matter to the General Council for further review. The General Assembly subsequently adopted a resolution on July 28th, 2022, in which it repeated the majority of the Human Rights Council resolution and reaffirmed the human right to a clean, healthy and sustainable environment.⁹ Despite the political authority of these two organs, their resolutions are not legally binding. The transformation of resolutions into customary international law or legal instruments depends on courts to recognize these views and translate them into their verdicts. This would create useful precedents for others to follow. So far, this has not occurred.¹⁰ However, this has not deterred their further political usage.

In March 2023, efforts by the Pacific small developing island state of Vanuatu finally paid off. Vanuatu succeeded in getting 140 countries (including Palestine) to support its efforts to obtain an advisory opinion of the International Court of Justice. Recalling resolutions such as the one of July 28th, 2022, the General Assembly thus requested the Court to answer questions on states' legal obligations to protect states as well as present and future generations from anthropogenic effects on the climate. Furthermore, the request enquires about consequent responsibilities should states fail in their obligations to protect the climate and thus cause harm, especially to small island developing states.¹¹ While an advisory opinion of the International Court of Justice would not create direct obligations for states, the legal authority of the Court could nonetheless promote its consideration by national and other courts.¹²

B. Outline and Methodology

Examining primary sources of international environmental law such as the 1997 Kyoto Protocol and the 2015 Paris Agreement that have evolved out of the 1992 United Nations Framework Convention on Climate Change (UNFCCC), it is clear that efforts dealing with climate change have gradually moved from primarily stressing

⁹ General Assembly, 'The Human Right to a Clean, Healthy and Sustainable Environment, A/RES/76/300' (1 August 2022).

¹⁰ At the time of writing in late 2023.

¹¹ General Assembly, 'Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, 77/L.58' (1 March 2023).

¹² Stephen Schwebel, 'The Effect of Resolutions of the U.N. General Assembly on Customary International Law' (1979) 73 Proceedings of the Annual Meeting (American Society of International Law) 301 (302-304).

mitigation to increasingly including calls for adaptation strategies.¹³ For these means, adaptation funds have been created after the 17th Conference of the Parties to UNFCCC (COP17) to assist developing countries to do so.¹⁴ However, while migration can be interpreted as an adaptation strategy, such direct conclusions have at the most entered political and academic spheres and not legal ones. The complex topic of climate change and migration leaves open debates with many unresolved issues. An adequate, universal solution has not been found so far. To shed some light on this complexity, this paper aims to describe the difficulties in the discussion on climate change induced migration in international law and aims to explain why the label “climate refugee” is not yet an accurate one.

The first part of this paper will outline the current state of the international legal framework and what it entails in terms of climate change and migration. This part will lead to the conclusion that there is first and foremost a substantive lack of definitions on climate migration or specific strategies to deal with such. This part will also clarify intersections of different areas of international law, such as international environmental law, human rights law, and international refugee law, as studied by various academics and list international, regional, and national regulations. The second part is dedicated to an analysis of the case study and precedent created by Ioane Teitiota, a Kiribati citizen who applied for asylum in New Zealand on the basis of climate change induced, life-threatening conditions in his homeland due to sea-level rise.¹⁵ It will explain why his efforts did not yield his desired results. In conclusion, the paper will summarize remaining difficulties in the discourse on “climate refugees”. The final part discusses the possibilities of approaching climate migration from an alternative perspective, such as an adaptation strategy. The literature reviewed for this paper includes several academic contributions, framework conventions and agreements as primary sources of international environmental law as well as court decisions.

¹³ United Nations, ‘Paris Agreement to the United Nations Framework Convention on Climate Change’ (2015).

¹⁴ Margaux Hall and others, ‘Climate Change Adaptation and Human Rights: An Equitable View’, *Climate Change: International Law and Global Governance* (2013) 261 (272 ff) <<http://www.jstor.org/stable/j.ctv941w8s.14>> accessed 15 May 2023.

¹⁵ Adaena Sinclair-Blakemore, ‘Teitiota v New Zealand: A Step Forward in the Protection of Climate Refugees under International Human Rights Law?’ (2020) <<https://ohrh.law.ox.ac.uk/teitiota-v-new-zealand-a-step-forward-in-the-protection-of-climate-refugees-under-international-human-rights-law/>> accessed 2 November 2023.

II. Current Legal Framework on Climate Change and Migration

The debate on climate refugees started in a highly politicized context in the 1980s during which the term entered public discussions, media coverage and various academic disciplines following some controversial, emerging research on the topic.¹⁶ The controversies included imprecise definitions, weak evidence used to make quantitative predictions – giving rise to its speculative nature – and the difficulty of directly linking environmental factors with the multi-layered causes of migrations.¹⁷ The problems inherent in these debates are reflected in the paucity of codified provisions on climate change induced migration within major legal frameworks of international environmental law. To illustrate this, the present chapter outlines relevant international treaties with a focus on potential links to climate migration.

A. Geneva Refugee Convention

Referring to migrants who moved due to environmental factors as refugees is, *de lege lata*, legally imprecise, rendering the potential to define them officially as such difficult. Recognized refugees' rights are legally and historically outlined in the Geneva Refugee Convention, with defined requirements such as persecution and discrimination being the cause of the affected persons' decision to remove themselves from their countries of origin.¹⁸ According to paragraph A (2) of Article 1 of the Convention, the term "refugee" is defined as a person

“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.”¹⁹

In terms of climate change induced migration, this definition would have to undergo an amendment to encompass the different context under which migration – forced or voluntary – takes place. Even when migration takes place involuntarily and due to

¹⁶ Joanna Apap, 'BRIEFING EPRS | European Parliamentary Research Service' (2019), 3. <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621893/EPRS_BRI\(2018\)621893_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621893/EPRS_BRI(2018)621893_EN.pdf)> accessed 2 November 2023.

¹⁷ Victoria Mence and Alex Parrinder, 'Environmentally Related International Migration: Policy Challenges,' *A Long Way to Go* (2017) 317 (323) <<http://www.jstor.org/stable/j.ctt20krxxh.20>> accessed 8 June 2023.

¹⁸ Mence, 'Policy Challenges' 317 (320).

¹⁹ The Refugee Convention 1951.

imminent threat to life and livelihood, climate change does not discriminate “for reasons of race, religion, nationality, membership of a particular social group or political opinion” and therefore does not fall under the definition. An amendment would entail political work, will, and negotiations and is unlikely to be realized anytime soon, considering the long processes behind international agreements.²⁰

Besides the Refugee Convention, instruments such as the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the Convention on the Rights of the Child protect individuals which do not fit the definition for recognized refugees.²¹ For example, Article 1 of the ICCPR states that “in no case may a people be deprived of its own means of subsistence” but does not include a source of such potential deprivation. While environmentally induced damages, resource scarcity and resulting displacement could lead to circumstances covered under these instruments and thus provide legal protection, this nexus is not specifically mentioned.

Including climate migration in the presently available categories would be conceptually and politically difficult as a substantially enlarged number of potential refugees could decrease states’ capabilities and willingness to accommodate them. In their article “Environmentally Related International Migration: Policy Challenges,” Victoria Mence and Alex Parrinder argue that this could further compromise the protection afforded to currently recognized refugees. In addition, the initial predictions that gave rise to the debate lacked sound quantitative research and were also devoid of proven and sound evidence that would link environmental factors with international migration patterns.²² Not only can reasons for migration be found in a combination of political, economic, and social factors, but the type of migration varies as well. It could be “internal versus cross-border; short- or long-distance; temporary or permanent; [or caused by] rapid- or slow-onset events.”²³ Linking migration with slow-onset events of climate change proves especially difficult in this debate.²⁴ These conceptual complexities have prevented finding a legal solution on the international

²⁰ Frances Mautner-Markhof, *Processes of International Negotiations*. (Westview Press 1989), 1-541 (v) <<https://pure.iiasa.ac.at/id/eprint/3214/1/XB-89-601.pdf>> accessed 2 November 2023.

²¹ Claire Petrie, Migration Amendment (Clarifying International Obligations for Removal) Bill 2021.

²² Mence, ‘Policy Challenges,’ 317 (320).

²³ Mence, ‘Policy Challenges,’ 317 (323).

²⁴ Mence, ‘Policy Challenges,’ 317 (317 ff).

level, which is evident when further examining main sources of international environmental law.

B. International Agreements on the Environment and Climate Change

International regulation on the environment remains fragmented and sectional with international agreements being concluded in individual areas. Dealing with the atmosphere, the Vienna Convention for the Protection of the Ozone Layer of 1985 laid the foundation for the conclusion of the Montreal Protocol of 1987. The instrument sought to regulate the use and phasing out of chemical agents causing ozone layer depletion and marks a major success in international environmental negotiations. The 1979 Geneva Convention on Long-Range Transboundary Air Pollution established rules governing emissions causing air pollution and acid rain. The 1992 United Nations Framework Convention on Climate Change (UNFCCC) signed at the Rio Earth Summit together with the non-binding Rio Declaration is the main source of law on climate change. In the UNFCCC, the parties acknowledge anthropogenic causes of climate change and declare their willingness to develop legislation on the environment, to seek the stabilization of greenhouse gas emissions, and to combat “climate change and the adverse effects thereof.”²⁵

While this primary framework outlines both provisions on mitigation and adaptation measures, and in Article 8 mentions the special consideration that should be awarded to countries that are especially under stress due to and vulnerable to climate change, the UNFCCC includes no mention of migration. While “it has been suggested [in academic literature] that not only can adaptation function as a way to reduce migration, but that migration can also function as an adaptation strategy that may significantly increase the resilience of communities to environmental and climate change impacts,”²⁶ no such direct relationship was mentioned in the framework convention.

The Kyoto Protocol, adopted in 1997, established commitment periods during which parties included in its Annex 1 were to “implement policies and measures under this Article in such a way as to minimize adverse effects, including the adverse effects of climate change, effects on international trade, and social, environmental and economic impacts on other Parties.”²⁷ Besides calling for mechanisms to mitigate climate change, the Kyoto Protocol also includes adaptation as one of its goals. Article

²⁵ United Nations, ‘United Nations Framework Convention on Climate Change’ (1992), Art. 3.

²⁶ Mence, ‘Policy Challenges,’ 317 (325).

²⁷ United Nations, ‘Kyoto Protocol to the United Nations Framework Convention on Climate Change’ (1998), Art. 2.

12 highlights that developing countries particularly affected by climate change should be assisted in their adaptation efforts.²⁸ Migration and migrants are also not addressed in this treaty, however.

In 2015, the Paris Agreement was concluded, shifting the focus from mitigation to adaptation mechanisms, with the latter mentioned 47 times in the treaty and the former only half as much. For the first time, the preamble also mentions human rights and migrants. Both are mentioned only, however, in the context of calling on the parties to consider the rights of this particular vulnerable group when addressing climate change through specific action and not in a way that connects these issues with targeted provisions.²⁹

Human rights in the face of climate change pose a complex problem, as no direct linkage between the two has reached the international legal framework. It is important to note that legislation on human rights and legislation on the protection of the environment have evolved separately, with the former having a longer history. Certain human rights, such as the right to life, the right to health and the right to property, can be severely compromised in cases of environmental degradation, as highlighted in prominent cases such as *Öneryıldız v. Turkey*.³⁰ The plaintiffs accused national authorities of being responsible after family members died “due to a methane explosion at a municipal waste dump” and won the case.³¹ However, neither the environment nor climate change are mentioned in documents such as the 1948 Universal Declaration of Human Rights or the 1950 European Convention on Human Rights.³² Therefore, linking potential human rights of migrants specifically displaced due to climate change proves a complex task as well.

Beyond the aforementioned difficulties of finding a clear definition and linking causes with direct effects, another reason why migration and climate change have not yielded international agreements addressing the issue are the diverse contexts in which

²⁸ United Nations, ‘Kyoto Protocol to the United Nations Framework Convention on Climate Change’ (1998), Art. 12.

²⁹ United Nations, ‘Paris Agreement to the United Nations Framework Convention on Climate Change’ (2015), Preamble.

³⁰ *Öneryıldız v Turkey [GC] - 48939/99* [2004] Coeint (European Court of Human Rights).

³¹ Dinah Shelton, ‘Human Rights and the Environment: Substantive Rights’ [2010] Research Handbook on International Environmental Law, no. 2013-33 (October 29, 2010), <https://doi.org/10.4337/9781849807265.00023>.

³² United Nations, ‘Universal Declaration of Human Rights,’ *United Nations* (United Nations, December 10, 1948), <<https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf>> accessed 2 November 2023; European Convention on Human Rights, 1950, <https://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 2 November 2023.

migration takes place and that vary worldwide. Universal solutions might not only be irrelevant for some areas, but even give rise to adverse results. In their article “Environmentally Related International Migration,” Victoria Mence and Alex Parrinder highlighted the potential danger of an international legal instrument possibly encouraging abuse to facilitate human trafficking “if not appropriately targeted.”³³ A universal international framework left too ambiguous could create a legal vacuum. Smugglers and traffickers may exploit this lack of legal clarity to engage in illicit activities, using the global phenomena of climate change to facilitate the movement of people across borders. Clearer strategies adapted to specific contexts with more productive outcomes can be found on regional or national levels, as will be discussed in the following sections.

C. Regional Agreements

In 2009, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa became “the first regional legal instrument in the world containing legal obligations for states with regard to the protection and assistance of internally displaced persons.”³⁴ In terms of climate change and migration, this convention, also known as the Kampala Convention, is important for two reasons. First, it includes persons displaced due to natural disasters alongside human-made disasters in its definition of “Internally Displaced Persons” and acknowledges such disasters’ adverse “impact on human life, peace, stability, security, and development.”³⁵ Furthermore, paragraph 4 of Article 5 explicitly mentions climate change, including it in the interpretation of natural disasters: “States Parties shall take measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change.”³⁶ Second, research has shown that the majority of migration due to environmental factors comprise internally displaced persons (IDPs). Nonetheless, the International Organization for Migration which provided these facts in 2017 points out the difficulty of identifying the number of people displaced across borders or within them

³³ Mence, ‘Policy Challenges,’ 317 (329).

³⁴ Oliver Ruppel and Sanita van Wyk, ‘Human Rights Responses to Aspects of Human Security’, Ruppel, Roschmann, and Ruppel-Schlichting, *Climate Change: International Law and Global Governance: Volume I: Legal Responses and Global Responsibility* (Baden-Baden, 2013), 799 (815), <<http://www.jstor.org/stable/j.ctv941vsk.34>> accessed 9 June 2023.

³⁵ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) 2009.

³⁶ African Union Convention, Art. V, para. 4.

as a result of slow-onset environmental degradation.³⁷ While the Kampala Convention created a precedent in adopting agreements including consideration of environmental factors and climate change, again the lack of precise definitions and the difficulties in creating them leaves its provisions not entirely clear and problematic. Furthermore, only 30 of all 55 African Union members have ratified the convention, with slow implementation to date of treaty provisions into national legislation.³⁸ Additionally, the provision of the Kampala Convention does not cover cross-border migration flows.

Besides the regional Kampala Convention, there is no international, legally binding instrument specifically addressing IDPs. The 1990s produced a milestone in that regard when the Guiding Principles on Internal Displacement were presented to the UN Commission on Human Rights. Even though it is not a legally binding document, it has been recognized as an important, normative framework on the protection of IDPs with some of its principles used or incorporated into national legislation and policies.³⁹ Unlike the Kampala Convention, the Guiding Principles do not specifically mention climate change but include “natural or human-made disasters” as causes for forced displacement.⁴⁰ Despite recognizing that global warming increases the occurrence of immediate events such as floods, wildfires or droughts, a conventional understanding considers sudden hazards - triggered by natural catastrophes, technological or man-made accidents - as disasters.⁴¹ However, the slower, gradual

³⁷ Walter Kälin and Sanjula Weerasinghe, ‘Environmental Migrants and Global Governance: Facts, Policies and Practices’ in McAuliffe, M. and M. Klein Solomon (Conveners) *Ideas to Inform International Cooperation on Safe, Orderly and Regular Migration* (Geneva, 2017) 1-7 (2) <https://publications.iom.int/system/files/pdf/environmental_migrants.pdf> accessed 2 November 2023.

³⁸ ICRC, ‘The Kampala Convention: Key Recommendations Ten Years On’ [2020] *International Committee of the Red Cross* <<https://www.icrc.org/en/document/kampala-convention-key-recommendations-ten-years>> accessed 13 January 2024.

³⁹ Internal Displacement Monitoring Centre, ‘Guiding Principles on Internal Displacement’ IDMC (17 April 1998)

⁴⁰ UN Human Rights Office to the High Commissioner, ‘Guiding Principles on Internal Displacement’ (www.ohchr.org/11 February 1998) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G98/104/93/PDF/G9810493.pdf?OpenElement>> accessed 11 June 2023.

⁴¹ The International Federation of Red Cross and Red Crescent Societies (IFRC), ‘What Is a Disaster?’ (www.ifrc.org2023) <<https://www.ifrc.org/our-work/disasters-climate-and-crises/what-disaster>> accessed 13 January 2024.

effects of climate change are more difficult to directly classify as such.⁴² Consequently, wording that does not explicitly include climate change might omit developments like ocean acidification, desertification, and sea level rise and affected persons.

Highlighting differentiated contexts across regions around the world, affected states in the Pacific pose a special case in the debate. Migration or displacement on grounds of environmental damage from low-lying island states severely affected by rising sea levels will necessarily be cross-border in the long term. Australia and New Zealand as key destinations of such migration have introduced some mechanisms aimed at relieving Pacific islanders' precarious situations.⁴³ Mechanisms also designed to meet needs of the receiving countries can help boost host countries' acceptance and the integration of arrivals into their new environment. The Australian Seasonal Worker Program (SWP) has allowed recruitment of Pacific islanders into their workforce since 2012, while New Zealand permits controlled immigration through the Pacific Access Category (PAC).⁴⁴ Both countries' programs are targeted to economic development and sustaining their own labour force and not intended as explicit climate change adaptation programs even though they also contribute to Pacific countries' development and poverty relief. In any case, they allow certain if limited migration and thus some perspective to a number of people.

In November 2023, the conclusion of the Australia-Tuvalu Falepili Union Treaty hit global media. Newspapers were quick to use "climate refuge"⁴⁵ or "climate asylum"⁴⁶ in their headlines. The partnership between the two nations in Oceania indeed addresses both climate change and human mobility. Under the Treaty, Australia has

⁴² UNFCCC, 'Slow Onset Events' <<https://unfccc.int/process/bodies/constituted-bodies/WIMExCom/SOEs#:~:text=Slow%20onset%20events%2C%20as%20initially,sea%20level%20rise%2C%20and%20salinization.>> accessed 13 January 2024.

⁴³ IOM Global Migration Data Analysis Centre, 'Migration Data in Oceania: Current Immigration Trends' (31 May 2023) <<https://www.migrationdataportal.org/regional-data-overview/oceania#past-and-present-trends-in-migration>> accessed 13 January 2024.

⁴⁴ Mence, 'Policy Challenges,' 317 (332).

⁴⁵ Andrew Tillett, 'Albanese Opens Borders in Landmark "Climate Refuge" Deal with Tuvalu' *Australian Financial Review* (10 November 2023) <<https://www.afr.com/politics/federal/albanese-opens-borders-in-landmark-climate-refuge-deal-with-tuvalu-20231110-p5ej0i>> accessed 13 January 2024, Tiffanie Turnbull, 'Australia Offers Climate Refuge to Tuvalu Citizens' *BBC News* (10 November 2023) <<https://www.bbc.com/news/world-australia-67340907>> accessed 13 January 2024.

⁴⁶ Isabelle Dellerba, 'Australia's Offer of Climate Asylum to Tuvalu Sparks Controversy' *Le Monde.fr* (28 November 2023) <https://www.lemonde.fr/en/environment/article/2023/11/28/australia-s-offer-of-climate-asylum-to-tuvalu-sparks-controversy_6295100_114.html#:~:text=On%20Friday%2C%20November%2010%2C%20Australia> accessed 13 January 2024.

committed itself to provide dignified pathways for Tuvaluans to immigrate, “live, study and work in Australia.”⁴⁷ The Treaty further seeks to support Tuvalu in its domestic efforts of climate adaptation as well as to continue to recognize Tuvalu’s statehood regardless of its uncertain long-term developments. These commitments are predicated on the premise that Australia has a say in all security and defence-related matters of its treaty partner.⁴⁸ However, just like the programs mentioned above, the treaty is not explicitly targeted as an instrument to provide climate asylum or refuge. In fact, these two words are not mentioned within the treaty. The Tuvaluans arriving in Australia by this scheme will also not have refugee status nor count against Australia’s yearly refugee cap.⁴⁹ Nonetheless, the treaty affords stable prospects to Tuvalu’s citizens threatened by climate change while strengthening Australia’s position in the Pacific, serving mutual interests.

D. International Organization for Migration

The International Organization for Migration (IOM), established in 1951 as the United Nations migration agency, uses the term “environmental migrants” to refer to people displaced, or who have chosen to migrate, in this context. The wording is tailored to take into account the unclear nature of such migration, including forced and voluntary and due to rapid and slow-onset environmental changes. In a report published by the IOM in 2017,⁵⁰ legal researchers analysed, and made policy recommendations based on, the ideas for the Global Compact for Safe, Orderly and Regular Migration.⁵¹ Adopted in 2018 in Marrakesh, Morocco at an intergovernmental conference on migration, the Global Compact on Migration “is the first intergovernmental agreement, prepared under the auspices of the United Nations, to cover all dimensions of international migration in a holistic and comprehensive manner” and includes as its key commitments “[m]inimising the adverse drivers of migration, including combatting poverty and discrimination and

⁴⁷ Department of Foreign Affairs and Trade of the Australian Government, ‘Australia-Tuvalu Falepili Union Treaty’ Art. 3, <<https://www.dfat.gov.au/geo/tuvalu/australia-tuvalu-falepili-union-treaty>> accessed 13 January 2024.

⁴⁸ Australian Government, ‘Australia-Tuvalu Falepili Union Treaty.’

⁴⁹ Andrew Tillett, ‘Albanese Opens Borders.’

⁵⁰ Kälín and Weerasinghe, ‘Environmental Migrants and Global Governance,’ 1-7 (1).

⁵¹ OHCHR, ‘Global Compact for Safe, Orderly and Regular Migration, (A/RES/73/195)’ (*OHCHR*10 December 2018) <<https://www.ohchr.org/en/migration/global-compact-safe-orderly-and-regular-migration-gcm#:~:text=The%20Global%20Compact%20for%20Safe%2C%20Orderly%20and%20Regular>> accessed 10 June 2023.

addressing climate and disaster-related displacement”⁵² As a UN General Assembly (GA) resolution, the compact is not legally binding but nonetheless sends a powerful political message.

The IOM report emphasizes the need for specific regulations to protect affected people from exploitation, discrimination, and human rights violations. It also highlights the complexity of the climate change and migration relationship as a result of lacking comprehensive understanding of the linkage, the multitude of causes of migration, and the varying regional contexts. Coming back to the problem of defining climate migration in general and linking it to environmental factors, the report acknowledges manifold socio-economic, political, and institutional causes that play into individual decisions. For example, marginalized people and those living in poverty, are more prone to displacement. Their already precarious conditions cause higher vulnerability to climate change and lower resilience to sudden and slow-onset disasters while access to greater resources enables people to withstand or adapt to environmental impacts.⁵³ While echoing the inherent challenges of defining and conceptualizing, the report is in line with other academic research that calls for “[e]xpanding options for international migration as a form of adaptation [utilizing, for example,] labour mobility schemes”⁵⁴ which have been introduced in some countries already.

To summarize, there is broad agreement on the importance of anticipatory regulation on migration in the face of climate change. But despite calls on political and academic levels, actual legislation remains fragmented and slow to develop. Whether international agreements on the matter can or even should be effectively negotiated is yet to be seen. But climate change does not wait for such instruments to be put in place to allow regular movements, and the effects of a warming climate and rising sea levels are already causing irregular migration. The next section is dedicated to one such specific case.

III. Case Study: Ioane Teitiota v. New Zealand

A. Background

In 2013, the Kiribati citizen Ioane Teitiota applied for protection and/or refugee status at the New Zealand Immigration and Protection Tribunal based on life-

⁵² OHCHR, ‘Global Compact.’

⁵³ Kälin and Weerasinghe, ‘Environmental Migrants and Global Governance,’ 2 f.

⁵⁴ Kälin and Weerasinghe, ‘Environmental Migrants and Global Governance,’ 4.

threatening conditions in his homeland caused by climate change. Kiribati is a Pacific Island Nation of about 800 square kilometres in land territory, around 120,000 inhabitants and 33 atolls with the highest point on each being under three meters above sea level. Most of the Kiribati population lives at the subsistence level and relies heavily on their environment's natural resources, which have increasingly become exposed to saltwater intrusions from rising sea levels. These intrusions have not only negatively affected agricultural crops but also polluted Kiribati's already limited fresh water supplies. Coping mechanisms such as raised traditional housing and sea defence constructions have been employed but proved ineffective in cases of storm surges or unusually high tides, phenomena that have become more prevalent due to global warming. As outer lying atolls have started to become uninhabitable or unsuitable for any form of agriculture, the growth of Kiribati's capital city of South Tarawa has accelerated. These factors – rising sea levels, soil and water salination, and rapid urbanization – have led to a number of associated problems. Already in 2007, the National Adaptation Programme of Action filed under the UNFCCC observed a general deterioration of health. Polluted fresh water either due to salination or population pressure in the capital has led to increased infant mortality. Furthermore, the dense and crowded settlements often proved to be rudimentary with inhabitants' possessions occasionally being washed away and their conditions often leading to social tension. Conflicts have been rising, sometimes resulting in injuries and deaths.⁵⁵ These effects can be directly linked to climate change and may limit the full enjoyment of human rights, such as the right to life, the right to health, and the right to property. Nonetheless, Ioane Teitiota's application to be granted refugee status and/or protected person status was rejected by several instances of the national authorities of New Zealand, in accordance with the current legal system. Eventually, his petition reached the United Nations Human Rights Committee.

B. New Zealand Immigration and Protection Tribunal

The New Zealand Immigration and Protection Tribunal rejected Mr. Teitiota's first application and upheld the decision in June 2013 on appeal.⁵⁶ Before the decision against the appeal was reached, the appellant's case was thoroughly reviewed, acknowledging that the efforts of Ioane Teitiota and his family to somehow make a living in their home country were exhausted. Dwindling water supplies of wells and decreasing government funded subsidies as well as exacerbated coastal erosion made life increasingly difficult and prospects dim. Any hopes of betterment were

⁵⁵ *AF (Kiribati) [2013] NZIPT 800413 (25 June 2013)* [2013] Nzliiorg.

⁵⁶ *AF (Kiribati) [2013] NZIPT 800413 (25 June 2013)* [2013] Nzliiorg.

overshadowed by media and other reports that informed the Kiribati Islanders “that there would be no possibility of living on Tarawa”,⁵⁷ the main atoll of Kiribati where also the capital South Tarawa is situated. With other islands enduring similar if not worse conditions, the applicant and his family attempted to find options to relocate within Kiribati and decided to emigrate to New Zealand in 2007 after these attempts had failed. After the three children of the appellant and his wife were born in New Zealand, the couple worried about their health and safety in case they had to return to their homeland.⁵⁸

The facts presented by the family were backed by ample evidence and found to be credible. Subsequently, potential claims for status and protection as a refugee or internal displaced person were assessed by the Tribunal. Considering both the Guiding Principles on Internal Displacement and the Refugee Convention, the Tribunal rejected any claims on the basis of the Principles, since Mr. Teitiota had moved across national borders. The Tribunal further reasoned that forced displacement does not apply in his case as he “has undertaken what may be termed a voluntary adaptive migration [...] to avoid the worst effects of [South Tarawa’s] environmental changes.”⁵⁹ The Tribunal also rejected the relevance of the Refugee Convention by demonstrating that the appellant does not meet the legal definition of a refugee, finding that his fear of persecution by effects of climate change is too remote and that failure of state protection applies only to cases of harm by human agents.⁶⁰ Encountering the conceptual difficulties of legal definitions as discussed in the first part of this paper, chapter II, the Tribunal acted in line with provisions set out in the applicable documents.

Further examining human rights, the authority recognized growing agreement in international human rights law on the responsibility of states to protect human rights from environmental factors, citing *Oneryildiz v Turkey*⁶¹, but argued that the appellant would have to prove “sustained or systemic violation of a core human right demonstrative of a failure of state protection” in order to receive protection. The Tribunal established that the claimant’s conditions upon return to Kiribati would not be life-threatening and would apply not only to the applicant but without

⁵⁷ *AF (Kiribati) [2013] NZIPT 800413 (25 June 2013)* [2013] Nzliiorg.

⁵⁸ *AF (Kiribati) [2013] NZIPT 800413 (25 June 2013)* [2013] Nzliiorg, para. 22-41.

⁵⁹ *AF (Kiribati) [2013] NZIPT 800413 (25 June 2013)* [2013] Nzliiorg, para. 49.

⁶⁰ *AF (Kiribati) [2013] NZIPT 800413 (25 June 2013)* [2013] Nzliiorg, para. 51-54.

⁶¹ *Öneryıldız v Turkey [GC] - 48939/99* [2004] Coeint (European Court of Human Rights).

discrimination to the general population. Thus, no international conventions were applicable.⁶²

C. High Court of New Zealand

Mr. Teitiota further appealed the Tribunal's decision and applied for judgment to the High Court of New Zealand, which upheld the initial decision in November 2013. Interestingly, the High Court observed that a person forced from his or her home due to climate change may be regarded as a refugee:

Natural disasters such as earthquakes, volcanic eruptions, severe weather events, and tsunamis can turn people into refugees. [...] And arguably, so too might climate change. Increased aridity of agricultural land on the fringe of deserts; the reduction or contamination of water tables; and the effect of rising sea levels and violent weather over decades on coastal lands and islands; all have the capacity to drive people from their traditional or historic homes.⁶³

However, the High Court decision also confirmed prevalent jurisprudence and affirmed that common usage of the term refugee in such cases is not in line with the definition of the Refugee Convention. The court therefore upheld the conclusions from the previous instance and added considerations on grounds of the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention on the Rights of the Child (UNCROC), which were claimed to have been erroneously overlooked by the Tribunal. The High Court elaborated that in lieu of receiving individual claims for each of the children, their position was outside the Tribunal's jurisdiction. In any case, the applicant's children lacked rights to New Zealand citizenship despite being born there due to domestic law changes in 2005. Further, immigration permits on humanitarian grounds are prevented by the applicant's illegal overstaying after his original permits had expired. One ground of appeal by the applicant argued that climate change constitutes worldwide human agency and thus persecution, on this logic approaching the language of Article 1 of the Refugee Convention. The High Court considered such a broad interpretation to be inconsistent with the criteria expressly defined in the Refugee Convention. They nonetheless acknowledged the possibility for environmental degradation to be incorporated into the Refugee Convention in the future.⁶⁴ The High Court declined

⁶² *AF (Kiribati) [2013] NZIPT 800413 (25 June 2013)* [2013] Nzliiorg, para. 56-98.

⁶³ *Teitiota v Chief Executive of the Ministry of Business Innovation and Employment [2013] NZHC 3125 (26 November 2013)* [2013] Nzliiorg.

⁶⁴ *Teitiota v Chief Executive of the Ministry of Business Innovation and Employment [2013] NZHC 3125 (26 November 2013)* [2013] Nzliiorg, para. 1-55.

to grant Mr. Teitiota protected status or other options for legal residence under present conventions and domestic legislation, confirming the Tribunal's decision.

D. Court of Appeal and Supreme Court of New Zealand

After Mr. Teitiota filed another appeal to the Court of Appeal on the grounds that the Tribunal's decision was faulty, the New Zealand Court of Appeal once again reviewed his presented statements but came to the same conclusions as the prior courts. In May 2014, it reaffirmed that the legal concept of a refugee cannot be applied in this case as well as the caution necessitated before attempting to generalize cases of environmental migration under the Refugee Convention. While the court expressed sympathy for the family's situation and took notice that conditions would be less favourable in Kiribati than in New Zealand, the court found that such conditions would still allow a life in dignity and found the Tribunal's decision lawful.⁶⁵ Without downplaying the seriousness of climate change and its effects on Kiribati, the courts could only act in accordance with legal provisions that unfortunately do not yet encompass definitions or strategies for environmental migration.

When another appeal filed with the Supreme Court of New Zealand was rejected in July 2015⁶⁶, Mr. Teitiota had exhausted all domestic remedies available in New Zealand and submitted his case to the UN Human Rights Committee in September 2015.⁶⁷

E. United Nations Human Rights Committee

Under the 1976 Optional Protocol to the International Covenant on Civil and Political Rights, Mr. Teitiota was able to file an individual communication to the UN Human Rights Committee (HRC).⁶⁸ On this basis, he claimed that New Zealand violated Article 6 on the right to life under the ICCPR. The HRC rejected his claim, noting that the risk to the right to life must be personal and imminent.⁶⁹ In spite of the unfortunate outcome for Ioane Teitiota, the views adopted by the HRC have been

⁶⁵ *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment [2014] NZCA 173 (8 May 2014)* [2014] Nzlii.org.

⁶⁶ *Teitiota v Ministry of Business Innovation and Employment [2015] NZSC 107 (20 July 2015)* [2015] Nzlii.org.

⁶⁷ Sinclair-Blakemore, "Teitiota v New Zealand."

⁶⁸ Optional Protocol to the International Covenant on Civil and Political Rights 1966 (OHCHR).

⁶⁹ Human Rights Committee, "Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2728/2016" (23 September 2020) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f127%2fD%2f2728%2f2016&Lang=en> accessed 11 June 2023.

hailed as a landmark ruling.⁷⁰ For the first time, the Committee has recognized environmental factors, including climate change, as potential reasons for flight:

Both sudden-onset events, such as intense storms and flooding, and slow-onset processes, such as sea level rise, salinization and land degradation, can propel cross-border movement of individuals seeking protection from climate change-related harm. The Committee is of the view that without robust national and international efforts, the effects of climate change in receiving States may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant.⁷¹

The Committee further acknowledges that climate change induced sea level rise are likely to cause Kiribati to become uninhabitable in the future. Such prospects would require future cases to be dealt with separately and potentially differently. In the case at hand, however, the claimant's deportation to Kiribati in 2015 did not pose an immediate threat to his life. Additionally, the Committee concluded that the judicial proceedings prior to the communication to HRC were conducted lawfully and thoroughly.⁷²

The ruling was upheld by the majority of the Committee. The dissenting opinion of one Committee member, Ambassador Duncan Muhumuza Laki, on the matter was included in the annex. He criticized the high threshold for determining whether the threat to life in Kiribati was imminent. He wrote that Mr. Teitiota's livelihood in his home country was "short of the dignity that the Covenant seeks to protect"⁷³ and highlighted "the Committee's position that environmental degradation and climate change constitute extremely serious threats to the ability of both present and future generations to enjoy the right to life."⁷⁴

F. Summary and Outlook

Mr. Teitiota's standard of living gradually deteriorated because of environmental factors, including sea level rise caused by global warming. Accessing basic needs like a steady freshwater supply or options to sustain himself through means of agriculture were increasingly difficult due to the salination of Kiribati's groundwater, crops, and soils. This affects the health and prospects of the entire population of Kiribati despite

⁷⁰ Amnesty International, 'UN Landmark Case for People Displaced by Climate Change' www.amnesty.org (20 January 2020) <<https://www.amnesty.org/en/latest/news/2020/01/un-landmark-case-for-people-displaced-by-climate-change/>> accessed 11 June 2023.

⁷¹ Human Rights Committee, 'Views Adopted by the Committee,' para. 11.

⁷² Human Rights Committee, 'Views Adopted by the Committee,' para. 12.

⁷³ Human Rights Committee, 'Views Adopted by the Committee,' para. 14.

⁷⁴ Human Rights Committee, 'Views Adopted by the Committee,' para. 13.

government efforts to ameliorate conditions. With climate change's impacts on Pacific islands widely reported in the media and alarming the citizenry, Mr. Teitiota relocated with his family to New Zealand, where he applied for protection three years after his legal residence expired. All judicial instances in New Zealand rejected his application on the basis of relevant domestic and international legal instruments. A claim submitted to the UN Human Rights Committee was also unsuccessful. The case highlights the need to address the issue of environmental migration at global legal and political levels. It is also interesting that the courts took the non-binding Guiding Principles on Internal Displacement into consideration, which allows optimism regarding the request for an advisory opinion from the International Court of Justice.

IV. Alternative Approaches to Climate Change Induced Migration

An analysis of the current legal framework as well as *Ioane Teitiota v. New Zealand* has shown that the conventional debate on “climate refugees” has not yielded helpful solutions. Ways have not yet been found to include persons forced from their homelands by environmental degradation in existing legally protected categories. This final section therefore raises alternative approaches on how to tackle migration in face of a changing climate. It argues that migration may be considered a measure of adaptation. After an overview of the current adaptation framework under the UNFCCC, it considers two possibilities: building resilience to prevent displacement in the first place and the option of relocation.

At the 16th Conference of the Parties (COP16) in Cancun, Mexico, the Cancun Adaptation Framework was adopted in 2010. It was created to call on parties to enhance resilience of social, economic, and ecological environments. The parties agreed to implement “measures 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.” The Cancun Agreements also established the Green Climate Fund through which the majority of funding is to flow.⁷⁵ Capabilities to build resilience, mitigation as well as adaptation mechanisms have gradually been strengthened since that time. Including migration within the framework acknowledges migration as a form of adaptation, even if specific and clear policies on climate change induced migration have not yet been implemented.

⁷⁵ UNFCCC, ‘Report of the Conference of the Parties on Its Sixteenth Session, Held in Cancun from 29 November to 10 December 2010, FCCC/CP/2010/7/Add.1’ (15 March 2011).

Finances play a vital role in building necessary capabilities and cooperations. Articles 52 to 58 of the Paris Agreement outline developed countries' intention to collectively contribute USD 100 billion per year to mitigation and adaptation efforts of developing countries. The capital is to be directed through several specially created funds and administered by the Global Environmental Facility mandated under the UNFCCC.⁷⁶ With this pledge, the largest greenhouse gas emitters agree to assume historical responsibility and equip those most vulnerable with resources to mitigate and adapt to climate change induced impacts. The World Bank serves as a trustee of the funds mentioned in the Paris Agreement and provides information on the funds' balances. The relevant funds, including the Adaptation Fund, the Special Climate Change Fund, the Least Developed Countries Fund, and the Green Climate Fund, have total commitments of approximately USD 45 billion, with their balances as of late 2023 amounting to around USD 20 billion.⁷⁷ It is clear that these funds are underfunded and falling short of the stated goals of the Paris Agreement.

Despite these shortcomings, the Green Climate Fund, with total commitments of approximately USD 16 billion and a current balance of approximately USD 12 billion, has been funding adaptation and resilience projects globally, including in low-lying island states threatened by sea-level rise.⁷⁸ The long-term outcome of these projects will determine whether communities have acquired sufficient resilience or must ultimately opt for relocation to adapt to climate change.

A. Resilience

Resilient communities and environments are adept in coping with and adapting to change, including disruptive disasters.⁷⁹ Small Pacific islands have been resilient in response to environmental impacts in the past. Living on islands with limited resources and affected by periodic weather phenomena such as El Niño, Pacific islanders have equipped themselves with unique resource management and

⁷⁶ United Nations, 'Paris Agreement to the United Nations Framework Convention on Climate Change' (2015).

⁷⁷ World Bank, 'Home' (World Bank) <<https://fiftrustee.worldbank.org/en/about/unit/dfi/fiftrustee>> accessed 12 September 2023.

⁷⁸ Green Climate Fund, 'Approved Projects' *Green Climate Fund* (1 February 2020) <<https://www.greenclimate.fund/projects>> accessed 12 September 2023.

⁷⁹ Francois Bousquet and others, 'Mobilizing for Transformation' (2016) 1, 21 *Ecology and Society* <<http://www.jstor.org/stable/26269986>> accessed 12 September 2023.

adaptation skills that have enabled them to survive in a volatile habitat.⁸⁰ Their resilience strategies are not only potentially valuable models for other regions, but are now put to an extraordinary test with climate change and heightened frequencies of extreme weather phenomena surpassing traditional experiences. The *Teitiota* case makes clear the need to find alternatives and support for those struggling to adapt.

New technologies and innovations can help to enhance and complement traditional knowledge. Successful adaptation projects have improved livelihoods, standards of living, and protection against disasters.⁸¹ Such investments can create prospects and profitable returns in the future, especially when prudent investments can serve both as mitigation and adaptation mechanisms.

Despite the importance and success of some adaptation projects, they cannot always satisfy all community needs and end migration from areas most affected by climate change. One study from such an area in Ghana has shown that adaptation projects do not fully curb migration even if they provide additional possibilities for livelihoods. Often, they cannot tackle other root causes of migration such as poverty and inequality which have been exacerbated due to climate change. Scholars have thus argued that migration should be regarded as an adaptation strategy alongside other adaptation projects.⁸² Resilience, which highlights the complex context in which mobility choices take place, can be a solution for some and is a desirable objective in general, but does not solve the dilemma, especially considering the unpredictability of environmental impacts and triggers of migrations.

B. Relocation

Relocation is sometimes inevitable, including for small islands in rising oceans. In order to reach a satisfactory outcome in which relocated persons can live in dignity and under conditions comparable to those previously enjoyed, such relocations need to be timely prepared, taking local interests into consideration. If this does not

⁸⁰ Heather McMillen and others, 'Systems of Customary Resource Use and Resilience to Climate Change in the Pacific' (2014) 1 (1), 19 *Ecology and Society* <<http://www.jstor.org/stable/26269694>> accessed 12 September 2023.

⁸¹ International Monetary Fund, 'Adapting to Climate Change—Three Success Stories' (IMF18 March 2018) <<https://www.imf.org/en/Blogs/Articles/2018/03/20/adapting-to-climate-change-three-success-stories>> accessed 12 September 2023.

⁸² Salloum Lindegaard and others, 'Why Adaptation Projects Do Not Stop Climate-Related Migration' [2023] *Danish Institute for International Studies* <<https://www.jstor.org/stable/resrep51198>> accessed 12 September 2023; Stockholm Environment Institute, 'Disaster and Climate-Induced Migration and Displacement' (2019) <<https://www.jstor.org/stable/resrep25053>> accessed 21 June 2023.

happen in advance, resulting in abrupt relocations and flight due to sudden catastrophes, fundamental rights will be severely curtailed.

One report by Human Rights Watch from July 2023 raises concern on the situation of the Guna Indigenous community in Panama. As their territory shrinks due to sea-level rise and floods, the tiny island on which they live is becoming increasingly unsafe and cramped. Since 2010, the community has accepted the tragic certainty of having to leave their homes behind and relocate to the mainland. To that end, the Panamanian government has promised to build new homes on land previously purchased by the Guna community. The buildings are far from ready, however, with repeated delays in the completion date.⁸³ The Guna community's hopes of building their livelihoods elsewhere is stalled even as their conditions grow more severe. Swift action now is crucial to ensure a safe, orderly, and coordinated migration of this community, as well as of those that will follow in other parts of the world.

V. Conclusion and Discussion

This paper has noted the recurring difficulties on the theoretical and practical level in the debate on climate change and migration. A major problem in the discussion is posed by the legal difficulty of referring to environmentally motivated migrants as “climate refugees” and the lack of legal instruments that would allow requests for asylum based on direct and indirect impacts of climate change. Complexity is added by the multi-layered nature of migration, including environmental, political, and socio-economic factors. Furthermore, the line is not easily demarcated between voluntary and forced migration, and the causes difficult to distinguish between sudden-onset events and the gradual implications of climate change. The dilemma in the discussion is reflected in the lack of legal instruments containing relevant provisions on the linkage between climate change and migration, as is apparent from an analysis of *Ioane Teitiota v. New Zealand*. Multi-disciplinary research is needed to gain insights on how to provide legal assistance to affected persons who do not fall into existing frameworks.

Although climate change does not discriminate, its impacts are felt disproportionately by those that have contributed the least emissions. Novel approaches are required outside the existing legal framework, such as the Refugee Convention and other agreements discussed in this paper. One such approach could be strengthening the perception that environmental migration constitutes a form of climate change

⁸³ Erica Bower, “The Sea Is Eating the Land below Our Homes” (2023) <<https://www.hrw.org/report/2023/07/31/sea-eating-land-below-our-homes/indigenous-community-facing-lack-space-and-rising>> accessed 12 September 2023.

adaptation. This would allow affected and/or receiving communities to be supported by operational climate funds. Such a mechanism could also be backed by the pending advisory opinion of the International Court of Justice on the human right to a clean, healthy, and sustainable environment. The current lack of a legally binding instrument confirming such a human right is tragic. There is hope, however, that, as national courts have considered documents of a non-binding, political character before, the requested advisory opinion of the International Court of Justice will create an exemplary and valuable precedent.

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