

CLIMATE REFUGEES IN DOMESTIC AND INTERNATIONAL LAW

Sam Weinberg¹

This paper explores the intersection between climate change and refugee law, analyzing how domestic and international legal frameworks either address or fail to address the phenomenon of climate-induced displacement. Although the 1951 Refugee Convention and its 1967 Protocol provide a foundational definition of the term “refugee,” they omit environmental factors, leaving climate refugees in a legal grey area. The paper goes through legal interpretations, case law—such as Teitiota in New Zealand—and UN developments, highlighting inconsistencies in enforcement across the board. It also considers the American law and its narrow refugee criteria amid a shifting political landscape, further complicating the inclusion of climate migrants. Finally, it proposes policy innovations to address this issue. Through legal critique and forward-looking proposals, the paper advocates for an inclusive and rights-based framework to protect those displaced by climate-related crises.

CLIMATE REFUGEES IN DOMESTIC AND INTERNATIONAL LAW.....	1
INTRODUCTION.....	1
A. Impact of climate change on immigration and refugee crisis.....	2
I. IN INTERNATIONAL LAW.....	3
A. Readings of the 1951/1967 Conventions.....	3
B. Developments in other major UN bodies.....	6
C. Other international bodies.....	8
II. IN DOMESTIC LAW.....	10
IV. POLICY POTENTIAL.....	14
A. Initial COP21 Idea of CCDCF.....	14
B. Expansion concept.....	15
C. Other.....	16
CONCLUSION.....	17

¹ Sam Weinberg (Yeshiva College ‘25) is a senior, majoring in English (Literary Studies) and minoring in Finance. He is the editor-in-chief of this journal, as well as president of the Yeshiva Student Union, Secretary General for YU National Model UN, campus president of YU Political Action Club and Jacob Hecht Pre-Law Society, among other positions.

INTRODUCTION

Scientists have seen changes in climate in every region of the world, some of which are unprecedented². Sometimes, such changes occur naturally, but the significant emissions of carbon dioxide and other greenhouse gases have led to the novel nature of the current planetary circumstance. The Intergovernmental Panel on Climate Change,³ among other sources, indicates that continuing at current levels will lead to disastrous environmental developments. Certain regions are more affected by these changes than others. A separate report from the IPCC indicates that “approximately 3.3 to 3.6 billion people live in contexts that are highly vulnerable to climate change... the largest adverse impacts observed in many locations and/or communities in Africa, Asia, Central and South America, LDCs⁴, Small Islands in the Arctic.”⁵

Much attention has gratefully been given to the direct impacts of climate change.⁶ The concept of *human security*—“a concern with human life and dignity”⁷—is relevant to our changing planet in all its forms. There are seven main categories of human security: economic, food, health, environmental, personal, community, and political security.⁸ All of these

² Intergovernmental Panel on Climate Change, Press Release, *Climate Change Widespread, Rapid, and Intensifying* (Aug. 9, 2021), https://www.ipcc.ch/site/assets/uploads/2021/08/IPCC_WGI-AR6-Press-Release_en.pdf (last visited Apr. 29, 2025).

³ *Id.* A vocal minority objects to this assertion, but a vast majority of the scientific community believes in both climate change and human activity's role in it. The rest of this paper will assume this as scientific fact.

⁴ Least developed countries.

⁵ The Core Writing Team, *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Intergovernmental Panel on Climate Change, https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf

⁶ See, for example, *Massachusetts v. EPA*, 549 U.S. 497 (2007)

⁷ UNDP Team, *Human Development Report 1994*, United Nations Development Programme (UNDP), p.22, <https://hdr.undp.org/system/files/documents/hdr1994encompletenostats.pdf>

⁸ *Id.*, p.24

concepts are affected by climate change, but most notably for our purposes, we will be highlighting communal and political security.

A. *Impact of climate change on immigration and the refugee crisis*

In scholarship, it emerges that there is a “clear link between” climate change, disaster, displacement, and migration.^{9,10} Many organizations predict that the amount of people displaced from climate change due to slow-onset impacts is over 200,000,000, moving from areas irrevocably affected by water shortages, crop productivity, and storms.¹¹ One would, therefore, anticipate the core international texts regarding refugees to acknowledge climate change and its impacts. Yet, that is not the case. The first anchoring text regarding refugees, the 1951 Convention and Protocol Relating to the Status of Refugees, has an explicit definition of “refugee”:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality 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.¹²

This language, emerging from the Office of the UN High Commissioner for Refugees (UNHCR), was a product of a post-World War II atmosphere, specifically with its temporal limitation of pre-1951 cases. In

⁹ Vikram Kolmannskog, *CLIMATE CHANGE, HUMAN MOBILITY, AND PROTECTION: INITIAL EVIDENCE FROM AFRICA*, 29.3 Refugee Survey Quarterly 103, 103 (2010).

¹⁰ See also Andreas Rechkemmer et al., *A complex social-ecological disaster: Environmentally induced forced migration*, 3 Disaster Health 112, 112 (2016).

¹¹ Clement, Viviane, Kanta Kumari Rigaud, Alex de Sherbinin, Bryan Jones, Susana Adamo, Jacob Schewe, Nian Sadiq, and Elham Shabahat. “Groundswell Part 2: Acting on Internal Climate Migration.” Washington, DC: World Bank, September 13, 2021. <https://openknowledge.worldbank.org/handle/10986/36248>.

¹² Convention relating to the Status of Refugees art. 1, July 28, 1951 189 U.N.T.S. 150

1967, the limitation was eliminated, but the initial definition remained unchanged.¹³ Ultimately, this raises a pressing question in the modern world: how do domestic and international bodies and treaties respond to the increasingly worrying phenomenon?

I. IN INTERNATIONAL LAW

A. *Readings of the 1951/1967 Conventions*

It would be dishonest to say that it is universally accepted that climate refugees¹⁴ would not fall under these traditional definitions of refugee. Alexander and Simon assert “at length that these persons will indeed lack a nationality... those in this position who lack any other nationality will not longer be considered a national by any state... [t]hey will therefore meet the legal definition of de jure statelessness.”¹⁵ If a state is uninhabitable, its habitants would leave, unable to return; this would potentially be considered “outside the country of his former habitual residence.”

States have not used this reading in practice. In New Zealand’s Supreme Court, a case was presented regarding a man who had lived in Kiribati’s capital, Tarawa.¹⁶ The case acknowledged the difficulties those living in that city experienced.

¹³ Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

¹⁴ Using this phrase is not uncontroversial. A handful of organizations, including the UN International Organization for Migration (IOM), object to its usage because of the implications of forced movement and external immigration. Often, as we will discuss, climate migration is internal and voluntary, albeit just as pressing. The usage of the phrase in this paper is not meant to be a comment on that debate.

¹⁵ Heather Alexander & Jonathan Simon, “Unable to Return” in the 1951 Refugee Convention: Stateless Refugees and Climate Change, 26 Fla. J. Int’l L. 531, 571 (2014)

¹⁶ AF (Kiribati) [2013] NZIPT 800413, New Zealand: Immigration and Protection Tribunal, 25 June 2013, <https://www.refworld.org/jurisprudence/caselaw/nzipt/2013/en/122924> [accessed 26 November 2024]

[26] Life generally became progressively more insecure on Tarawa as a result of sea-level-rise. From the late 1990s onwards, Tarawa suffered significant amounts of coastal erosion during high tides. Also the land surface was regularly flooded and land could be submerged up to knee-deep during king tides. Transportation was affected as the main causeway separating north and south Tarawa was often flooded. [27] This caused significant hardship for the appellant, his wife and family as well as other inhabitants on Tarawa.¹⁷

Ioane Teitiota and his wife were granted visas to New Zealand, which expired in 2010. They remained in the country unlawfully, and after a traffic stop apprehension, Teitiota applied for refugee status, citing an inability to return to his home country. After a Refugee and Protection Officer rejected the application,¹⁸ Teitiota appealed to the Immigration and Protection Tribunal.

While the Tribunal considered ways environmental degradation can, at some point, create pathways for refugeehood, it ruled that a broader, the climate-change-inclusive definition of “refugee” was not at play here. “It is clear,” the Tribunal ruled, that this “may be termed a voluntary adaptive migration”¹⁹ and that the “legal concept of ‘being persecuted’ rests on human agency.”²⁰ New Zealand would not house an individual whose

¹⁷ *Id.*, p. 7.

¹⁸ *Ioane Teitiota v. Chief Executive of the Ministry of Business, Innovation and Employment*, 107, SUP. CT. OF NEW ZEALAND (2015). In this case, MJ Kidd, the counsel for Teitiota, identifies four main points in his appeal.

- (a) Whether as a matter of public international law an “environmental refugee” qualifies for protection under art 1A(2) of the Refugee Convention;
- (b) Whether, in the alternative, the manner in which art 1A(2) is incorporated into New Zealand law provides a basis for a broader interpretation of “refugee” in s 129(1) of the Immigration Act;
- (c) Whether the United Nations Convention on the Rights of the Child is relevant to the assessment of “harm” for the purposes of the Refugee Convention;
- (d) Whether the right to life under the ICCPR includes a right of a people not to be deprived of its means of subsistence. (p. 5)

Much of our conversation today is in reference to points (a) and (b), but that does not take away from the validity of questions (c) and (d).

¹⁹ *AF (Kiribati)* [2013] NZIPT 800413, New Zealand: Immigration and Protection Tribunal, 25 June 2013, <https://www.refworld.org/jurisprudence/caselaw/nzipt/2013/en/122924> p. 13 [accessed 26 November 2024]

²⁰ *Id.* p. 14

homeland “will likely experience more than 100 days of flooding every year by century’s end.”²¹

The requirement for the definition of persecution to have a component of human agency is similarly challenging. Many examples of refugees certainly involve an international human decision; a person or group of people makes some form of decision in their treatment of another, and that other group must leave their region because of it. Climate refugees do not have the same immediate relationship with their persecutors. “A climate asylum claim is unlikely to be able to overcome the intent requirement implicit in ‘deliberate imposition,’” writes Smith. “Even if high-emitting actors know they are contributing to climate change.”^{22,23}

Another questionable component is the destructive partnership between state obligation (or lack thereof) and the concept of “refoulement.” Article 33 of the Convention says that a contracting state may not “expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened.”²⁴ Yet the Convention does not require states to actually examine asylum claims.²⁵ If a refugee were to make her way inside a state’s borders, that state would not be legally permitted to send her back to her home country; there is, however, no need for the state to let her within its

²¹ Pat Brennan, *NASA Sea Level Team Examines an Island Nation at Risk*, NASA (September 3, 2024), <https://sealevel.nasa.gov/news/276/nasa-sea-level-team-examines-an-island-nation-at-risk/>

²² Natalie Smith, *A Path to Climate Asylum Under U.S. Law*, 124 *Columbia Law Review* 1779, 1801 (2024).

²³ The phrase “deliberate imposition” comes not from an aforementioned internationally relevant text but from American law. The same concept, one can argue, would apply to the phrase “being persecuted” in the 1951 Convention. *Cf. Kovac v. Immigration and Naturalization Service*, 407 F.2d 102 (U.S. Court of Appeals — Ninth Circuit 1969).

²⁴ Convention relating to the Status of Refugees art. 33, July 28, 1951 189 U.N.T.S. 150

²⁵ Pierre-Michel Fontaine, *The 1951 Convention and the 1967 Protocol Relating to the Status of Refugees: Evolution and Relevance for Today*, 2 *Intercultural Hum. Rts. L. Rev.* 149, 156 (2007).

borders in the first place, creating “a perverse incentive to prevent the initial entry into their territory.”²⁶

B. *Developments in other major UN bodies*

There are a handful of other bodies within the United Nations that ostensibly can help out on this topic beyond just the UNHCR, but these potentially relevant bodies face hurdles based on their mandates.²⁷ The General Assembly (GA) is severely limited by its minimal practical power; it can “discuss any questions or any matters within the scope of the [UN] Charter or... make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.”²⁸ It can also “initiate studies... for the purpose of promoting international cooperation.”²⁹ But by itself, it can’t push forward a policy that its members are bound to.

The Security Council could also perhaps be relevant to this issue, but it, too, faces challenges. The UNSC is charged with “the maintenance of international peace and security,”³⁰ and climate change is increasingly viewed as perilous toward such security.^{31,32} It is plausible that realistic climate change scenarios “could potentially destabilize the geo-political environment, leading to skirmishes, battles, and even war due to resource constraints.”³³ Yet the Security Council has not necessarily viewed itself as

²⁶ Eric Ormsby, *The Refugee Crisis as Civil Liberties Crisis*, 117 Columbia Law Review 1191, 1192 (2017).

²⁷ Phillip Warren, *Forced Migration After Paris COP21: Evaluating the "Climate Change Displacement Coordination Facility"*, 116 Columbia Law Review 2103, 2117-2120 (2016).

²⁸ U.N. Charter art. 10

²⁹ *Id.* art. 13

³⁰ *Id.* art. 24

³¹ John Broder, *Climate Change Seen as Threat to U.S. Security*, The New York Times, August 8, 2009, at A1.

³² Questionably, the Security Council determines what is a “threat to the peace,” thereby having the power to make anything under its jurisdiction. U.N. Charter art. 39

³³ Peter Schwartz & Doug Randall, *An Abrupt Climate Change Scenario and Its Implications for United States National Security*, Defense Technical Information Center, September 1, 2003, at 2.

a primary player in these conversations³⁴, despite reminders that “[p]eace can only be maintained if the very forests, soils and rivers that communities depend on are protected and managed sustainably.”³⁵ Being bound by China and Russia, both of whom are permanent members of the Security Council, makes political will a question as well.³⁶

The UNFCCC has, as a core principle, the responsibility of the “specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change.”³⁷ One would be justified in thinking that it would then be a natural fit, especially following the Paris Agreement, a legally binding treaty which was adopted by 195 parties that provided a list of long-term goals regarding climate change.³⁸ Yet the Paris Agreement speaks little about displacement³⁹ and has merely a passing mention of “minimizing... loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events.”⁴⁰

³⁴ In S.C. Pres. Statement 2011/15, at 1-2 (July 20, 2011), the President of the Security Council asserts that the UNFCCC “is the key instrument for addressing climate change” and acknowledges its role in international peace and security are relevant to climate change insofar as it represents “a challenge to the implementation of Council mandates” and it “requests the Secretary-General... ensure that his reporting to the Council contains such contextual information.”

³⁵ “With Climate Crisis Generating Growing Threats to Global Peace, Security Council Must Ramp Up Efforts, Lessen Risk of Conflicts, Speakers Stress in Open Debate.” *United Nations*, 13 June 2023, <https://press.un.org/en/2023/sc15318.doc.htm>.

³⁶ See, for example, Daria Kurushina, *How China-Russia Relations Are Impacting COP28*, Asia Society Policy Institute, December 5th, 2023, at <https://asiasociety.org/policy-institute/how-china-russia-relations-are-impacting-cop28><https://asiasociety.org/policy-institute/how-china-russia-relations-are-impacting-cop28>.

³⁷ United Nations Framework Convention on Climate Change art. 3, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.

³⁸ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

³⁹ There is a task force mentioned in section (III), par. 49, and it remains active. See FCCC/SB/2022/2/Add.2 for reference.

⁴⁰ *Id.* art. 8 (1)

C. *Other international bodies*

There are a handful of other core texts that are noteworthy on this topic.⁴¹ The “OAU Convention,” which deals with refugee problems in Africa, adds to the prior conventions by acknowledging the term refugee’s application to “every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order... is compelled to leave his place of habitual residence in order to seek refuge in another place.”⁴² This core additional point can, theoretically, be used to justify traditional refugee policy being applied to those who are displaced due to climate change, considering that climate change can fall under the classification of disrupting public order.

Similarly, the Cartagena Declaration on Refugees slightly expands the definition of “refugee” to potentially include those affected by climate change.⁴³ That document uses a definition of the term refugee, “which, in addition to containing the elements of the 1951 Convention... includes... persons who have fled their country because their lives, safety, or freedom have been threatened by... circumstances which have seriously disturbing public order.”⁴⁴ While this document only has regional significance—it does, after all, only apply to Central America—its forward-thinking nature regarding a definition of refugee is helpful for crafting a more inclusive term and, therefore, a global response.

⁴¹ Paramjit Jaswal & Stellina Jolly, *Climate Refugees: Challenges and Opportunities for International Law*, 55 *Journal of the Indian Law Institute* 45, 54 (2013).

⁴² Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa (“OAU Convention”), 1001 U.N.T.S. 45, 10 September 1969, <https://www.refworld.org/legal/agreements/oau/1969/en/13572> [accessed 29 November 2024]

⁴³ Regional Refugee Instruments & Related, Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, -, 22 November 1984, <https://www.refworld.org/legal/resolution/rri/1984/en/64184> [accessed 29 November 2024]

⁴⁴ *Id.* III(3), p. 36

A third noteworthy text is the Kampala Declaration.⁴⁵ The document, primarily dealing with internally displaced people (IDPs) as opposed to refugees, details obligations to state actors in Africa as they pertain to displacement.⁴⁶ Signatories to the Declaration are obligated to “incorporate their obligations... into domestic law by enacting or amending relevant legislation on the protection of, and assistance to, internally displaced persons.”⁴⁷ They similarly must aim to “prevent and avoid conditions that might lead to the arbitrary displacement of persons.”⁴⁸ While not relevant on a global scale, such a document⁴⁹ gives a good framework for a potential regional response that would address the displacement of a significant number of displaced people due to environmental factors.

II. IN DOMESTIC LAW

The definition of the term “refugee” according to U.S. law is relevant to this discussion.⁵⁰ It states that a refugee is someone who is “unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in

⁴⁵ African Union, African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (“Kampala Convention”), 23 October 2009, <https://www.refworld.org/legal/agreements/au/2009/en/70509> [accessed 29 November 2024]

⁴⁶ The relevance of IDPs to our conversation is vast. Reference Angela Williams, *Turning the Tide: Recognizing Climate Change Refugees in International Law*, 30 Law & Policy 502, 510-513 (2008).

⁴⁷ *Id.* art. 3 par. 2(a)

⁴⁸ *Id.* art. 4 par. 1

⁴⁹ There is a recognition within even international language relating to internally displaced people. *Cf.* Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39, Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2, UN Commission on Human Rights, 11 February 1998, <https://www.refworld.org/legal/otherinstr/unchr/1998/en/18487> [accessed 02 December 2024]. There are also resources and organizations that, from an international vantage point, monitor developments in internal displacement. Reference <https://www.internal-displacement.org/> for an example.

⁵⁰ 8 U.S.C. § 1101

a particular social group, or political opinion.”⁵¹ It also clarifies that the term refugee “does not include any person who ordered, incited, assisted, or otherwise participated in the persecution.”⁵²

Policies relating to asylum are among the most politically fraught issues in the United States at the time of this writing,⁵³ and a desire for greater enforcement played a role in the recent presidential campaigns.⁵⁴ It could, therefore, feel backward to discuss expanding, not limiting, asylum protection for those impacted by the environmental crisis; this point is especially relevant considering President Trump’s disdain for climate-conscious policies⁵⁵ and shifts in tenor from President Biden toward the end of his presidency,⁵⁶ when he began to utilize authority⁵⁷ to suspend entry into the United States. The final years of President Trump’s first term were already characterized by a steep decline in refugees admitted; 2019 and 2020 were both, at their times, the years with the fewest refugees admitted in history.⁵⁸ “Until recently, the United States offered refuge each year to more people than all other nations combined,” the

⁵¹ *Id.*, (42)(a)

⁵² *Id.*, (42)(b)

⁵³ Laura Barrón-López et al., *As immigration emerges as key election issue, experts provide insights on border situation*, PBS News, June 26, 2024, at <https://www.pbs.org/newshour/show/as-immigration-emerges-as-key-election-issue-experts-provide-insights-on-border-situation>.

⁵⁴ See, for example, Elliot Spagat, *Trump’s goal of mass deportations fell short. But he has new plans for a second term*, AP News, September 22, 2024, at <https://apnews.com/article/trump-mass-deportations-immigration-844f3050ba99552b900ed9f3a1dec22d>.

⁵⁵ A Martínez & H.J. Mai, *Trump wants to ‘Drill, baby, drill.’ What does that mean for climate concerns?*, NPR, November 15, 2024, at <https://www.npr.org/2024/11/13/nx-s1-5181963/trump-promises-more-drilling-in-the-u-s-to-boost-fossil-fuel-production>.

⁵⁶ See, for example, Press Release, White House Briefing Room, FACT SHEET: President Biden Announces New Actions to Secure the Border (June 4, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/06/04/fact-sheet-president-biden-announces-new-actions-to-secure-the-border/>

⁵⁷ *Cf.* 8 U.S.C. § 1152 (f)

⁵⁸ American Immigration Council, *An Overview of U.S. Refugee Law and Policy*. American Immigration Council, Oct. 6, 2023, at www.americanimmigrationcouncil.org/research/overview-us-refugee-law-and-policy, p. 5

American Immigration Council wrote.⁵⁹ “But the Trump administration drastically reduced the maximum number of refugees that could enter the United States.”

The United States has not adopted the Cartagena Declaration of 1984, which expanded the definition of a refugee to include those impacted by the climate crisis. While other states in the Americas have seen litigation on climate displacement through the Inter-American Court of Human Rights, the USA is not bound to that body. The court, in preparation for an advisory opinion, has received a handful of relevant *amicus curiae* briefs on the issue.⁶⁰

This development points us to a fundamental truth regarding the American approach to this crisis: the US's inconsistency in applying international perspectives on climate refugees. In 1984, a Yugoslavian man named Predrag Stevic, overstaying his visa to the United States, was facing deportation, and after reevaluating the need for a “clear probability of persecution,” the circuit court ruled that all he needed was a “well-founded fear of persecution,” not “clear probability.”⁶¹ Yet the Supreme Court overruled the circuit court, saying that there is a standard of “clear probability of persecution.”⁶² That ruling came in the face of a UNHCR amicus brief arguing against such a standard.⁶³

⁵⁹ *Id.*, p. 1

⁶⁰ See, for example, Center for Gender and Refugee Studies (CGRS); International Refugee Assistance Project (IRAP); Global Center for Environmental Legal Studies (GCELS) at the Elisabeth Haub School of Law at Pace University; Sir Arthur Lewis Institute of Social and Economic Studies (SALISES), The University of the West Indies (Mona); Refugees International; Alianza Americas; and Professor Shana Tabak, *On Issues Related to the Response to Climate Displacement in the Request for an Advisory Opinion Submitted by the Republics of Colombia and Chile*, 2023.

⁶¹ *Stevic v. Sava*, 678 F.2d 401 (2d Cir. 1982). *Cf. American Courts and the U.N. High Commissioner for Refugees: A Need for Harmony in the Face of a Refugee Crisis*, 131 Harvard Law Review 1399, 1403 (2018).

⁶² *INS v. Stevic*, 467 US 407 (1984).

⁶³ UN High Commissioner for Refugees (UNHCR), Immigration and Naturalization Service v. Stevic: Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondent, 29 August 1983, <https://www.refworld.org/jurisprudence/amicus/unhcr/1983/en/70335> [accessed 16 December 2024]. The document spends time discussing the origin of the phrase

Yet only a few years later, the Supreme Court changed its perspective on the UNHCR's definition and its relevance to American law. Nicaraguan Luz Maria Cardoza-Fonseca overstayed her visa, and the INS began proceedings to deport her, so she turned toward the notion of "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion" to stay in America.⁶⁴ Sandinistas,⁶⁵ she said, tortured her brother and, by extension, would torture her as his relative. While she also looked at the "clear probability" standard as a potential legal mechanism for staying, the argument is significantly weaker.

It didn't matter. The Supreme Court said, "[t]he standard [of being determined a refugee...certainly does *not*⁶⁶ require an alien to show that it is more likely than not that he will be persecuted in order to be classified as a 'refugee.'"⁶⁷ The court was then "further guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees" that "the applicant's fear should be considered well founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him."⁶⁸ The idea of utilizing UNHCR documents as a guide toward crafting American asylum policy, while not intuitively novel, has major ramifications for the law.⁶⁹

"well-founded fear" and notes that it does "not necessarily" indicate that the refugee "would be more likely than not to become the victim of persecution."

⁶⁴ Cong. Rsch. Serv., 1987: *INS v. Cardoza-Fonseca*,

<https://guides.loc.gov/latinx-civil-rights/ins-v-cardoza-fonseca>

⁶⁵ Known as the Frente Sandinista de Liberación Nacional (FSLN) in Spanish, the group helped overthrow the Somoza dictatorship in Nicaragua in 1978-79. The FSLN still exists today, albeit not in its prior far-left form.

⁶⁶ Italics are my own.

⁶⁷ *INS v. Cardoza-Fonseca*, 480 US 438 (1987).

⁶⁸ 480 US 438-39 (1987). In footnote 22, the Supreme Court asserts that the UNHCR definition is not binding and does not contain within it the force of law. "Nonetheless, the Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes."

⁶⁹ *Cardoza-Fonseca* has ramifications even beyond the strict discussions of asylum-seeking. Bassina Farbenblum wrote about how the case had a major impact on the court's understanding of the *Chevron* doctrine. Bassina Farbenblum, *Executive Deference*

These are but two examples of the inconsistency American law has showcased when regarding the UNHCR definition of refugee. A ramification of this issue is the confusion American courts continue to have when deciding individual cases. A Harvard Law note explains the issue as follows:

Some courts focus on the deference the Supreme Court has given to the UNHCR and its persuasive reasons for doing so and have directly used the UNHCR's interpretations to formulate their own jurisprudence. Others, meanwhile, have ignored the UNHCR's views, emphasized their nonbinding nature, and even criticized other entities such as the BIA for relying too much on the UNHCR's interpretations.⁷⁰

In light of such confusion, it would be beneficial to readdress how courts look toward understandings of refugeeship.

IV. POLICY POTENTIAL

A. *Initial COP21 Idea of CCDCF*

COP21, or the Paris Agreement, hardly addressed forced migration, presumably because the emphasis was on emissions. Yet the omission was hardly a given. In preparation for the conference, there were debates and scholarship regarding creating a CCDCF, or a Climate Change Displacement Coordination Facility, within the UNFCCC.⁷¹ Wentz and Burger, for example, outlined “a broad array of considerations for decision-makers as they contemplate whether and how to proceed with the displacement coordination facility.”⁷²

in *U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 Duke Law Journal 1059, 1085-1089 (2011).

⁷⁰ *American Courts and the U.N. High Commissioner for Refugees: A Need for Harmony in the Face of a Refugee Crisis*, 131 Harvard Law Review 1399, 1411-1412 (2018).

⁷¹ Jessica A. Wentz & Michael Burger, *Designing a Climate Change Displacement Coordination Facility: Key Issues for COP 21*, Sabin Center for Climate Change Law, Columbia Law School, September 2015 (2015).

⁷² *Id.*, p. 1.

This did not materialize. The Paris Agreement came and went with only slight mention of displacement, and so scholars have worked to fill the gap with theoretical renderings of what the CCDCF can look like. The most helpful text in this area comes from Phillip Warren, who concludes his paper with a couple of main areas of argument.⁷³

Firstly, he notes the importance of regional determination in policy coordination.⁷⁴ Evaluating initially on a smaller scale, as opposed to large multilateral agreements, permits “some level of cultural integrity” for individuals suffering from displacement and gives a greater voice to smaller nations that may be lost in the shuffle of world powers.⁷⁵ Preempting a counterargument positing that only those nations most guilty of emissions should be charged with refugee acceptance, Warren says such a move “might not represent the preferences of those actually displaced, which ought to remain a primary concern.”⁷⁶ Those major powers, like the United States, may provide greater economic encouragement instead of actual acceptance of migrants themselves.

The second aspect that Warren notes is the short-term work. He suggests working with the Nansen Initiative to provide support to different states, along with coordinating studies on areas “most suitable for accepting displaced climate change migrants.”⁷⁷ When nations inevitably work on regional or bilateral treaties, the CCDCF would coordinate between the relevant parties. Doing so would potentially enhance the robust nature of the treaties, especially given the likelihood that the United States will be a less reliable player in climate change work, given President Trump’s election.⁷⁸

⁷³ Phillip Warren, *Forced Migration After Paris COP21: Evaluating the "Climate Change Displacement Coordination Facility"*, 116 Columbia Law Review 2103, 2134-2144 (2016).

⁷⁴ *Id.* p. 2134.

⁷⁵ *Id.* p. 2135.

⁷⁶ *Id.*, p. 2136.

⁷⁷ *Id.*, p. 2137.

⁷⁸ Matthew Daly and Seth Borenstein, *Trump signs executive order directing US withdrawal from the Paris climate agreement — again*, AP, January 20, 2025,

B. *Expansion concept*

This phenomenon points us to a core truth about how legal entities have recognized refugees: “a conception of ‘refugee’ is not, strictly speaking, a definition.”⁷⁹

Indeed, much has been written about expanding the legal definition of refugees, both explicitly and implicitly related to environmental factors. More than half of all new displacements occurred because of extreme weather events⁸⁰, and yet the United States has “worked to... narrow the qualifying ground of protection.”⁸¹

There are a handful of unique issues with defining “refugee” that, when addressed, can lead to a more holistic mode of international law. The first is a requirement of “motivated” persecution, the idea that the only modes of persecution that can create a refugee status are those done with intention. This places climate change in a unique spot, since acts generally only indirectly impact the climate. (One would assume that unleashing carbon emissions into the atmosphere is a side effect, not the end goal, of major polluters.) If a “man was being threatened by high tides and not by his government, he could not be considered a ‘refugee.’”⁸² Removing or even moderately altering the language of motivation (e.g., “as a result, direct or visibly indirect, of intentional actions”) can have a tremendous impact on who is affected by refugee law.

<https://apnews.com/article/trump-paris-agreement-climate-change-788907bb89fe307a964be757313cdfb0>

⁷⁹ Andrew Shacknove, *Who Is a Refugee?*, 95 *Ethics* 274, 275 (1985).

⁸⁰ Abbey Koenning-Rutherford, *US Should Expand Refugee Definition*, Human Rights Watch (July 2, 2024),

<https://www.hrw.org/news/2024/07/02/us-should-expand-refugee-definition>.

⁸¹ Human Rights Watch, *US Order Limiting Asylum Will Harm People Seeking Protection*, Human Rights Watch (June 5, 2024),

<https://www.hrw.org/news/2024/06/05/us-order-limiting-asylum-will-harm-people-seeking-protection>.

⁸² Sreyas Adiraju, *What is a “Refugee”? Expanding the UN Refugee Convention in the Face of Climate Change*, Columbia Undergraduate Law Review Online, <https://www.culawreview.org/journal/what-is-a-refugee-expanding-the-un-refugee-convention-in-the-face-of-climate-change?rq=what%20is%20a%20refugee> (2022).

Another method that may prove effective is explicitly tying refugee law with human rights violations that come from climate change, beyond the question of the motivation of the primary actors. In doing so, climate change becomes relevant to the conception of refugees due to its blatant violation of certain rights declared in the *Universal Declaration of Human Rights*: “the right to a standard of living adequate for... health and well-being... including... housing.”⁸³

This all relates to the concept of “surrogacy” in international law.⁸⁴ Surrogacy—the idea that international law is relevant to the status of a refugee—comes into play when ‘resort to national protection [of the country of origin] is not possible.’⁸⁵ If a country cannot be responsive to human rights concerns because of climate change’s impacts on its borders—even if not intentional—refugee law would be able to take effect.

C. *Other*

There remains a range of other methods that international law can use to address the issue. One of those comes from a 2008 article by Biermann and Boas called “Protecting Climate Refugees: The Case for a Global Protocol.” In the piece, the two argue that the current *ad hoc* national responses are insufficient and have failed to provide long-term solutions. A “Climate Refugee Protocol” would operate under the UNFCCC, establish legal recognition of climate refugees, and craft a burden-sharing system among different nations.

⁸³ Universal Declaration of Human Rights, U.N., <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (last visited Apr. 24, 2025).

⁸⁴ Jenny Han & Amanda Kuras, Climate Change and International Law: A Case for Expanding the Definition of “Refugees” to Accommodate Climate Migrants Definition of “Refugees” to Accommodate Climate Migrants, 1 Fordham Undergraduate Law Review 50, 55 (2020).

⁸⁵ James C. Hathaway, *The Law of Refugee Status*, Butterworths, 1991, p. 135. See also Supreme Court of Canada, *Canada (Attorney General) v. Ward* [1993] 2 S.C.R. 689, pp. 709, 716, 726, 752.

The protocol comprises several major components. It would establish a formal definition of climate refugees, citing specifically those affected by rising sea levels (e.g., Tuvalu and the Maldives) and desertification (e.g., various areas of Africa). It would also stipulate clear rights regarding residency, working, and non-refoulement. It would also establish resettlement programs using funds provided by wealthier nations and operate under the UNFCCC. Biermann and Boas write that this protocol would focus on proactive, planned relocation, rather than responding in the moment.

Another option is for less vulnerable cities to function as “climate havens.” Americans⁸⁶ are being pushed around the country because of climate change, and so less affected cities have taken proactive steps to respond to an influx of citizens.⁸⁷ Some have noted that post-industrial legacy cities, like Cincinnati⁸⁸ and Pittsburgh, may be growing in population because of climate change and have taken steps to welcome those sorts of people. Cincinnati has spent on “improving stormwater drainage systems” and “substantially increasing funding for public transit,”⁸⁹ while also incentivizing “neighborhood climate resource plans.” Such infrastructure planning is key for responding to influxes that are still months or years away.

⁸⁶ Abrahm Lustgarten, *Climate Change Will Force a New American Migration*, ProPublica (Sept. 15, 2020, 5:00 AM EDT),

<https://www.propublica.org/article/climate-change-will-force-a-new-american-migration>.

⁸⁷ Helen Bonnyman, *Bolstering Our Climate Havens: How Cities Can Prepare for Climate Migration*, NEW AM. (Apr. 2, 2024),

<https://www.newamerica.org/the-thread/climate-change-migration-housing/>.

⁸⁸ National League of Cities, *What Cities Should Know About Climate Change and Populations on the Move* (Apr. 2022),

<https://www.nlc.org/wp-content/uploads/2022/04/CS-Domestic-Climate-Migration-and-US-Cities-Report.pdf>

⁸⁹ Helen Bonnyman, *Bolstering Our Climate Havens: How Cities Can Prepare for Climate Migration*, NEW AM. (Apr. 2, 2024),

<https://www.newamerica.org/the-thread/climate-change-migration-housing/>.

Lastly, the Fund for responding to Loss and Damage (FRLD)⁹⁰ is an interesting source of funding and information for this issue. There have been publications⁹¹ already indicating how the FRLD can be responsive to the climate refugees, although the fund is, at the time of this writing, still very novel. In an era where international bodies have been stalling⁹² on some loss and damage funding, that novelty will be met with resistance. All decisions and functions of the fund should be mindful of the ways they impact the communities at hand, and the loss of physical homeland should never be compounded with the loss of non-physical entities, such as culture, language, and practices.⁹³

CONCLUSION

There is much work to be done on the issue of climate refugees. Their status in law varies from scale to scale and nation to nation, and a lack of clarity and streamlined direction makes resolving the issue immensely difficult. Yet, there are various avenues that different entities can use to help mitigate the impact of this uniquely destructive circumstance, and we hope and urge organizations to recognize the grave

⁹⁰ United Nations Framework Convention on Climate Change, *Fund for Responding to Loss and Damage – Joint Interim Secretariat*, UNFCCC, <https://unfccc.int/loss-and-damage-fund-joint-interim-secretariat> (last visited Apr. 24, 2025).

⁹¹ See, for example, Loss and Damage and the Challenges of Human Mobility and Displacement Working Group & Advisory Group on Climate Change and Human Mobility, *Participation, Engagement and Representation of Migrants, Displaced Persons and Refugees in Loss and Damage Financing, Action and Support* (Sept. 13, 2024), https://cdn.prod.website-files.com/605869242b205050a0579e87/66e40b20ceea8855413ed816_MIGRANTS%2C%20DISPLACED%20PERSONS%20REFUGEES%20IN%20L%26D%20FINANCING%2C%20ACTION%20AND%20SUPPORT.pdf.

⁹² United Nations Office at Geneva, *COP29: Guterres Urges Countries to ‘Get Serious’ on Loss and Damage Funding*, UN GENEVA (Nov. 12, 2024), <https://www.ungeneva.org/en/news-media/news/2024/11/100182/cop29-guterres-urges-countries-get-serious-loss-and-damage-funding>.

⁹³ Cf. Jocelyn Perry, *The Fund for Responding to Loss and Damage Must Listen to Affected Communities*, REFUGEES INT'L (July 9, 2024), <https://www.refugeesinternational.org/perspectives-and-commentaries/the-fund-for-responding-to-loss-and-damage-must-listen-to-affected-communities/>.

nature of this threat appropriately, allowing human communities to be treated with the respect and dignity they deserve, regardless of their location.