

## The Canadian Association of Refugee Lawyers' 2021 Report on Climate Migrants<sup>1</sup>

Founded in 2011, the Canadian Association of Refugee Lawyers (CARL) serves as an informed national voice on refugee law and the human rights of refugees and forced migrants, and promotes just and consistent practices in the treatment of refugees in Canada. CARL carries out its work promoting the human rights of refugees in the courts, before parliamentary committees, in the media, among its membership via bi-annual conferences, and elsewhere in the public sphere.

CARL's membership includes over 350 lawyers, academics and law students from across Canada. Relying on the broad experience of this membership, CARL has a mandate to research, litigate and advocate on refugee rights, forced migrants and related issues. CARL recognizes that climate change is a major contributor to forced migration.

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<sup>1</sup> CARL uses the term "climate migrant" as the term "refugee" has a specific and narrow meaning under international law; CARL is advocating for a broader category of protection. Many organizations use the term "climate migrant" in this broader sense. In popular discourse, the terms are often used interchangeably.

## I. Introduction – Need to Act

Governments internationally have known for decades that the ever-worsening damage to our environment will soon cause large-scale displacement. Thirty years ago, the Intergovernmental Panel on Climate Change warned that in coming years “shoreline erosion, coastal flooding, and agricultural disruption” would force millions of people from their homes.<sup>2</sup> Indeed, in the decade between 2008 and 2018, by one estimate, natural disasters uprooted over 253.7 million people, “displacing three to 10 times more people than conflict and war worldwide.”<sup>3</sup> While future numbers are notoriously difficult to predict,<sup>4</sup> the World Bank recently projected that “by 2050, as many as 216 million people could be internal climate migrants across the six World Bank regions.”<sup>5</sup> If so, almost three per cent of the regions’ total projected population will uprooted;<sup>6</sup> this will disproportionately affect “the world’s most vulnerable communities.”<sup>7</sup> By the end of the century, the homelands of 280 million people could be entirely submerged, without any chance of return.<sup>8</sup>

Even before the pandemic, researchers pointed out that most of those displaced will likely relocate within their own countries.<sup>9</sup> For the large majority, crossing international borders to seek safety will now be even more difficult, if not impossible. Nonetheless, many millions will try, and some will succeed. A number will have no choice but to leave.

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<sup>2</sup> Intergovernmental Panel on Climate Change, *Climate Change: The IPCC Scientific Assessment: Final Report of Working Group I* (New York, NY: Cambridge University Press, 1990), cited in Jane McAdam & Ben Saul, “An insecure climate for human security? Climate-induced displacement and international law” in Alice Edwards & Carla Ferstman, eds., *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge: Cambridge University Press, 2014). See also Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford: Oxford University Press: 2012) 2; Penny Becklumb, Background Paper No. 2010-04-E: *Climate Change and Migration: Canada’s Role* (1 February 2013):

[https://lop.parl.ca/sites/PublicWebsite/default/en\\_CA/ResearchPublications/201004E](https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201004E)

<sup>3</sup> Internal Displacement Monitoring Centre, *Global Report on Internal Displacement 2019*, cited in Othering & Belonging Institute at UC Berkeley, “Climate refugees: The Climate Crisis and Rights Denied” (Dec 2019):

<https://belonging.berkeley.edu/climate-refugees> [Othering & Belonging] at 5.

<sup>4</sup> See discussion in Sumudu Anopama Atapattu, “A New Category of Refugees? ‘Climate refugees and a gaping hole in international law” in Simon Behrman & Avidan Kent, eds., *Climate refugees: Beyond the Legal Impasse?* (New York: Routledge, 2018) 34 at 36; McAdam, *supra* note 1.

<sup>5</sup> Viviane Clement, Kanta Kumari Rigaud, Alex de Sherbinin, Bryan Jones, Susanan Adamo, Jacob Schewe, Nian Sadiq, and Elham Shabahat, “Groundswell: Acting on Internal Climate Migration: Part II” (The World Bank, 2021): <https://openknowledge.worldbank.org/handle/10986/36248> at xxii.

<sup>6</sup> Viviane Clement, Kanta Kumari Rigaud, Alex de Sherbinin, Bryan Jones, Susanan Adamo, Jacob Schewe, Nian Sadiq, and Elham Shabahat, “Groundswell: Acting on Internal Climate Migration: Part II” (The World Bank, 2021): <https://openknowledge.worldbank.org/handle/10986/36248> at xxii.

<sup>7</sup> Othering & Belonging, *supra* note 2 at 8.

<sup>8</sup> IOM, “Human Mobility at COP26,” (2021) <https://environmentalmigration.iom.int/policy/human-mobility-cop26>

<sup>9</sup> McAdam 2012, *supra* note 1 at 16; Matthew Lister, “Climate change refugees” (2014) 17 *Critical Review of International Social and Political Philosophy* 618 at 622; Indeed, the World Bank notes that the overlapping climate and health crises, i.e. the COVID-19 pandemic, reveal how climate impacts hinder humanitarian responses and increase the vulnerability of internal migrants forced out of cities due to pandemic lockdowns. See Clement et al 2021 *supra* note 4 at xxix.

This report addresses potential approaches for Canada to consider in the context of offering protection for climate migrants.

## 1. *Ioane Teitiota v. New Zealand*

The status under international law of those displaced by an environmental crisis was the subject of the 2020 watershed decision of the UN Human Rights Committee in *Teitiota v. New Zealand*. The applicant, Mr. Ioane Teitiota, was a citizen of Kiribati, a small island state in the equatorial Pacific. In as little as ten to fifteen years, “sea level rise is likely to render the Republic of Kiribati uninhabitable.”<sup>10</sup> Mr. Teitiota argued before the Human Rights Committee that, in returning him to Kiribati after his application for refugee status was rejected, New Zealand had violated his right to life under article 6 of the *International Covenant on Civil and Political Rights*<sup>11</sup> (“the Covenant”).

Article 6 imposes on State parties a duty to “refrain from engaging in conduct resulting in arbitrary deprivation of life” as well as a duty to “ensure the right to life and exercise due diligence to protect the lives of individuals against deprivations.”<sup>12</sup> This obligation “extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life.”<sup>13</sup> The Committee in *Teitiota* found that “the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending states.”<sup>14</sup>

While various international human rights bodies and reports had previously affirmed that environmental harms can threaten a person’s right to life under the Covenant,<sup>15</sup> before *Teitiota*, these violations had only ever been recognized in the context of environmental harms committed by the State party responsible for the affected territory.

*Teitiota* therefore represents the first decision of an international body to recognize that environmental disaster or degradation in a person’s home country can trigger a host state’s non-refoulement obligations. Although the Committee ultimately found that the risk facing Mr. Teitiota was neither “imminent” nor “personal” enough to prevent his removal to Kiribati, this decision requires Canada and other states to consider their obligation in international law and ensure against non-refoulement.

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<sup>10</sup> *Ioane Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 23 September 2020 at para 9.12.

<sup>11</sup> *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

<sup>12</sup> Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, 30 October 2018, CCPR/C/GC/36, para 7. Article 6, ICCPR: “1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

<sup>13</sup> *Ibid*, para 7.

<sup>14</sup> *Ioane Teitiota*, supra note 9 at para 9.11

<sup>15</sup> See for example: UN Human Rights Committee (HRC), *General comment no. 36, Article 6 (Right to Life)*, 3 September 2019, CCPR/C/GC/35; Inter-American Court of Human Rights, Advisory Opinion OC-23/17, November 15, 2017, p. 46; IPCC, AR5, p. 19.; The World Bank, *Turn down the heat: why a 4°C warmer world must be avoided* (2012), p. xvii; United Nations Special Rapporteur on Human Rights and the Environment, *Safe Climate*, October 1, 2019, A/74/161

## 2. Canada's Legal Responsibility

Canada has legal obligations flowing from both the *Convention Relating to the Status of Refugees*<sup>16</sup> (“the Refugee Convention”) and the Covenant. The Refugee Convention is limited by its strict definition of “refugee” as someone outside their country of nationality or habitual residence that cannot return owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.<sup>17</sup> As we see in *Teitiota*, citizens of small-island states, such as Kiribati and Tuvalu, have had difficulty claiming refugee status in nearby Australia and New Zealand due to the effects of climate change.<sup>18</sup>

As it stands, the Convention may only offer protection to persons affected by climate change in states where:

- (a) there is a denial of protection from the adverse effects amounting to persecution,
- (b) national authorities leverage the adverse effects of climate change to target and persecute particular groups or individuals, or
- (c) serious human rights violations or conflict triggered by the effect of climate change cause people to flee based on a well-founded fear of persecution due to the violence.<sup>19</sup>

However, considering Canada’s human rights obligations, the bar is set higher. The Covenant, alongside the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), imposes obligations on Canada to respect, protect, and fulfill human rights for all without discrimination. This includes human rights in the area of climate change.

Articles 6 and 7 of the Covenant (or ICCPR) guarantee the right to life and freedom from cruel, inhuman, or degrading treatment or punishment. Canada has the attached obligation not to return a migrant who may face violations of these rights and freedoms, or other serious human rights violations. Under the Covenant, unlike the Refugee Convention, the principle of non-refoulement is absolute. Accordingly, states ought to consider measures to admit individuals affected by climate change as they legally cannot return persons to areas where there is a high likelihood that climate change-related risks threaten human rights.

The Office of the High Commissioner of Human Rights (“OHCHR”) highlights these human rights obligations and calls on states to address climate change-related human mobility challenges.<sup>20</sup> In the High Commissioner’s annual report for the 38<sup>th</sup> session of the Human Rights

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<sup>16</sup> *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189

<sup>17</sup> *Ibid*

<sup>18</sup> Refugee Appeal No. 72189/2000 (New Zealand); Refugee Review Tribunal Case No. 0907346 (Australia); and *Ioane Teitiota*, *supra* note 9.

<sup>19</sup> W. Kälin and N. Schrepfer, “Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches”, (2012), pp. 32–34. Available at [www.unhcr.org/4f33f1729.pdf](http://www.unhcr.org/4f33f1729.pdf); UNHCR, “Legal considerations on refugee protection for people fleeing conflict and famine affected countries” (2017). Available at [www.refworld.org/docid/5906e0824.html](http://www.refworld.org/docid/5906e0824.html)

<sup>20</sup> OHCHR, *Key Messages on Human Rights, Climate Change and Migration*, available at [www.ohchr.org/Documents/Issues/ClimateChange/Key\\_Messages\\_HR\\_CC\\_Migration.pdf](http://www.ohchr.org/Documents/Issues/ClimateChange/Key_Messages_HR_CC_Migration.pdf)

Council, he called on states to “facilitate migration with dignity for all migrants, including those affected by climate change, and address their specific human rights protection needs.”<sup>21</sup>

Likewise, in 2018, Canada signed onto the first international agreements on refugee responsibility-sharing and migration – the Global Compacts – which further establish Canada’s international obligations to climate migrants. The Global Compact for Safe, Orderly and Regular Migration (“the Compact”) couches signatories’ responsibilities in the United Nations Framework Convention on Climate Change (UNFCCC), the Paris Agreement, and the Sendai Framework for Disaster Risk Reduction.<sup>22</sup> Unlike other fundamental international human rights treaties referenced in the Compact – i.e. the Convention Against Torture, the Convention on the Elimination of all Forms of Discrimination Against Women, and the Convention on the Rights of the Child – these climate change instruments are specifically included in the text of paragraph 2 of the Compact. The nexus between migration and climate change is centered in the Compact.

Objective 5 of the Compact calls on state parties to “enhance availability and flexibility of pathways for regular migration”<sup>23</sup> and paragraph 21 requires that states commit to adapting options and pathways for regular migration in a manner that “responds to the needs of migrants in a situation of vulnerability.”<sup>24</sup> Saliently, subsections (g) and (h) present two concrete actions for states to achieve this objective for climate migrants:

(g) Develop or build on existing national and regional practices for admission and stay of appropriate duration based on compassionate, humanitarian or other considerations for migrants compelled to leave their countries of origin, due to sudden-onset natural disasters and other precarious situations, such as by providing humanitarian visas, private sponsorships, access to education for children, and temporary work permits, while adaptation in or return to their country of origin is not possible

(h) Cooperate to identify, develop and strengthen solutions for migrants compelled to leave their countries of origin due to slow-onset natural disasters, the adverse effects of climate change, and environmental degradation, such as desertification, land degradation, drought and sea level rise, including by devising planned relocation and visa options, in cases where adaptation in or return to their country of origin is not possible.<sup>25</sup>

To achieve objective 5 of the Compact, Canada must develop compassionate pathways and policies for climate migrants fleeing both sudden-onset natural disasters and slow-onset degradation.

## **II. Proposed definition: Climate Migrant**

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<sup>21</sup> OHCHR, *Addressing human rights protection gaps in the context of migration and displacement of persons across international borders resulting from the adverse effects of climate change and supporting the adaptation and mitigation plans of developing countries to bridge the protection gaps*, April 23, 2018, A/HRC/38/21, at para 41.

<sup>22</sup> *Global Compact for Safe, Orderly and Regular Migration*, 13 July 2018, UN Refugees and Migrants at para 2

<sup>23</sup> *Ibid*, at para 21

<sup>24</sup> *Ibid*

<sup>25</sup> *Ibid*, at paras 21(g) and 21(h) (emphasis added)

CARL encourages legislation to adopt the following definition of a ‘climate migrant’:

A climate migrant is a person: 1) who is outside of their country of nationality or former habitual residence; 2) whose country of nationality or former habitual residence has been or will during their lifetime be affected by a short- or long-term environmental disaster or by environmental degradation; and 3) who, if returned, faces on account of that disaster or degradation a risk to their life, liberty, or security of the person.

Short-term disasters include, e.g., typhoons, hurricanes, wildfires, and tsunamis, among others, while long-term environmental changes include, e.g., desertification, deforestation, rising temperatures, and rising sea levels, among others. A person may face a risk to their life, liberty, or security of the person on account of an environmental disaster or environmental degradation both because of its direct physical effects and because of secondary socio-political effects such as population pressures, profound poverty, and political strife.<sup>26</sup>

### III. Developments in other jurisdictions

Calling the *Teitiota* decision a “wake-up call,”<sup>27</sup> the UNHCR has stated that “it is incumbent on Canada to consider the committee’s decision and its implications domestically.”<sup>28</sup> Meant to inform Canada’s approach, this section provides a helpful overview of several positive developments in other international jurisdictions.

Countries around the world have been slow to incorporate a response to climate-induced displacement within their immigration or refugee protection regimes. Measures have been attempted or proposed, however, in the United States, Sweden, Finland, and Fiji.

#### a) United States

The United States does not currently grant status for individuals fleeing from the effects of climate change. The Biden Administration has, however, initiated a study of the issue. Pursuant to the Executive Order on Rebuilding and Enhancing Programs to Resettle Refugees and Planning for the Impact of Climate Change on Migration, issued by President Biden on February 4, 2021, the

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<sup>26</sup> This definition incorporates elements of the language from several of the definitions discussed above, principally the Executive Summary Othering & Belonging, supra note 2.

<sup>27</sup> “UN Human Rights Committee decision on climate change is a wake-up call, according to UNHCR” (UNHCR, Jan 24 2020): <https://www.unhcr.org/news/briefing/2020/1/5e2ab8ae4/un-human-rights-committee-decision-climate-change-wake-up-call-according.html>

<sup>28</sup> Carl Meyer, “Everything you need to know about the UN climate refugee ruling and Canada”, *Canada’s National Observer* (2020): <https://www.nationalobserver.com/2020/01/23/news/everything-you-need-know-about-un-climate-refugee-ruling-and-canada>



White House released the Report on the Impact of Climate Change on Migration in October 2021.<sup>29</sup> This report emphasizes that:

When migration presents as the preferable form of adaptation, or in situations when people are forced to flee the impacts of climate change, the United States has a compelling national interest in strengthening global protection for these displaced individuals and groups. Those protections are rooted in humanitarian objectives and inextricably linked to U.S. interests in safe, orderly, and humane migration management, regional stability, and sustainable economic growth and development.<sup>30</sup>

The White House stands behind the following legislative recommendations:

- Evaluate opportunities for funding for development and humanitarian programming to provide aid to people when displaced, help them recover rapidly for safe returns to their homes, support climate risk reduction actions, address the root causes of migration, support climate adaptation, build capacity at local, national, and regional levels, and harness the potential positive development impact of migration. In particular, increase social protection investments, including through economic inclusion models that target women, youth and groups in vulnerable situations, labor mobility and shock responsive and mobile safety nets.
- Explore with the Congress and stakeholders the need for additional protections for individuals who can establish that they are fleeing serious, credible threats to their life or physical integrity as a result of climate change.
- Evaluate whether reforms to the TPS statute would offer appropriate protection needs arising from climate-related displacement such as by removing the requirement that governments request TPS designation in cases of “environmental disaster,” establishing a legal mechanism to allow all TPS beneficiaries who otherwise qualify to apply for adjustment to permanent status under existing law, and updating the criteria for designation or re-designation.<sup>31</sup>

Indeed, there has already been some legislative advancement towards tackling the issue of climate migration in the United States. On September 26, 2019, legislation was introduced in the U.S. House of Representatives and Senate, attempting to create a regime accommodating individuals fleeing environmental disasters.<sup>32</sup> The proposed legislation, entitled “*A Bill To establish a Global Climate Change Resilience Strategy, to Authorize the Admission of Climate-Displaced persons,*

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<sup>29</sup> White House, Report on the Impact of Climate Change on Migration, October 2021: <https://www.whitehouse.gov/wp-content/uploads/2021/10/Report-on-the-Impact-of-Climate-Change-on-Migration.pdf>

<sup>30</sup> *Ibid*, at 5

<sup>31</sup> *Ibid*, at 32

<sup>32</sup> Lundstrom, Jayla, *Centre for American Progress*, Climate Change Is Altering Migration Patterns Regionally and Globally (December 3, 2019): <https://www.americanprogress.org/issues/immigration/news/2019/12/03/478014/climate-change-altering-migration-patterns-regionally-globally/>.

*and For Other Purposes*”, attempts to make provisions for “climate-displaced person(s)” by amending the *Immigration and Nationality Act* (INA, which is the American equivalent of IRPA).

The *Bill* recognizes that the Office of the United Nations High Commissioner for Human Rights has suggested that a person who cannot be reasonably expected to return to his or her country of origin should be considered a victim of forced displacement and should be granted at least a temporary stay in the country where they have found refuge.<sup>33</sup> Accordingly, the *Bill* attempts to have the United States *inter alia* “assist in providing durable solutions for climate-displaced persons” and to “aid other countries in their climate change mitigation efforts”.<sup>34</sup> In particular, the *Bill* seeks to introduce the concept of a person displaced due to climate change by inserting the following definition into section 101(a) of INA:

The term ‘climate-displaced person’ means any person who, for reasons of sudden or progressive change in the environment that adversely affects his or her life or living conditions:

- (A) is obliged to leave his or her habitual home, either within his or her country of nationality or in another country;
- (B) is in need of a durable resettlement solution; and
- (C) whose government cannot or will not provide such durable resettlement solution.<sup>35</sup>

The *Bill* would allow applications “for climate-displaced person status” at designated application centres.<sup>36</sup>

The *Bill* also reiterates the position of the Commissioner for Human Rights which has suggested that a person who cannot be reasonably expected to return to his or her country of origin:

- (A) should be considered a victim of forced displacement; and
- (B) should be granted at least a temporary stay in the country where they have found refuge.<sup>37</sup>

Finally, the *Bill* aims to have the United States collect and report data on individuals displaced by climate change and environmental disasters, report the findings to Congress and the Secretary of State, and coordinate with the US Agency for International Development to create a “Global Climate Resilience Strategy” over the medium term.<sup>38</sup>

The previous legislative session passed without a vote on the *Bill*, but its sponsors reintroduced it in the House and Senate on April 22, 2021.<sup>39</sup>

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<sup>33</sup> *A Bill To establish a Global Climate Change Resilience Strategy, to authorize the admission of climate-displaced persons, and for other purposes*, 116<sup>th</sup> United States Congress, 1<sup>st</sup> Session, (September 26, 2019) section 2.2(6):

[https://velazquez.house.gov/sites/velazquez.house.gov/files/VELAZQ\\_104\\_xml%20%28002%29%20hr%204732.pdf](https://velazquez.house.gov/sites/velazquez.house.gov/files/VELAZQ_104_xml%20%28002%29%20hr%204732.pdf)

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid*, section 3.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid*, section 2(2)(6).

<sup>38</sup> *Ibid.*

<sup>39</sup> *A Bill to establish a Global Climate Change Resilience Strategy, to authorize the admission of climate-displaced persons, and for other purposes*, 117<sup>th</sup> United States Congress, 1<sup>st</sup> Session, (April 22, 2021):



b) Sweden and Finland

From 2011 to 2016, Sweden and Finland both granted temporary and permanent immigration status to individuals inside of these respective countries and unable to return to countries of origins due to environmental disaster.<sup>40</sup> In Sweden, environmental migrants were included in a special category of ‘person otherwise in need of protection’ who is unable to return to their native country because of an environmental disaster. It is unclear whether this category encompassed climate change impacts.<sup>41</sup> It also remains to be seen whether these countries will reinstate their progressive policies, which were repealed or walked back as the “refugee crisis” emerged in Europe.

The Finnish Aliens Act did not change their definition of a refugee or the subsidiary protections against torture and other inhuman or degrading treatment. Instead, it added a new category of “humanitarian protection:”

*An alien residing in Finland is issued with a residence permit on the basis of humanitarian protection, if there are no grounds under section 87 or 88 for granting asylum or providing subsidiary protection, but he or she cannot return to his or her country of origin or country of former habitual residence as a result of an environmental catastrophe or a bad security situation which may be due to an international or internal armed conflict or a poor human rights situation.<sup>42</sup>*

Finland also extended protection for groups of environmentally displaced persons under section 109 of the Act. This protection remained temporary but is available to “aliens who need international protection and who cannot return safely to their home country or country of permanent residence, because there has been a massive displacement of people in the country or its neighbouring areas as a result of an armed conflict, some other violent situation or an environmental disaster.”<sup>43</sup>

Sweden included a separate category of protection called “other protection needs,” which included individuals who cannot return to [their] home countries due to an environmental disaster.”<sup>44</sup> This was limited to sudden-onset disasters alone, initially intended to protect victims of catastrophes like Chernobyl. Individuals affected by slow-onset environmental disasters were not included. Likewise, Sweden limited protection to individuals who could not find internal flight alternatives.

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<https://www.congress.gov/bill/117th-congress/house-bill/2826/actions> and <https://www.congress.gov/bill/117th-congress/senate-bill/1335/actions>.

<sup>40</sup> Murray, Sheila, *Environmental Migrants and Canada's Refugee Policy* (2010) 27:1 Refuge 89 available online at <https://refuge.journals.yorku.ca/index.php/refuge/article/view/34351/31258>, p. 98

<sup>41</sup> Ilse Pinto-Dobernig, ed, “Migration and Climate Change” (2008) 31 International Organization for Migration available online at <https://publications.iom.int/books/mrs-ndeg31-migration-and-climate-change>, p. 39.

<sup>42</sup> The Finnish Aliens Act 301:2004

<sup>43</sup> *Ibid*, at s. 109

<sup>44</sup> Swedish Aliens Act 2005:716.

c) Fiji

Fiji has stated it will welcome climate migrants on a permanent basis.<sup>45</sup> In 2016, the Attorney General and acting Prime Minister of Fiji said that the nation would welcome climate migrants displaced by rising sea levels in the Pacific islands. At the time, Fiji invested large sums into developing a legal framework to help relocate future climate migrants from other Pacific Island countries.<sup>46</sup>

Note that Fiji's Planned Relocation Guidelines intend to include all people at risk of, or affected by disasters and environmental change, but not until all other adaptation options in the National Adaptation Plan are exhausted and full, free, and informed consent and cooperation is provided by the communities at risk.<sup>47</sup>

#### **IV. Recommended pathways for protecting climate migrants**

Following UNHCR's call for Canada to consider the Committee's decision in *Teitiota* and its domestic implications, there are a range of options available to protect climate migrants in our country. We set out the recommended legal and policy options below.

##### **1. Section 97 exception to the requirement for 'personalized risk'**

Had Mr. Teitiota been seeking protected person status under s. 97 of the IRPA, he would have run into the same difficulty that he did at the Committee. To entitle a person for protection, the Committee held that "the risk must be personal, that it cannot derive merely from the general conditions in the receiving State, except in the most extreme cases."<sup>48</sup> IRPA likewise requires that an applicant be subjected "personally" to a danger of torture or to a risk to their life or of cruel, unusual treatment or punishment. While Mr. Teitiota demonstrates that he was personally at risk, he fails to meet the second branch of this 'personalized risk' test under section 97.

Subsection 97(1)(b)(ii) of the IRPA holds that the risk to life or risk of cruel, unusual treatment must not be "faced generally by other individuals in or from that country." In rejecting his claim, the Committee noted that Mr. Teitiota "appeared to accept that he was alleging not a risk of harm specific to him, but rather a general risk faced by all individuals in Kiribati."<sup>49</sup> Cases such as Mr. Teitiota's would not have access to protection under section 97 due to the generalized risk stemming from wide-reaching climate impacts. However, there may be grounds to challenge this requirement in the context of climate migrants.

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<sup>45</sup> Suong Vong, *Protecting Climate refugees is Crucial for the Future*, Humanity in Action, May 2017 available online at [https://www.humanityinaction.org/knowledge\\_detail/protecting-climate-refugees-is-crucial-for-the-future/](https://www.humanityinaction.org/knowledge_detail/protecting-climate-refugees-is-crucial-for-the-future/)

<sup>46</sup> Sarah Taylor, "Fiji preparing for 'climate refugees.'" Euronews (November 17, 2017) available online at <https://www.euronews.com/2017/11/17/fiji-prepares-for-climate-refugees>.

<sup>47</sup> National Legislative Bodies / National Authorities, *Fiji: Planned Relocation Guidelines - A framework to undertake climate change related relocation (2018)*, December 2018, p. 95

<sup>48</sup> *Teitiota*, *supra note* **Error! Bookmark not defined.** at para 9.3.

<sup>49</sup> *Ibid* at para 9.8

The evident problems with requiring that climate migrants demonstrate a ‘personalized risk’ were alluded to by one Committee member in dissent, who suggested that “New Zealand’s action is more like forcing a drowning person back into a sinking vessel, with the ‘justification’ that after all there are other voyagers on board.”<sup>50</sup> The threat to an individual’s right to life, liberty, and security of the person does not disappear because the risk is generalized, so there may be room to present another s. 7 challenge against this ‘personalized risk’ requirement.

CARL proposes considering the adoption of a new subsection – subsection 97(1)(c) – which carves out a legislated exception to the requirement of ‘personalized risk’ for climate migrants specifically.

## **2. Policy Options**

CARL strongly affirms that Canada’s *ad hoc* approach to humanitarian disasters is inadequate for contending with the growing scale of “climate migrants.” A thoughtful and proactive response is needed. We set out six such policy options, most of which can be implemented in combination with one another and in conjunction with the above strategies.

### *a) Option 1: H&C Guidelines*

Canada allows the granting of permanent residency on humanitarian and compassionate grounds under section 25 of the IRPA. This section provides the Minister with discretion to admit individuals to Canada who may not have been contemplated elsewhere in legislation. Specifically, the Minister is permitted, under most circumstances, to “examine the circumstances concerning the foreign national” and “grant the foreign national permanent resident status” based on any “humanitarian and compassionate considerations relating to the foreign national.”<sup>51</sup> Canada could explicitly recognize climate-induced migration as a relevant consideration in humanitarian and compassionate decision-making by enacting or amending guidelines pertaining to section 25 of IRPA.

The current IRCC operational bulletin provides the following guidance on the factors relevant to section 25 decision-making:

Applicants may base their requests for H&C consideration on any relevant factors including, but not limited to:

- establishment in Canada for in-Canada applications;
- ties to Canada;
- the best interests of any children directly affected by the H&C decision;
- factors in their country of origin including adverse country conditions;
- health considerations including inability of a country to provide medical treatment;
- family violence considerations;
- consequences of the separation of relatives;

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<sup>50</sup> *Ibid*, Annex 2, para 6.

<sup>51</sup> *Immigration and Refugee Protection Act* (S.C. 2001, c. 27), section 25.

- inability to leave Canada has led to establishment (in the case of applicants in Canada);
- ability to establish in Canada for overseas applications;
- any unique or exceptional circumstances that might merit relief.<sup>52</sup>

CARL proposes adding the following factor to its guidelines explicitly requiring that examining officers turn their minds to climate related migration:

- short-term or long-term environmental disasters or degradation - including typhoons, hurricanes, wildfires, tsunamis, desertification, deforestation, rising temperatures, and rising sea levels, among others - that can be expected to pose a risk to a person's life, liberty, or security of the person during the course of their lifetime, because of its direct physical effects and/or because of secondary socio-political effects such as population pressures, profound poverty, and political strife.

*b) Option 2: Public Policy Class*

A second manner of addressing the predicaments of climate migrants would be to create a public policy class under section 25.2(1) of IRPA.<sup>53</sup> Under this section, the Minister may grant permanent residence on the basis of “public policy considerations.”<sup>54</sup> Canada currently has over a dozen public policy classes.<sup>55</sup> In the past, public policy classes have been implemented to provide protection to large groups of individuals in the aftermath of environmental disasters. After the 2010 earthquake in Haiti, for instance, the Minister ordered stays of removals to all Haitian nationals otherwise removal-ready from Canada.<sup>56</sup> Similarly, Canada made a temporary allowance for people already residing in Canada at the time of the 2004 Indian Ocean Tsunami, and the Haitian earthquake in 2010.<sup>57</sup> Most recently, in 2019, the Government of Canada implemented a public policy concerning foreign national family members of victims of Ukrainian International Airlines Flight PS752.<sup>58</sup>

<sup>52</sup> Government of Canada, Immigration, Refugees Citizenship Canada, Operational Instructions and Guidelines , *Humanitarian and compassionate assessment: Hardship and the H&C assessment* (March 2, 2016), available online: <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/humanitarian-compassionate-consideration/processing/assessment-hardship-assessment.html>.

<sup>53</sup> *Immigration and Refugee Protection Act* (S.C. 2001, c. 27), section 25.2(1).

<sup>54</sup> *Ibid.*

<sup>55</sup> Citizenship and Immigration Canada, Public policies, (16, January 2020), online: <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/public-policies.html>

<sup>56</sup> Citizenship and Immigration Canada, News Release, “Government of Canada introduces special immigration measures in response to the earthquake in Haiti” (16 January 2010), online: <https://www.canada.ca/en/news/archive/2010/01/government-canada-introduces-special-immigration-measures-response-earthquake-haiti.html?=&wbdisable=true>.

<sup>57</sup> Sheila Murray, “*Environmental Migrants and Canada's Refugee Policy*” (2010) 27 *Refuge* 98: <https://refuge.journals.yorku.ca/index.php/refuge/article/view/34351/31258>.

<sup>58</sup> Government of Canada, Immigration, Refugees, Citizenship Canada, Policies, ministerial instructions, and agreements, *Public policy concerning foreign national family members of victims of Ukrainian International Airlines Flight PS75* (January 16, 2020): <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/ps752-public-policy.html>.

No legislative or regulatory process is required for the creation of a public policy class under section 25.2(1) of IRPA. Rather, the internal policy process begins with the department or the Minister's office. The creation of a public policy class for climate migrants would permit Canada a great deal of flexibility in adapting to the needs of such migrants in light of Canadian policy objectives.

*c) Option 3: Temporary Resident Permits*

A third option is to provide temporary resident permits (TRPs) to climate migrants. Section 24(1) of IRPA allows the issuance of a discretionary temporary resident permit both to classes of individuals and to specific individuals where such persons do not otherwise meet the requirement of IRPA. The Minister is allowed to issue TRPs where it is "justified in the circumstances".<sup>59</sup> The government of Canada itself seemed to contemplate such permits to address climate migrants in its 2010 Background Paper, *Climate Change and Forced Migration: Canada's Role*.<sup>60</sup> However, a temporary measure, such as a TRP, could leave an individual's life in limbo for far too long, falling short of an ideal long-term solution for climate migrants. CARL recommends a consideration of TRP protection only in conjunction with more meaningful, long-term pathways to status and protection in Canada, as outlined elsewhere in this section.

*d) Option 4: Ministerial instructions re: s.48(2)*

As mentioned earlier, the CBSA is obligated under s. 48(2) of IRPA to enforce a removal order "as soon as possible". With renewed attention to the plight of climate migrants in the wake of the *Teitiota* decision, a fifth measure to address climate migration would be to consider mandating that removals officers consider whether removal would subject an individual to a risk of life, liberty or security of the person as a result of climate related events. CARL recommends the consideration of Ministerial instructions to ensure such a consideration by enforcement officers.

*e) Option 5: Resettlement through private sponsorship / Expansion of the humanitarian protected persons class*

Regulation 146 of the *Immigration and Refugee Protection Regulations* ("IRPR") specifies that protection may be granted to "a person in similar circumstances to those of a Convention refugee [who] is a member of the country of asylum class."<sup>61</sup> The Humanitarian Protected Persons Abroad Class grants permanent resident visas to members of the country of asylum class where "they have been, and continue to be, seriously and personally affected by civil war, armed conflict or massive violation of human rights in each of those countries."<sup>62</sup>

CARL recommends the introduction of a new class under the humanitarian-protected persons class for climate migrants who have been, and continue to be, seriously and personally affected by climate-induced risks to their life and security of the person in their country. There previously

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<sup>59</sup> *Immigration and Refugee Protection Act* (S.C. 2001, c. 27), section 24(1).

<sup>60</sup> Parliament of Canada, Background Paper, *Climate Change and Forced Migration: Canada's Role* (February 2, 2010): [https://lop.parl.ca/sites/PublicWebsite/default/en\\_CA/ResearchPublications/201004E#ftn22](https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201004E#ftn22)

<sup>61</sup> *Immigration and Refugee Protection Regulations* (SOR 2002-227), s. 146

<sup>62</sup> *Ibid*, s. 147(b)

existed a “Source Country Class” to protect victims of persecution who were still in their home country, so the precedent for new classes is established. In the alternative, regulation 147(b) could be expanded to include victims of climate-induced risks to life and security of the person.

*f) Option 6: Pilot Programs*

All of the proposals above that rest within the jurisdiction of the Minister could be tested in practice with the creation of a pilot program. Pilots can be established or modified by Ministerial instructions, so the parameters and any reviews ultimately start with the relevant branch of the department and the Minister's office. Pilot programs are typically implemented by Ministerial instructions, after a cabinet process. Canada currently has 42 pilot programs.<sup>63</sup> Pilot programs permit a period of time to test a new idea, potentially prior to legislative implementation.

## **Conclusion**

Environmental disaster and degradation will inevitably cause many climate migrants to relocate internationally, including to Canada. Out of both moral obligation and self-interest, Canada must develop a thoughtful and proactive response. CARL proposes, in step with emerging trends in several other countries, a multi-pronged approach that includes the following:

- Advocacy to carve out an exception to s. 97's ‘personalized risk’ requirement for climate migrants.
- Advocacy for a proactive and broad policy response from Parliament and from government, which includes:
  - changing the H&C Guidelines to require examining officers to turn their minds to the hardships caused by environmental disasters and degradation;
  - creating a public policy class under s.25(2) of IRPA to provide protection to climate migrants;
  - issuing Temporary Resident Permits to climate migrants;
  - issuing Ministerial instructions to removals officers to consider the risks caused by environmental disasters and degradation in the context of a s.48(2) analysis;
  - allow resettlement in Canada, i.e. through private sponsorship; and / or
  - implementing pilot programs as needed to test any of the above prior to requisite legislative reform.

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<sup>63</sup> Government of Canada, Immigration, Refugees and Citizenship Canada, *Ministerial Instructions related to other immigration programs and goals*: <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/ministerial-instructions/other-goals.html>