The World After *Teitiota*: What the HRC Decision Means for the Future of Climate Migration

LUCIA ROSE*

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I. ABSTRACT

The effects of global climate change is forecasted to cause millions of people to leave their homes and home countries over the next century.[1] Until this point, the current legal framework for determining the fate and protection of people fleeing their homes due to emergency was rooted in the United Nations ("UN") Refugee Convention of 1951 and has been read to exclude those whose primary reason for migration is the effects or threat of climate change. However, the UN Human Rights Committee's (HRC) January 2020 decision regarding Ioane Teitiota's deportation to his

* © 2021 Lucia Rose. J.D. Candidate 2022, University of San Diego School of Law.

1. Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349, 349 (2009).

home nation of the Republic of Kiribati suggests the current framework is amenable to expansion to address this impending global crisis.

The *Teitiota* decision indicates that there are two possible legal pathways through which climate migrants may find legal standing and protection: (1) an expanded reading of the definition of "refugee" under the 1951 Convention, and (2) an application of article 6 of the International Covenant of Civil and Political Rights protections to climate migrants. This paper will examine the suggestions offered by the HRC in *Teitiota* and their potential requirements, revealing the remaining legal questions and outlining a series of scenarios that will need to be addressed for either pathway to become a viable strategy for migrants.

Teitiota offered two pathways to establishing refugee status under the HRC definition. Neither pathway is well-defined, though both provide a useful framework for future claims. First, the HRC suggested five benchmarks by which a person displaced due to climate change or its effects might qualify as a "refugee" under the 1951 Convention. *Teitiota* offers exclusions from which to build. Second, *Teitiota* also detailed three requirements of article 6 to be met in order for an author (a claimant in UN proceedings) must meet to successfully make a "right to life" violation claim. The Tribunal did not, however, define quantitative standards to evaluate governmental violations of a resident's "right to life" stemming from climate change. Accordingly, although *Teitiota* offers a useful starting point, the Tribunal will likely need to decide a variety of "stepping-stone" cases to clarify the framework set forth in *Teitiota*.

II. THE CRISIS OF CLIMATE MIGRANTS AND EXISTING FRAMEWORK

The 1951 Convention Relating to the Status of the Refugees (hereinafter "1951 Convention") declared that the term "refugee" shall apply to any person who:

> [O]wing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country or who, not having a nationality and being outside of 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.[2]

2. G.A. Res. 2198 (XXI), Convention and Protocol Relating to the Status of Refugees, at 14 (Dec. 2010).

One hundred and forty-five state parties signed and ratified the Convention.[3] The 1967 Protocol relating to the Status of Refugees (hereinafter "1967 Protocol") amended the definition of refugee to remove certain temporal and geographical limits of the definition, leaving four elements required to qualify as a refugee: (1) the refugee must have fled his/her country; (2) the refugee must be unable or unwilling to return home; (3) the refugee's inability or unwillingness to return must be due to a fear of persecution; and (4) the persecution must be related to the refugee's status in a particular group.[4] The 1951 Convention was drafted in the aftermath of World War II in response to civil and political rights violations. Given this context, most experts have expressed doubt that "environmental refugees" would fall within the scope of the 1951 Convention and the 1967 Protocol. This conclusion is particularly underscored by the fourth requirement that the persecution be related to one's status in a particular group, a factor rarely in play among those seeking refugee status as a result of environmental displacement.[5] In contrast to those traditionally understood as "refugees," climate migrants are often able to rely on their own home countries for prevention and protection measures against the effects of climate change, in a way that migrants escaping persecution (often from their home state) cannot.[6]

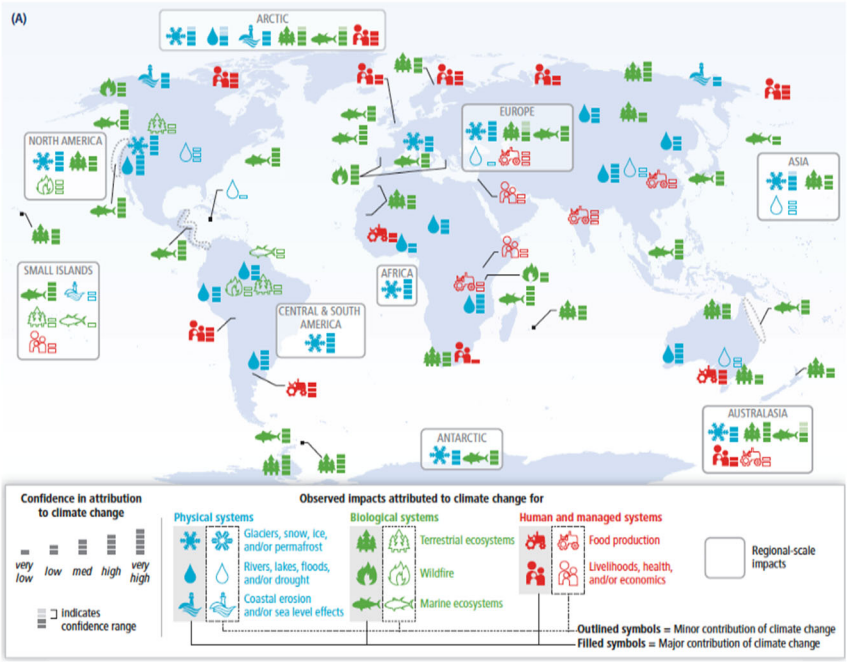
Nevertheless, the potential for climate change to create a new class of refugees, whose status would not necessarily be defined by membership in a particular group, has been recognized for decades. As early as 1990, the Intergovernmental Panel on Climate Change acknowledged that the "gravest effects of climate change may be those on human migration as millions are uprooted by shoreline erosion, coastal flooding, and agricultural disruption."[7] The United Nations Office of the High Commissioner for Human Rights has more recently noted that climate change could "affect hundreds of millions of people in numerous ways, including through 'permanent displacement.'"[8] The Office of the High Commissioner went on to illustrate that: "The melting or collapse of ice sheets alone threatens

3. Docherty & Giannini, note 1, at 362; Oshani Amaratunga, *Climate Displaced Peoples: Utilizing Regional Approaches to Combat Climate-Induced Displacement in the 21st Century*, 36 PACE ENVTL. L. REV. 261, 273–74 (2019).
4. Docherty & Giannini, *supra* note 1, at 362; Amaratunga, *supra* note 3, at 272–73.
5. Docherty & Giannini, *supra* note 1, at 362.
6. *Id.* at 358.
7. *Id.* at 352.
8. *Id.*

the homes of 1 in every 20 people."[9] In 2008, a UN Human Development report called climate change the "defining development issue of our generation." Likewise, the Deputy High Commissioner for Human Rights stated: "By 2050, hundreds of millions more people may become permanently displaced due to rising sea levels, floods, droughts, famine, and hurricanes."[10]

Human influence on the climate system is increasingly clear; climate change has influenced natural and human systems across every continent and every ocean in recent decades.[11] Figure 1 below displays the widespread and diverse impacts climate change has already inflicted on every continent; ranging from effects on physical climate systems to biological systems to human and managed systems.[12]

FIGURE 1[13]



9. *Id.*
10. Julia Toscano, *Climate Change Displacement and Forced Migration: An International Crisis*, 6 ARIZ. J. ENVTL. L. & POL'Y 457, 460 (2015) and; Docherty & Giannini, *supra* note 1, at 349, 352.
11. Christopher B. Field, et al., *Climate Change 2014*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 4, 12 (2014) [hereinafter IPCC].
12. *Id.* at 7.
13. *Id.*

In sum, climate change is predicted to "cause tens, potentially hundreds, of millions of people to leave their over the coming century.[14] An average of 21.7 million people are displaced by weather-related incidents every year.[15] There is no clear global dataset on displacement by slow on-set events, like sea level rise, but models are based on combined projections derived from factors such as population growth and submerging coastal zones.[16] Utilizing these models, it is estimated that the number of climate migrants may eclipse the number of traditionally defined refugees by 2050.[17] Migration will not be evenly distributed across the globe; large-scale migration will mainly be from the global south and developing regions.[18] Climate change migration will affect certain "hotspots" in particular: small island states, coastal zones, and specific regions of Africa and Asia.[19] Some migration may be temporary, as individuals fleeing from severe weather events may be able to return at the conclusion of an event, but others will be permanent, when a part or all of a state becomes uninhabitable.[20] While adaptation, expertise, and experience are growing across the globe in both the public and private sector, adaptation measures may come too late for some island nations who are already facing inevitable total ocean submersion.[21]

The UN has highlighted sea level rise, water availability, and extreme weather events as three primary drivers that affect climate migration.[22] However, climate-related hazards often increase the severity of other stressors, leading to "negative outcomes for livelihoods, especially for those living in poverty."[23] Various studies have found that the "negative impacts

14. Docherty & Giannini, *supra* note 1, at 349.
15. *Beyond Borders*, ENVIRONMENTAL JUSTICE FOUNDATION 14 (2017).
16. *Id.*
17. Docherty & Giannini, *supra* note 1, at 349.
18. Lauren Nishimura, '*Climate Change Migrants': Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies*, 27 INT. J. REFUGEE LAW, 107, 112 (2015). *But see* Abraham Lustgarten, *How Migration Will Reshape America: Millions will be displaced. Where will they go?*, N.Y. TIMES (Sept 15, 2020), https://www.nytimes.com/interactive/2020/09/15/magazine/climate-crisis-migration-america.html for the recent projections of significant domestic migration in the USA [https://perma.cc/D56M-2TEJ].
19. Docherty & Giannini, *supra* note 1, at 355.
20. *Id.*
21. IPCC, *supra* note 11, at 8. *See also* Rana Balesh, *Submerging Islands: Tuvalu and Kiribati as case studies illustrating the need for a climate refugee treaty*, 5 ENV. & EARTH LAW J. 78, 78 (2015).
22. Jane Steffens, *Climate Change Refugees in the Time of Sinking Islands*, 62 VAND. J. TRANSNAT'L L. 727, 731 (2019); *see also* IPCC, *supra* note 11, at 6.
23. *Id.*

of climate change on crop yields across a wide range of regions are more common than any positive impacts of climate change on agriculture."[24] While existing conflict increases vulnerability to climate change effects, climate change in turn increases the risk of violence.[25] Civil war and inter-group violence can be heightened by climate change through intensifying existing drivers of violence like poverty and "economic shocks."[26]

Historically, climate migrants have been excluded from the 1951 Convention definition of "refugee," primarily because of their inability to show a fear of persecution due to membership in a particular group. Climate migrants have similarly been excluded from successful "right to life" violation claims under article 6 of the International Covenant of Civil and Political Rights because they are unable to show an act or omission on behalf of the State party failing to protect the basic life of its citizens.

Moreover, not all climate migrants will qualify as climate refugees.[27] Migrants are all persons who move from one location to another for any range of reasons. Within this group, some migrants will remain within their own countries and are characterized legally as internally displaced persons. Crossing an international border and seeking residence in another country qualifies one as an immigrant. On the contrary, merely moving across a border is insufficient to qualify as a refugee under international law, which as set forth above requires a far more rigorous showing of displacement factors.[28]

However, as the issue of climate migration begins to intensify across the international community, the case of Ione Teitiota, while ultimately denied, indicates that there is now a potential for future climate migrants to be granted "refugee" protections under the 1951 Convention and/or article 6.

III. THE *TEITIOTA* CASE

The Teitiota family, originally from the Republic of Kiribati, a Pacific Island nation south of Hawaii, relocated to New Zealand in 2007.[29] Kiribati is projected to be completely submerged by water by 2050 as a

24. IPCC, *supra* note 11, at 4.
25. *Id*. at 8, 20.
26. *Id*. at 20.
27. UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER FOR REFUGEES (UNCHR), *UNHCR viewpoint 'Refugee' or 'migrant' – Which is right?* (July 11, 2016), https://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html [https://perma.cc/3NFF-TLXF].
28. There are also remaining questions about the standards of admittance under a "climate refugee" definition, for example: is there a certain socioeconomic threshold required? These remaining questions will need to be clarified by the international legal community as this issue continues to escalate.
29. Amaratunga, *supra* note 3, at 267.

result of rising sea levels.[30] The Teitiota family resided in New Zealand until 2010 when their visas expired. They applied for refugee status based on "changes to their environment in Kiribati caused by sea-level-rise associated with climate change."[31] After several lower courts' dismissals, the Teitiota family's case came in front of the Supreme Court of New Zealand in 2015.[32] The Supreme Court upheld the lower courts' decisions and denied the Teitiota family refugee status, holding their claim was "inconsistent with the definition of 'refugee' within existing refugee law."[33] The Court mandated the family to return to Kiribati.[34]

In June of 2013, the Immigration and Protection Tribunal of New Zealand first heard Ioane Teitiota's claims as an individual claimant.[35] Teitiota testified that beginning in the late 1990s, "life progressively became more insecure on Tarawa [the island he resided on] because of sea level rise."[36] Tarawa became overcrowded due to the influx of residents from other islands, increasing tensions between villages.[37] Simultaneously, significant coastal erosion affected transportation routes, salinized water supplies, and stripped the land of vegetation.[38] Teitiota reported that his family relied primarily on subsistence fishing and agriculture.[39] He and his wife left for New Zealand in hopes of a better life for their future children, as they "had received information from news sources that there would be no future for life in their country."[40] Teitiota "believed that the country's Government was powerless to stop the sea level rise," and "internal relocation was not possible."[41]

In the decision of *Ioane Teitiota v. New Zealand,* the Tribunal examined the 2007 National Adaptation Programme of Action, which provided that "the great majority of the population [of Kiribati] w[as] heavily dependent

30. *Id*. at 266.
31. *Id.* at 268.
32. *Id.*
33. *Id.* at 268.
34. Sophie Lewis, *Millions of future climate refugees may need protection, U.N. committee warns in ruling*, CBS NEWS (Jan. 21, 2020, 10:55 PM), https://www.cbsnews.com/news/climate-change-refugees-united-nations-rules/ [https://perma.cc/PE6K-XYXW].
35. Human Rights Comm., Ioane Teitiota v. New Zealand, Comm. No. 2728/2016, U.N. Doc. CCPR/C/127/D/2728/2016, P 2 (Oct. 24, 2019) [hereinafter *Teitiota*].
36. *Id.* at 3.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 2.

on environmental resources."[42] The Programme of Action detailed a range of issues deriving from the existing and projected effects of climate change, including coastal erosion that impacts housing, land, and property.[43] Kiribati's government took steps to adapt to the effects of climate change, such as diversifying crop production, but by the time of *Teitiota's* filing, half of South Tarawa's population had "generally deteriorated" reflecting grave food insecurity.[44]

The Tribunal also heard the testimony of John Corcoran, a doctoral candidate from the University of Waikato in New Zealand.[45] Mr. Corcoran testified that social tensions had heightened, and even violent fights broke out in Tarawa and other islands of Kiribati due to the scarcity of land. Additionally, rapid population growth and urbanization had compromised the fresh water supply, waste contamination had contributed to the pollution of freshwater, and the increase of intense storms had led to submerged, uninhabitable land.[46] About 60% of South Tarawa obtained fresh water entirely from the public utilities board.[47]

The Tribunal concluded that Teitiota (1) did not fall under the definition of "refugee" pursuant to the 1951 Refugee Convention, and (2) had not established a sufficient claim to a "right to life" violation under article 6 of the Covenant of Civil and Political Rights. First, Teitiota did not "objectively face a real risk of being persecuted if he returned to Kiribati."[48] Teitiota had not been subject to any land dispute—nor did a future land dispute seem apparent.[49] Additionally, there was insufficient evidence to show Teitiota faced a "real chance of suffering serious physical harm from violence," nor that he would be unable to find land accommodations to grow food and obtain potable water for his family.[50] Furthermore, there was no evidence that the environmental conditions in Tarawa were "so perilous that [Teitiota's] life would be jeopardized."[51] Together, these factors excluded Teitiota from the protections proffered to a "refugee" as defined by the 1951 Convention.[52]

Second, in response to the article 6 claim, the Tribunal underscored that "the right to life involves a positive obligation of the State to fulfill its

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42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 4.
49. *Id.*
50. *Id.*
51. *Id.*
52. G.A. Res. 2198 (XXI) 2010, at 14.

right by taking programmatic steps to provide for the basic necessities for life."[53] Here, according to the Tribunal, Teitiota failed to point to an act or omission by the Government of Kiribati that "might indicate a risk that he would be arbitrarily deprived of his right to life."[54] This was because the Government of Kiribati was active on the international stage in regards to climate change, which was evident in the 2007 Programme of Action.[55] Finally, Teitiota failed to establish that there was a "sufficient degree of risk to his life, or that of his family, at the relevant time."[56] This "imminent" temporal requirement was not fulfilled by a general risk of climate change effects at an unspecified future date.[57]

Ioane Teitiota filed communication No. 2728/2016 with the Human Rights Committee against New Zealand in September of 2015.[58] The Committee released its decision in January 2020.[59] Teitiota argued that, by removing him to Kiribati, New Zealand violated his "right to life" under the International Covenant on Civil and Political Rights.[60] He claimed sea level rise in Kiribati resulted in: (1) a scarcity of habitable space, causing violent land disputes endangering his life, and (2) environmental degradation, including saltwater contamination of freshwater supply.[61] Teitiota argued that the "effects of climate change and sea level rise forced him to migrate" to New Zealand and that the situation on the island of Tarawa in the Republic of Kiribati "ha[d] become increasingly unstable and precarious due to sea level rise caused by global warming."[62] Teitiota claimed Kiribati had become "an untenable and violent environment."[63] The Committee analyzed Teitiota's claim utilizing the definition of "refugee" in the 1951 Convention as well as the article 6 "right to life" guarantee, and, like the Tribunal, denied Teitiota's claim.[64] However, the Committee differed from the Tribunal[65] by suggesting that both the 1952 Convention's definition

53. *Teitiota*, *supra* note 35, at 4.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 1.
59. *Id.*
60. *Id.* at 5.
61. *Id.*
62. *Id.* at 2.
63. *Id.*
64. *Id.* at 4-5.
65. *Id.* at 12.

of "refugee" and article 6's "right to life" concept could be used in the future to provide refugee protections to migrants displaced due to climate change and its effects.[66]

IV. PATHWAY #1: EXPANDED INTERPRETATION OF "REFUGEE"

As detailed previously, the 1951 Convention (as amended by the 1967 Protocol) limited refugee status to individuals meeting four requirements: (1) the refugee must have fled his/her country; (2) the refugee must be unable or unwilling to return home; (3) the refugee's inability or unwillingness to return must be due to a fear of persecution; and (4) the persecution must be related to the refugee's status in a particular group.[67] Whereas, *Teitiota* suggested a five-factor test for climate migrants to qualify for refugee protections under the 1951 Convention. Under *Teitiota,* to fall under the definition of "refugee," the author must have been (1) involved in a land dispute or faced a real chance of being physically harmed in such a dispute in the future; (2) unable to find land to provide accommodation for himself (and family); (3) unable to grow food or to access potable water; (4) faced with life-threatening environmental conditions if returned; or (5) faced with a situation materially different than every other resident.[68] The proposed test in *Teitiota* does not require that individuals seeking refugee protections prove they would face *imminent* harm if returned. Instead, the Committee recognized that climate change-induced harm may occur both through "sudden onset" events, like extreme weather episodes, as well as "slow-onset" processes, like sea level rise.[69] The latter may already be occurring but does not threaten *imminent* harm.

Ultimately Ioane Teitiota failed to demonstrate that his situation met any of these five factors.[70] While the Committee indicated that the "refugee" definition under the 1951 Convention could be read to include climate migrants, there are several remaining questions on its applicability. The "or" placed after the fourth factor indicates that each of the factors are individually sufficient for a successful claim, rather than all five being required. However, this decision was based on the facts presented by Teitiota, and there is no guarantee that these five factors are either extensively

66. *Id.* at 10-12.

67. DOCHERTY & GIANNINI, *supra* note 1, at 362; *see also* Amaratunga, *supra* note 3, at 272–73.

68. *Teitiota*, *supra* note 35, at 10.

69. U.N. Human Rights Office of the High Comm'r, Historic U.N. Human Rights Case Opens Door to Climate Change Asylum Claims (Jan. 21, 2020), https://www. ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25482&LangID=E [https://perma.cc/8HG4-YVVX].

70. *Teitiota*, *supra* note 35, at 10.

present or individually sufficient. Further, as the Committee found that Teitiota did not fulfill any of the five factors, the precedential value of the decision is limited. Further litigation will be necessary to delineate the contours of each factor.

Teitiota failed to show that he had been involved in a land dispute or faced a real chance of suffering physical harm from violence; thus, it remains unclear what degree of land disputes or violence would suffice to establish entitlement to relief. The Committee stated that:

> [The] general situation of violence is only of sufficient intensity to create a real risk of irreparable harm under articles 6 and 7 of the Covenant in the most extreme cases, where there is a real risk of harm simply by virtue of an individual being exposed to such violence on return, or where the individual in question is in a particularly vulnerable situation.[71]

The Committee also noted a lack of a "situation of general conflict" in the Republic of Kiribati.[72]

Given the specificity inherent to the individualized assessment in *Tetiota,* the precise contours of "most extreme" and "particularly vulnerable situation" will be left to future cases. In addition to determining what level of violence and vulnerability suffices, future cases will need to determine whether protection-seekers whose nation is experiencing general conflict due to climate change concerns, or where climate change is an element causally related to conflict, will sufficiently qualify an author for protections.

The Committee stated that Teitiota's testimony reflected that he was not alleging a specific risk of harm to himself, rather stating a general risk experienced by all in Kiribati.[73] This proposed dichotomy creates a great deal of uncertainty when considered with the on-the-ground reality of climate change and catastrophe. Additional decisions will be necessary to reconcile the requirement to safeguard individuals from the violence caused by resource shortages. Indeed, if the idea that general, rather than individual, risk of harm is insufficient is carried to its extreme, then the complete collapse of a society due to climate change-induced conflicts would apply to *all* of its residents—yet that ubiquity could make *none* of the residents eligible to qualify as a refugee.

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71. *Id.* at 11.

72. *Id*. *See also* Human Rights Comm., Commc'n No. 1540/2007, at 7, U.N. Doc. CCPR/C/94/D/1540/2007 (Nov. 19, 2008) (determining that even if the State party recognizes the "general human rights" of violence in Syria, the author must also show that the general violence is particularly applicable to the author).

73. *Teitiota*, *supra* note 35, at 14.

The second factor—that the author is unable to find land to provide accommodation for himself and his family—was not individually analyzed by the Committee; instead, the Committee deferred to the Tribunal's decision that Teitiota had not provided sufficient evidence that land was unavailable.[74] Thus, the precise requirements for successfully making a showing under this factor are unknown, and further litigation is necessary to establish workable limits and guidelines for making a showing regarding unavailability of land for a domicile.

Teitiota also failed to provide sufficient evidence of the third factor: his inability to grow food or access potable water[75] The Committee noted that sixty percent of the population of South Tarawa obtained fresh water from the public utilities commission and stated that there was no evidence showing a lack of access to potable water.[76] The Committee distinguished a "hardship" to access potable water from the inability to do so.[77] However, the dissent from Committee Member Vasilka Sancin stated that "potable water should not be equated with safe drinking water," and argued that Teitiota established an inability to access fresh water.[78] Future cases will need to parse this distinction between "hardship" and "inability," while balancing the tensions of Committee members on the subject. In regard to the "inability to grow food" subset of this factor, the Committee found that, while it is difficult to grow crops due to the salt deposits in previously fertile land in South Tarawa, it was not impossible.[79] The Committee also noted that Teitiota failed to provide any information regarding alternative employment options or financial assistance from the state, suggesting that a future asylum-seeker will need to have exhausted all avenues of financial security before seeking refugee protections under this factor.[80] Thus, future litigation will need to determine whether this is a necessary subset of this factor and to what extent a state's land must be unable to sustain crops in order to seek refugee protections.

The Committee alludes to article 6 when discussing the fourth factor: that the author must be facing life-threatening environmental conditions if returned. They stated that, "given the risk of an entire country becoming submerged under water is extreme, the conditions of life in such a country may become incompatible with the right to life with dignity."[81] In the case of Teitiota, the Committee notes that the timeframe of ten to fifteen

74. *Id.* at 5.
75. *Id.* at 10.
76. *Id.* at 11.
77. *Id.*
78. *Id.* at Annex I (internal quotations omitted).
79. *Id.* at 14.
80. *Id.*
81. *Id.* at 12.

years before "critical submersion" could allow for "intervening acts by the Republic of Kiribati, with assistance from the international community."[82] However, "could" is not the same as "capable of." What could Kiribati, who has no control over rising sea levels, actually do to diminish the risk? The Committee was vague regarding what timeframe would be necessary for a claim to succeed which leaves the international community wondering how long an individual would have to wait in a nation deteriorating from the effects of climate change before seeking protections. The message to the international community, however, is clear: mitigate emissions to avoid these outcomes for individuals *now*, or risk undertaking the responsibilities and obligations of the newly interpreted "refugee" status of climate migrants.

Finally, the fifth factor, requiring the seeker to embody a situation materially different than every other resident, is not independently specified or even discussed by the Committee. Rather, they note that there is an "absence of a situation of general conflict," in Kiribati, seemingly disqualifying Teitiota from the individuality of risk requirement and instead deferring to the Tribunal's ruling: Teitiota did not face a threat from climate change separate from the threat faced by all residents of Kiribati.[83] This interpretation aligns with the 1951 Convention's understanding of refugee as one fleeing persecution. Future litigation will need to tease out the degree of the individuality of risk the protection-seeker faces to succeed in a refugee protection claim. Researchers have previously presented an avenue in which individuals could qualify under the "persecution" requirement if their government knew about the vulnerability of a group to climate change effects but was unwilling to reduce those impacts.[84] United States immigration law suggests that nations opposed to expanding refugee protections to climate migrants may similarly define "group" as rooted in inherent, immutable characteristics that pre-date persecution.[85] Further criteria would need to be evaluated by the Committee to determine the requirements of such a "group" and then would be subject to state parties' own definitions.

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82. *Id.*
83. *Id.* at 4, 11.
84. Toscano, *supra* note 10, at 481.
85. *See* DEPARTMENT OF JUSTICE OFFICE OF THE ATTORNEY GENERAL, 27 I&N Dec. 316, MATTER OF A-B-, RESPONDENT (A.G. 2018) (declaring that an applicant seeking to establish persecution on account of membership in a "particular social group" must demonstrate membership in a group, which is composed of members who share a common immutable characteristic).

The Committee's decision in *Teitiota* creates an opening and an incentive for the international community to act. Climate migrants will either be deemed "refugees" under the expanded interpretation, or they will need to seek assistance through other means.[86] There is a strong incentive for countries to avoid the problem of climate migrants as refugees. Addressing the situation before catastrophe ensues will reduce states' risks of incurring increased responsibilities, costs, and legal obligations that would arise with an expanded definition of refugee.[87]

Relatedly, it is possible that polluting nations could be seen as causing the circumstances for persecution and face steeper responsibilities and obligations.[88] There are 146 parties to the 1951 Convention, nineteen of which are signatories (including France, Germany, and Israel).[89] The 1967 Protocol has no signatories, but has 147 Parties, including the United States, the United Kingdom, and the Russian Federation.[90] However, the 1951 Convention, as international law, is a law of consent. Accordingly, an adapted reading of the 1951 Convention and 1967 Protocol is only effective if the states subject to the Convention and Protocol accept the interpretation.

It would be naïve to suggest the international community would be able to avoid the climate migrant crisis, even if major progressive climate action was implemented today. However, in suggesting that the 1951 Convention definition could be read to include climate migrants, the Committee created a strong incentive for the international community to reduce the scale of this impending crisis. The emphasis the Committee placed on the Republic of Kiribati having a ten-to-fifteen-year timeline before critical submersion allows the international community to act quickly to avoid the mammoth crisis expected by 2050.[91] Expanding the 1951 Convention definition will not solve the crisis on its own. In dissent, Committee Member Duncan Laki Muhumuza underscored that the burden will still fall on the migrant to establish the risk and danger of being returned, and that in his opinion, this burden remains too high.[92] In sum, expanding

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86. Nishimura, *supra* note 18, at 115.

87. *Id.*

88. Benoit Mayer, *The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework*, 22 COLO. J. INT'L ENVTL. L. & POL'Y 357, 382 (2011).

89. Convention Relating to the Status of Refugees art. 2, Apr. 22 1954, 189 U.N.T.A.S. 137, https://treaties.un.org/pages/ViewDetailsII.aspx?src=IND&mtdsg_no=V2&chapter=5&Temp=mtdsg2&clan g=_en [https://perma.cc/7QQZ- MA7A].

90. Protocol Relating to the Status of Refugees art. 5, Oct. 4, 1967, 606 U.N.T.S. 267, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=V-5&chapter=5&clang=_en [https://perma.cc/8GC6-9224].

91. *Teitiota*, *supra* note 35, at 12.

92. *Id.* at Annex 2, (Muhumuza, D., dissenting); *see also* Nishimura, *supra* note 18, at 115.

the definition of "refugee" set in the 1951 Convention is not a permanent or all-encompassing solution, but it offers a pathway to climate migrants within the existing legal framework.

V. PATHWAY #2: APPLYING ARTICLE 6 TO CLIMATE MIGRANTS

Article 6 of the International Covenant on Civil and Political Rights recognizes an inherent right to life that "shall be protected by law," and that "no one shall be arbitrarily deprived of life."[93] There are currently 173 parties to the Covenant and seventy-four signatories, including the United States, the United Kingdom, and Germany.[94] The Human Rights Committee has noted that the right to life "has been too often narrowly interpreted."[95] The Committee stated in CCPR General Comment No. 6 that the "inherent right to life cannot properly be understood in a restrictive manner, and protection of this right requires nations adopt positive measures."[96] The statement considered it "desirable for states parties to take all possible measures" to reduce infant mortality, increase life expectancy, and eliminate malnutrition and epidemics.[97] "Desirable," is not particularly binding language, but it serves as an informal push from the Committee to the international community to pursue such efforts to protect life before it becomes dire.

Teitiota presents the possibility of a future global precedent in which a state would be in breach of its human rights obligations if it returns someone to a country where—due to climate change—the returnee's life is at risk or in danger of cruel, inhumane, or degrading treatment.[98] The Committee stated that "the obligation not to extradite, deport, or otherwise transport pursuant to article 6 may be broader than the scope of the principal

93. U.N. Hum. Rts. Off. of the High Comm'r, *Executions: International Standards*, https://www.ohchr.org/EN/Issues/Executions/Pages/InternationalStandards.aspx-:~:text=Article 6 of the international, be arbitrarily deprived of life" [https://perma.cc/M64Z-82PQ] (last visited Feb. 12, 2021).

94. International Covenant on Civil and Political Rights art. 4, Mar. 23, 1976, 999 U.N.T.S. 171, https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND [https://perma.cc/8FWM-SVRX].

95. Memorandum from Off. of the High Comm'r for Hum. Rts., CCPR General. Comment No. 6: Article 6 (Right to Life), ¶ 5, Apr. 30, 1982.

96. *Id.*

97. *Id.*

98. *See generally Teitiota*, *supra* at 35.

of non-refoulment[99] under international refugee law, since it may also require the protection of aliens not entitled to refugee status."[100] This Committee declaration suggests that there are responsibilities owed by both origin state parties and the international actors encountering refugee and asylum claims regardless of whether the individual qualifies for refugee status under the 1951 Convention. Such an interpretation opens another pathway for climate migrants to seek protections under the current framework.

The Committee also noted that its previous general comment No. 36 established that, "the right to life also includes the right of individuals to enjoy a life with dignity and to be free from acts or omissions that would cause their unnatural or premature death."[101] General comment No. 36 extended the obligations of parties to "respect and ensure [that] the right to life extends to reasonably foreseeable threats and life-threatening situations" to "environmental degradation, climate change, and unsustainable development."[102] The Committee noted that these climate related risks are "some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life."[103] Tying the risks of climate change and its effects—even if they have not yet resulted in the loss of life—to article 6 protections, is a profoundly bold declaration by the Committee. This declaration binds the fate of nations' response to climate change to their inherent duties to their residents and to those seeking refugee status.[104]

Teitiota suggested a three factor test that may be used to determine if a state has violated its obligations under article 6: (1) an act or omission by government that indicates a risk that the individual would be deprived of life; (2) sufficient degree of risk at the relevant time; and (3) a situation materially different from that of every other citizen.[105] In Teitiota's case, the Committee found insufficient evidence that "the Government of Kiribati had failed to take programmatic steps to provide for the basic needs of life in order to meet its positive obligation to fulfill the author's right to life."[106] The Committee noted that the five factors of the "refugee"

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99. *Id.* at 9 (explaining non-refoulement is the practice of not forcing refugees or asylum seekers to return to a country in which they are liable to be subjected to persecution).
100. *Id.* at 9–10.
101. *Id.* (explaining this definition has yet to be used on a wide scale on issues like abject poverty, which arguably is a failure on the behalf of a State to provide the right to life. This reality complicates the extension of the No. 36 protection to climate migrants).
102. *Id.* at 10.
103. *Id.*
104. *Id.*
105. *Id.* at 10–11.
106. *Id.* at 10.

definition expansion discussed above were not sufficiently proved by Teitiota—he had not sufficiently demonstrated a sufficient degree of risk at the relevant time.[107] The Committee underscored the ten to fifteen year timeline and the positive actions taken by the Government of Kiribati to address climate change and its effects.[108]

While Teitiota's case failed to meet the three factors required for article 6 protections, the Committee did not insist that "pacific islands [need] to be under water before triggering human rights obligations to protect the right to life."[109] Future litigation is necessary, as with the 1951 Convention definition of "refugee," to determine the extent and limits of a sufficient governmental response as well as the level of risk and imminence of risk. As in the expansion of the "refugee" definition, the Committee's comments on article 6 protections hinged on the notion of individual or unique risk—the author's situation must be materially different than every other citizen. Thus, there is some meaningful interplay between the five-factor test under the expanded refugee definition and the three-factor test for relief under article 6. A thorough analysis of this relationship will require additional cases and rulings.

As the two inquiries are rhetorically connected, the questions left open by this aspect of the Committee's decisions are similar to those discussed above regarding refugee status. Specifically, the question remains as to: (1) what sort of characteristics would suffice to qualify a *group* to meet these standards, and (2) to what extent does one need to face unique circumstances in a crisis that, by definition, will affect whole States? As noted throughout, *Teitiota* merely created a framework from which to begin to examine these pressing issues. Parsing the specific elements will require additional cases that allow the Committee to apply its proposed inquiries to different fact patterns. But commentary by the Committee on article 6 reinforces the possibility that doing so will promote climate change action by state parties and the international community. As the Office of the High Commissioner for Human Rights stated shortly after *Teitiota*, "without robust national and international efforts, the effects of climate

107. *Id.* at 12.
108. *Id.*
109. *UN landmark case for people displaced by climate change*, AMNESTY INT'L, (Jan. 20, 2020, 6:51 PM), https://www.amnesty.org/en/latest/news/2020/01/un-landmark-case-for-people-displaced-by-climate-change/#:~:text=In%20a%20ground%2Dbreaking%20asylum,seekers%2C%20said%20Amnesty%20International%20today [https://perma.cc/6988-NCSG].

change in origin nations may trigger the non-refoulment obligations of receiving states"[110] Triggering non-refoulment would incentivize all parties to address the now unavoidable climate migrant crisis.

VI. HYPOTHETICAL

Teitota's claims failed across all five factors of the expanded reading of "refugee" and all three factors of the extension of article 6, but the HRC's decision does definitively open the possibility that a varying fact pattern could lead to a climate migrant being granted refugee protections. I propose a fact pattern[111] that could be successful in the eyes of the Committee, based on the inferences they left dispersed throughout *Teitiota*:

1.1 The author of the communication is Pipsqueak Bear, a national of Thneed-Ville. His application for refugee status in Whoville was rejected. He claims that the State party violated his article 6 right to life under the Covenant and the 1951 Convention by removing him to Thneed-Ville. The author is represented by Counsel, the Lorax.

1.2 The author claims that the effects of climate change and deforestation by both the State of Thneed-Ville and other developed states forced him to migrate from Thneed-Ville to Whoville. The situation in Thneed-Ville has become increasingly unstable and precarious due to deforestation, pollution, and loss of habitable land.

1.3 Fresh water has become scarce due to the high levels of pollution and habitat is largely inhabitable due to deforestation and subsequent erosion. Attempts to mitigate erosion and its consequences have proven ineffective.

1.4 Inhabitable land has resulted in a housing crisis and widespread land disputes leading to multiple fatalities. The author himself suffered non-life-threatening injuries when he was thrown off his land repeatedly by newcomers, Brett and Chet. Thneed-Ville has thus become an untenable and violent environment for the author and his family.

1.5 The government of Thneed-Ville has attempted to provide subsidized "clean air" and water supplied by O'Hare Air, which is owned and operated by the Mayor. However, the

110. UN Hum. Rts. Off. of the High Comm'r, *supra* note 69.

111. The general framework of this hypothetical is based on Dr. Seuss's *The Lorax*, however creative liberties have been taken to create a fact pattern fitting of the questions presented in *Teitiota.*

> government has also actively continued efforts that are accelerating pollution and deforestation in Thneed-Ville.

To review, in analyzing Pipsqueak Bear's case, the Committee will (likely) look to the 1951 Convention and article 6. Pipsqueak meets the first two requirements under the wording of the 1951 convention: (1) he has fled his home country and (2) is unable/unwilling to return home. In analyzing the third and fourth requirements: (3) the inability/unwillingness to return being due to persecution and (4) that persecution being related to status in a particular group, the Committee will look towards the five-factor test discussed earlier in this analysis: (a) Pipsqueak has been involved in a land dispute, (b) the deforestation and subsequent pollution has led to Pipsqueak and his family being unable to find suitable land for accommodation, (c) the pollution has led to a lack of access to clean drinking water, (d) Pipsqueak fears for his family's safety both from natural conditions and the violence stemming from lack of resources and considers Thneed-Ville to provide life-threatening conditions, and finally (e) Pipsqueak argues that his condition is unique in that he has personally faced violence and the effects of resource scarcity in Thneed-Ville.

The Committee will likely accept that Pipsqueak fulfills the requirements of (a) and (b), he has endured violence in direct result of a land dispute and is now unable to find housing for himself and his family. Thneed-Ville has seen a rapid expansion of deforestation efforts and a recent report suggests that there is only one tree left standing. As for (c), the Committee may rule that there are still potable water sources available in Thneed-Ville, especially since the government has provided some water to its citizens. However, if the Committee adopts the view of Member Vasilka Sancin, the lack of accessible drinking water would be sufficient to fulfill this requirement. It is likely the Committee would also accept (d), the Committee stated in *Teitiota* that life-threatening conditions would suffice even if such situations do not result in the loss of life.[112] Here, the author states that there has been loss of life from land disputes and that he himself has suffered injury. Finally, the most difficult hurdle to Pipsqueak's claim, (e) the requirement that an author's situation must be materially different than other residents. Solely drawing from the *Teitiota* decision, it is unlikely Pipsqueak would prevail on this factor alone because all individuals in Thneed-Ville are suffering the same effects of climate

112. *Teitiota*, *supra* note 35, at 10.

change and witnessing a loss of habitable land, drinkable water, and the presence of wide-spread violence. It is unlikely the Committee will see Pipsqueak's situation as unique. However, Member Duncan Laki Muhmuza stated in his dissent his belief that the "threshold should not be too high and unreasonable," and that the Committee must "consider all relevant facts and conditions, which comprise among other conditions, the grave situation in the author's country."[113] Pipsqueak could draw upon this dissent to urge the Committee to specify its requirement under factor (e).

As *Teitiota* is understood to this point, any of the five factors may be sufficient to allow Pipsqueak refugee protections under the 1951 Convention. The urgency of the situation in Thneed-Ville would likely compel the Committee to grant Pipsqueak protections. It will still be necessary for the Committee to grapple with the fifth factor, the "materially different" requirement as it stands in theoretical conflict with the threat of climate change and its effects.

Pipsqueak's case under an article 6 argument is even more clear. *Teitiota* suggested that protections could be extended to climate migrants if there is (a) and act or omission by the government that indicates risk of being deprived of life, (b) sufficient degree of risk at the relevant time, and (c) a materially different situation than every other citizen. Here, the government of Thneed-Ville has failed to sufficiently provide its citizens with mitigation supplies (at least without also profiting from such supplies) and have continued efforts to worsen the climate change effects in Thneed-Ville. Further, as the author has presented, there is one remaining tree left in Thneed-Ville and violence over resource scarcity has already broken out and resulted in death. Finally, the Committee will again have to grapple with the "materially different" element, and if read like *Teitiota*, may deny Pipsqueak protections.

Overall, Pipsqueak would likely be extended refugee protections by the Committee. There is a clear and imminent threat in Thneed-Ville and Pipsqueak has met the majority of all requirements discussed in *Teitiota*. However, this ruling will be in conflict with the "materially different" aspect of both the 1951 Convention and article 6 reading. Additionally, it will be up to Whoville to accept the new reading provided by Teitota and this ruling by the Committee to comply and extend such protections to Pipsqueak and his family.

VII. CONCLUSION

Teitiota offers two possible pathways in which climate migrants could seek refugee protections under existing legal frameworks. However, the reality is that the international community and its existing institutions are

113. *Id.* at 15.

insufficiently addressing the problem.[114] The UNHCR has not instituted protections for environmental refugees and has not "viewed its mandate as including such protections."[115] The intersection between climate migration with socioeconomic status means that confronting climate migration must be addressed through both policy and law.[116] There are unresolved tensions between the majority and the dissenters in the *Teitiota* case regarding how drastic conditions must be, which conditions must exist, and how unique those conditions must be to the seeker in order to qualify for protections. These remaining questions need to be addressed in future litigation before a new path to protections can be relied on by climate migrants. Presently, whether or not to accept these new interpretations rests on the shoulders of political actors in their respective nations. Ultimately, *Teitiota* offers a landmark framework for tying the fate of climate migrants and climate change to positive obligations of state parties and the international community.[117] Such a milestone—while not comprehensive and riddled with tensions—should not be overlooked. *Teitiota* has pioneered potential legal pathways toward international solutions to the mammoth and complex crisis of climate migrants.

114. Docherty & Giannini, *supra* note 1, at 359.
115. *Id.*
116. *Id.* at 360; Sumudu Atapattu, *Climate Change, Human Rights, and Forced Migration: Implications for International Law*, 27 WIS. INT'L L.J. 607, 607 (2009).
117. Nishimura, *supra* note 18, at 119.