

TEITIOTA v THE CHIEF EXECUTIVE OF MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT - A PERSON DISPLACED

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Small Island States are the most exposed and vulnerable to the impacts of climate change, particularly sea level rise. Unfortunately, mitigation measures, building capacity for the vulnerable groups, or even the adoption of adaptation measures may not be a sufficient solution. Instead, resettlement outside their country of origin may in some instances, be the only alternative. With resettlement however comes other issues, not least are the grounds under which they might qualify for another country's protection. In this article, we examine the case of Ioane Teitiota, who in 2013 applied to Immigration New Zealand for refugee status under the Convention Relating to the Status of Refugees as a 'climate change refugee'. His application was refused because he failed to meet the current criteria required to demonstrate refugee status. Teitiota's case, reflects what appears to be the dominant situation of displaced peoples who apply for refugee status on the ground of the impacts of climate change. Aside from the Convention, it is questionable whether the rights of people affected by climate change are protected under international law. There are a number of solutions mooted for resolution of the issue of climate displacement however as yet, none have gained international agreement.

I INTRODUCTION

'Our entire survival is at stake.'

Kiribati president Anote Tong¹

In less than 40 years' time,² significant portions of Tarawa, the island upon which the capital of Kiribati is located, is expected to be subject to inundation.³ Sea level rise also threatens parts of the capital itself (South Tarawa) with all roads in one of the three main urban centres

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¹ 'Our entire survival is at stake': Kiribati President Anote Tong Calls for International Community to Deliver on Climate Funding Pledge' *ABCNews* (online), 11 July 2014 <<http://www.abc.net.au/news/2014-07-11/kiribati-president-calls-for-urgent-climate-funding/5590202>>.

² The World Bank, 'Cities, Seas and Storms Managing Change in Pacific Island Economies: Volume IV Adapting to Climate Change' (2000) 22 <<http://siteresources.worldbank.org/INTPACIFICISLANDS/Resources/4-VolumeIV+Full.pdf>>; See, eg, Leonard A Nurse et al, 'Small Islands' in Vicente R Barros et al (eds) *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution Of Working Group II To The Fifth Assessment Report Of The Intergovernmental Panel On Climate Change* (Cambridge University Press, 2014) (This latest report tends to agree on the negative effects that Kiribati and Tarawa are likely to face).

³ Kelly Wyett, 'Escaping a Rising Tide: Sea Level Rise and Migration in Kiribati' (2013) 1(1) *Asian & The Pacific Policy Studies*, 171, 171; Office of Te Beretitenti and T'Makei Services, '6.South Tarawa' (2012) Republic Of Kiribati Island Report Series, 10 <http://www.climate.gov.ki/wp-content/uploads/2013/01/6_SOUTH-TARAWA-revised-2012.pdf>.

potentially lost to storm surge and sea level rise by 2100.⁴ However, in even less time, long before the urban centres of South Tarawa are submerged, sea level rise could render large parts of Kiribati uninhabitable.⁵ Therefore, what are the occupants of Kiribati to do as their wells become salty,⁶ seawater destroys their crops, high tides and king tides wash the ocean into their homes,⁷ when what they need is protection on a non-political humanitarian⁸ basis from environmental endangerment?

II PROTECTION UNDER THE CURRENT REFUGEE FRAMEWORK

The current international legal framework holds few, if any, protections for the people of Kiribati faced with this situation.⁹ Certainly to date, those who have tried to gain recognition under legal mechanisms provided for refugees have had little success. With its origins in the first global body for inter-State cooperation, the League of Nations, the Office of the United Nations High Commissioner for Refugees ('UNHCR'), was established, and continues to operate, for the purpose of providing international protection for refugees.¹⁰ To this end, the defining 1951 *Convention Relating to the Status of Refugees* ('*Convention*')¹¹ came into existence. With such a *Convention* in place, it seems reasonable at first glance that an I-Kiribati, a person from Kiribati who seeks refuge due to the prospect of being forced to leave his or her homeland because of rising sea levels, could expect to find legal protection under such a *Convention*. While it would seem intuitively logical for Ioane Teitiota (born on Tabiteuea atoll in the Republic of Kiribati, where life became 'progressively insecure as a result of ocean inundation'¹²) to claim refugee protection under the *Convention*, in practice; the direct protection it offers for those affected by climate change is non-existent.

The absence of protection provided to 'climate refugees' or, as more recently framed, 'climate displaced persons',¹³ is no better demonstrated than in Mr Teitiota's case. As required by Immigration New Zealand,¹⁴ Mr Teitiota made a claim, in New Zealand, where he continued to reside unlawfully after the expiry of an initial permit,¹⁵ for recognition and protection as a refugee. Once made, the claim was reviewed by refugee and protection officers, but was

⁴ The World Bank, above n 2, 22.

⁵ Jon Barnett and W Neil. Adger, 'Climate Dangers And Atoll Countries' (2003) 61 *Climatic Change* 321-337, 326; Wyett, above n 3, 172; Australian Bureau of Meteorology and CSIRO 'Climate Variability, Extremes and Change in the Western Tropical Pacific: New Science and Updated Country Reports' (2014) (Pacific-Australia Climate Change Science and Adaptation Planning Program Technical Report, Australian Bureau of Meteorology and Commonwealth Scientific and Industrial Research Organisation, Melbourne, Australia) 114, 131.

⁶ *AF (Kiribati)* [2013] NZIPT 800413, [27]; Wyett, above n 3, 172.

⁷ *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173, [37].

⁸ UN High Commissioner for Refugees ('UNHCR'), 'Self-Study Module 1: An Introduction to International Protection. Protecting Persons of Concern to UNHCR' (1 August 2005) 7 <<http://www.refworld.org/docid/4214cb4f2.html>>.

⁹ International Bar Association, 'Achieving Justice and Human Rights in an Era of Climate Disruption' (July 2014) Climate Change Justice and Human Rights Task Force Report, 7.

¹⁰ UNHCR, 'Self-Study Module 1: An Introduction to International Protection. Protecting Persons of Concern to UNHCR' above n 8, 7.

¹¹ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

¹² *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125, [19].

¹³ Oli Brown, 'Migration and Climate Change' (International Organization for Migration, Geneva, 2008) 13-15.

¹⁴ Immigration New Zealand, 'Refugee Status Branch' (June 2013) <<http://www.immigration.govt.nz/branch/RSBHome/>>.

¹⁵ *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107, [4].

refused. The decision to refuse the claim was appealed, in the first instance, to the Immigration and Protection Tribunal ('IPT'), which, although finding Mr Teitiota credible and his account acceptable 'in its entirety',¹⁶ upheld the refusal to grant protection. Subsequent appeals to the Court of Appeal and Supreme Court,¹⁷ including an application for leave to appeal to the High Court of New Zealand,¹⁸ led to the ultimate and final decision – at least to the limits of the New Zealand judiciary – to refuse protection. The overarching question for the decision maker in Mr Teitiota's case (which was eventually the Supreme Court of New Zealand) was whether Mr Teitiota was able to bring himself within the terms of the *Convention*. The Supreme Court determined finally that he was not.¹⁹

The following case note examines Mr Teitiota's unsuccessful claim and his appeals. It considers the availability of protection for refugees based on the impacts of climate change under the *Convention*. It considers why the *Convention* does not afford a legal mechanism for international resettlement of people like Mr Teitiota, who seek to claim status as a climate change refugee, and concludes that unless the *Convention* is amended, 'the world's first climate change refugee'²⁰ is likely to be the last.²¹

III A MATTER OF OPTIONS AND AVAILABLE ACTIONS

By way of general background, there is little doubt that climate change is already affecting Mr Teitiota's homeland of Kiribati, a small island state and will continue to do so. The science of climate change produces varied projections, but in respect of the trend towards global warming and ensuing environmental impacts, it is generally consistent,²² particularly in respect of rising sea levels.²³ This is, at the very least, disquieting for small island states²⁴ as they will become, and indeed for some Pacific islands already are,²⁵ the most exposed and vulnerable²⁶ nations to these impacts.²⁷ They remain vulnerable because many of the islands are small and

¹⁶ *AF (Kiribati)* [2013] NZIPT 800413, [38].

¹⁷ *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173; *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107.

¹⁸ *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107, [1].

¹⁹ *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* SC7/2015 [2015] NZSC 107.

²⁰ 'World's First Climate Change Refugee Has Appeal Rejected', *The New Zealand Herald* (online), 13 May 2014 <http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=11254252>.

²¹ See, eg, *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173, [41] (The point this judgment makes is that climate change and its effects on countries like Kiribati is not appropriately addressed under the *Refugee Convention*).

²² Frank Biermann and Ingrid Boas, 'Protecting Climate Refugees: The Case for a Global Protocol' (2008) 50(6) *Environment* 8, 10; Climate and Development Knowledge Network, 'The IPCC's Fifth Assessment Report What's in it for Small Island Developing States?' (2014) 1 <http://cdkn.org/wp-content/uploads/2014/08/CDKN_IPCC_Whats_in_it_for_SIDS.pdf>.

²³ Nurse et al, above n 2, 1616.

²⁴ *Ibid* 1618.

²⁵ Ursula Rakova, 'How to Guide for Environmental Refugees' (2009) *Ourworld* 2.0 <<http://ourworld.unu.edu/en/how-to-guide-for-environmental-refugees/>>.

²⁶ Nurse et al, above n 2, 1616-1617; Climate and Development Knowledge Network, above n 22, 3.

²⁷ Kate Morioka, 'A Climate for Change: Understanding Women's Vulnerability And Adaptive Capacity To Climate Change From Actionaid's Rights-Based Approach – Case Studies From Papua New Guinea And Solomon Islands' (2012) ActionAid Australia, 13 <http://www.actionaid.org.au/images/stories/Blog/a%20climate%20for%20change_final.pdf>; Maryanne Loughry and Jane McAdam, 'Case Study: Kiribati – Relocation And Adaptation' (2008) 31 *Forced Migration Review* 51, 51.

low-lying,²⁸ which affords them little, if any, adaptive capacity.²⁹ Kiribati is no exception, with its many atolls and single raised coral island, and an average height of less than three metres above sea level.³⁰ Current projections indicate climate change impacts will further reduce the size of many Pacific islands and atolls,³¹ increasing what is already a high risk of inundation³² and leading to their foreseeable, if not inevitable, evanescence.³³ Those who will fare worst from these impacts will be subsistence communities situated in small island states.³⁴ In the face of sea level rise, the options for defensive action are limited. It is therefore likely that increased erosion, salinisation of water supplies and damage to the growing environments of community gardens will affect and limit food supplies.³⁵ Salt-water is already contaminating gardens on some islands,³⁶ leaving them unable to produce traditional crops.³⁷ As a result, some island economies are becoming unviable.³⁸

A *Mitigation, Resilience, Adaptation and Resettlement*

In terms of action, international attention has historically focused largely on mitigation rather than adaptation measures.³⁹ However, mitigation alone may be insufficient and come too late to help many small island states.⁴⁰ In the inescapability of sea level rise, additional mechanisms such as building resilience and adaptation are suggested.⁴¹ Resilience is one of the more recent additions to the narrative of solutions for climate affected persons.⁴² A complex term, in that the definition is somewhat fuzzy,⁴³ the aim of resilience is to build capacity for particularly vulnerable groups in situ, or at least in-country, where possible. Methmann and Oels⁴⁴ however, critique the resilience approach, asserting that the focus on resilience ‘opportunities’ ‘ignores

²⁸ Nobuo Mimura et al, ‘Small Islands’, in Martin L Parry et al (eds) *Climate change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, Cambridge: 2007) 689, 690; Nurse et al, above n 2, 1616, 1618.

²⁹ Mimura et al, above n 28, 690; Morioka, above n 27, vii; See, eg, Nurse et al, above n 2 (This report does suggest that in cases adaptive strategies may be undertaken to limit the impact of sea level rise).

³⁰ *AF (Kiribati)* [2013] NZIPT 80041, [13]; Wyett, above n 3, 171.

³¹ Mimura et al, above n 28, 689-690; See, eg, Nurse et al, above n 2, 1616, 1618 (This later report reinforces the negative consequences on low lying atolls).

³² Mimura, above n 28, 690; Nurse et al, above n 2, 1616.

³³ Rafael Leal-Arcas, ‘Climate Migrants: Legal Options’ (2012) 37 *Procedia – Social and Behavioural Sciences* 86, 87.

³⁴ Mimura et al, above n 28, 698; Nurse et al, above n 2, 1616, 1621.

³⁵ Mimura et al, above n 28, 690.

³⁶ Australian Broadcasting Corporation, ‘Rising Seas force Carteret Islanders Out Of Home’, *Lateline*, 5 February 2007 <<http://www.abc.net.au/lateline/content/2006/s1840956.htm>>.

³⁷ Rakova, above n 25; *There Once Was An Island: Te Henua E Noho* (Directed by Brian March, On the Level Productions, New Zealand, 2010).

³⁸ Leal-Arcas, above n 33, 88.

³⁹ Louise Kruger and Rowena Maguire, ‘The International Regulation of Persons Displaced by Climate Change’ in Angus Francis and Rowena Maguire (eds) *Protection of Refugees and Displaced Persons in the Asia Pacific Region* (Ashgate Publishers, 2013) 210; Eike Albrecht and Malte Paul Plewa, ‘International Recognition of Environmental Refugees’ (2015) 45(2) *Environmental Policy and Law* 78, 79.

⁴⁰ Leal-Arcas, above n 33, 87.

⁴¹ *Ibid* 86; Kruger and Maguire, above n 39, 210-211.

⁴² See, eg, The Nansen Initiative, ‘Agenda for The Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change Final Draft’ (2015) iv <<https://www.nanseninitiative.org/global-consultations/>>.

⁴³ Chris Methmann and Angela Oels, ‘From “Fearing” To “Empowering” Climate Refugees: Governing Climate-Induced Migration In The Name Of Resilience’ (2015) 46(1) *Security Dialogue* 51, 53.

⁴⁴ *Ibid*.

the destruction, loss and violence triggered by climate change’ and ‘avoids all rights-based language’.⁴⁵

With regard to adaptation, both ‘soft’ and ‘hard’ adaptation measures⁴⁶ can be employed to contribute to effective coastal adaptation. Nonetheless, where the means of adaptation are available locally, they can be costly.⁴⁷ These costs, for example, the costs of building sea walls, can make the employment of adaptation mechanisms infeasible⁴⁸ and equally, the mechanisms may not effectively address the risk.⁴⁹ There may also be cultural beliefs and a ‘lack of awareness’, which act as a barrier to implementation of adaptation measures, not to mention the absence of technological and human resources.⁵⁰ This suggests that neither approach offers the one perfect solution.

So is there another option? One adaptation measure of course, and one that may become ‘a necessity’, is to relocate, either internally or across borders.⁵¹ Population movement⁵² and displacement⁵³ have already been attributed to ‘environmental degradation’⁵⁴, yet resettlement is often considered to be a measure of last resort.⁵⁵ Nevertheless, displacement through voluntary and forced internal and external migration is anticipated to increase,⁵⁶ and while the IPCC acknowledges the potential is there, there is still a lack of evidence to support the contention that migration has become a true response to climate change.⁵⁷

IV A MATTER OF DISPLACEMENT, MIGRATION AND RESETTLEMENT

As highlighted, displacement may occur either internally or across international borders. Internal migration is anticipated to represent the greater proportion of movement stimulated by climate change impacts.⁵⁸ Internal migration or displacement is primarily the responsibility of

⁴⁵ Methmann and Oels, above n 43, 61, 62, 64.

⁴⁶ See, eg, Benjamin K Sovacool, ‘Hard and Soft Paths for Climate Change Adaptation’ (2011) 11 *Climate Policy* 1177 <<http://www.tandfonline.com/doi/abs/10.1080/14693062.2011.579315>>.

⁴⁷ Nurse et al, above n 2, 1625, 1626, 1638; Climate and Development Knowledge Network, above n 22, 1-2; Laurence Caramel, ‘Besieged By The Rising Tides Of Climate Change, Kiribati Buys Land In Fiji’, *The Guardian* (online), 1 July 2014 <<http://www.theguardian.com/environment/2014/jul/01/kiribati-climate-change-fiji-vanua-levu>>; Urvashi Narain, Sergio Margulis and Timothy Essam, ‘Estimating Costs of Adaptation to Climate Change’ (2011) 11 *Climate Policy* 1001 <<http://www.tandfonline.com/doi/abs/10.1080/14693062.2011.582387>>.

⁴⁸ Leal-Arcas, above n 33, 87; Wyett above n 3, 173.

⁴⁹ Nurse et al, above n 2, 1638.

⁵⁰ Ibid 1640.

⁵¹ Mimura et al, above n 28, 708; Nurse et al, above n 2, 1641; Wyett, above n 3, 173.

⁵² Mimura et al, above n 28, 711.

⁵³ United Nations High Commissioner for Refugees, ‘Protection and Planned Relocations in the Context of Climate Change’ (2012) Legal and Protection Policy Research Series (Elizabeth Ferris) 4.

⁵⁴ See, eg, discussion on ‘environmental migration’ in Jerrold W Huguet, ‘The Demography of Environmental Migration’ (2012) 8 *Asian Population Studies* 121 <<http://www.tandfonline.com/doi/abs/10.1080/17441730.2012.684539>>; Trudy Ann Cameron and Ian T McConnaha, ‘Evidence of Environmental Migration’ (2006) 82 *Land Economics* 273 <<http://le.uwpress.org/content/82/2/273.short>>.

⁵⁵ Kruger and Maguire, above n 39, 203.

⁵⁶ See, eg, ‘FEATURE: Should International Refugee Law Accommodate Climate Change?’ *UN News Centre* (online), 3 July 2014 <<http://www.un.org/apps/news/story.asp?NewsID=48201>>; Kruger and Maguire, above n 39, 202-203; United Nations High Commissioner for Refugees, ‘Protection and Planned Relocations in the Context of Climate Change’ (2012) Legal and Protection Policy Research Series (Elizabeth Ferris) 7.

⁵⁷ Nurse et al, above n 2, 1625.

⁵⁸ Albrecht and Plewa, above n 39, 80; Matthew Lister, ‘Climate Change Refugees’ (2014) 17(5) *Critical Review of International Social and Political Philosophy* 618, 622.

the domestic government and is a matter for domestic law,⁵⁹ while international migration will be determined by international law and the scope of domestic policies on migration.

Appealing to rights for those faced with displacement, migration and resettlement, the rights with regard to climate change impacts are not clearly defined or understood at international law.⁶⁰ This is particularly true prior to displacement when asserting rights as a basis of claim for protection, yet sea level rise and climate change in general may be said to impact on fundamental human rights.⁶¹ This is arguably and disproportionately so in vulnerable⁶² and indigenous communities,⁶³ where justice may not be afforded equitably to women⁶⁴ and children.⁶⁵ While the protection of rights is often a matter of urgency,⁶⁶ there is a lack of specific protection mechanisms for the less exigent cases; for example, where people are threatened with the longer term, forced displacement resulting from climate change impacts.⁶⁷

For those facing internal displacement, there may be some protection under domestic law or international human rights and humanitarian law.⁶⁸ Displaced persons in this context however, are often unaware of their rights and government accountability may be lacking.⁶⁹ Where governments have signed up to international Conventions which incorporate relevant rights, obligations may apply.⁷⁰ Notably however, some small island states are absent signatories to major Conventions.⁷¹ Consequently, frustrations with responsible governments can arise.

In searching for specific rights for protection, climate change may not be considered a direct violation of human rights,⁷² nor may a specific right be found to an environment of a particular quality.⁷³ Nevertheless, in some circumstances climate change affects, amongst other rights:

⁵⁹ Leal-Arcas, above n 33, 91; UN High Commissioner for Refugees, ‘Guiding Principles on Internal Displacement’ (22 July 1998) E/CN.4/1998/53/Add.2 (1998); See, eg, *AF (Kiribati)* [2013] NZIPT 800413, [47] (As the case states, ‘internally displaced person cannot meet the requirements of the Refugee Convention’).

⁶⁰ Camilla Boana, Roger Zetter, and Tim Morris, *Environmentally Displaced People: Understanding The Linkages Between Environmental Change, Livelihoods And Forced Migration* (2008) Refugee Studies Centre, University of Oxford, 6 <<http://www.rsc.ox.ac.uk/publications/policy-briefings/RSCP1-Environment.pdf>>.

⁶¹ Morioka, above n 27, 11.

⁶² John von Doussa, Allison Corkery and Renée Chartres, ‘Human Rights and Climate Change’ (2007) 14 *Australian International Law Journal* 161, 162.

⁶³ *Ibid* 167.

⁶⁴ Morioka, above n 27; *Convention on the Elimination of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 August 1981).

⁶⁵ Jill Lawler, ‘Children and Climate Change: Children’s Vulnerability to Climate Change and Disaster Impacts in East Asia and the Pacific’ (2011) UNICEF East Asia and Pacific Regional Office <http://www.unicef.org/media/files/Climate_Change_Regional_Report_14_Nov_final.pdf> ; *Convention on the Rights of the Child*, opened for signature 29 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); Donovan Burton, Johanna Mustelin, and Peter Urich, ‘Climate Change Impacts On Children In The Pacific: Kiribati And Vanuatu Technical Report’ (2011) (UNICEF, Bangkok).

⁶⁶ Boana, Zetter and Morris, above n 60, 11.

⁶⁷ *Ibid*; Kruger and Maguire, above n 39, 205.

⁶⁸ Leal-Arcas, above n 33, 91.

⁶⁹ Morioka, above n 27, ix.

⁷⁰ Von Doussa, Corkery and Chartres, above n 62, 168.

⁷¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁷² Kruger and Maguire, above n 39, 208.

⁷³ Von Doussa, Corkery and Chartres, above n 62, 163; Kruger and Maguire, above n 39, 208; Bridget Mary Lewis, *The Human Right to a Good Environment in International Law and the Implications for Climate Change* (Doctor of Philosophy, Monash University, 2014) i.

the right to life;⁷⁴ the right to adequate food;⁷⁵ and the right to clean water.⁷⁶ For example, the impacts of climate change may directly or indirectly⁷⁷ cause a significant enough reduction in food to cause a deterioration of health⁷⁸ from malnutrition.⁷⁹ Food shortages have already been felt in some small island states where gardens fail to flourish and government food aid is infrequent.⁸⁰ Equally, the right to clean water has been used to support recent claims for refugee protection in New Zealand, as unclean water poses, particularly to children of small island states, a real risk of causing diarrhoea and subsequent death.⁸¹ Rising sea levels also affect rights to freedom of movement,⁸² housing,⁸³ and secondarily, education,⁸⁴ where high tides and storm surges inundate community dwellings and local schools, rendering them unusable.⁸⁵ The difficulty is finding protection for these rights under international law when the basal threat emanates from climate change.

A *Limited Legal Mechanisms*

Aside from rights-based Conventions there is, as yet, no direct international hard law instrument which addresses the plight of internally displaced peoples.⁸⁶ Non-binding⁸⁷ guiding principles for standards of protection and assistance exist.⁸⁸ Under these principles, those internally displaced should enjoy the same rights and freedoms as other persons.⁸⁹ Again, what is unclear is whether the rights extend and apply to ‘slow onset disasters’,⁹⁰ such as gradual island sinking.⁹¹ Certainly, one solution mooted for the future is a new international legal

⁷⁴ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 6(1); *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 3.

⁷⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 11(1), 12.

⁷⁶ *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 11, 12; *Convention on the Elimination of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 August 1981) art 14(2)(h); Von Doussa, Corkery and Chartres, above n 62, 164-165.

⁷⁷ Von Doussa, Corkery and Chartres, above n 62, 164.

⁷⁸ *Ibid.*

⁷⁹ *Ibid* 166.

⁸⁰ Rakova, above n 25; Beenish Ahmend, ‘Pacific Islanders Threatened by Climate Change Face a Legal Black Hole’ *Vice* (online), 23 September 2014 <<http://www.vice.com/read/pacific-islanders-threatened-by-climate-change-face-a-legal-black-hole-923>>.

⁸¹ *AF (Kiribati)* [2013] NZIPT 800413, [19]; *AC (Tuvalu)* [2014] NZIPT 800517-520, [15], [17], [27].

⁸² *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 13.

⁸³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 12; Kruger and Maguire, above n 39, 208.

⁸⁴ *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 26; Kruger and Maguire, above n 39, 208.

⁸⁵ *There Once Was An Island: Te Henua E Noho* (Directed by Brian March, On the Level Productions, New Zealand, 2010).

⁸⁶ Albrecht and Plewa, above n 39, 80-81.

⁸⁷ International Bar Association, above n 9, 7.

⁸⁸ UN High Commissioner for Refugees, *Guiding Principles on Internal Displacement*, 22 July 1998, E/CN.4/1998/53/Add.2 (1998).

⁸⁹ UN High Commissioner for Refugees, *Guiding Principles on Internal Displacement*, 22 July 1998, E/CN.4/1998/53/Add.2 (1998) Principle 1.

⁹⁰ *AF (Kiribati)* [2013] NZIPT 800413, [39].

⁹¹ Leal-Arcas, above n 33, 91.

instrument which incorporates, or ‘provides a platform for adoption’, of these principles within national legal systems.⁹²

International displacement is a different matter. States are only responsible at international law for the human rights of a foreign national once he or she has entered the responsible country.⁹³ Those migrating internationally due to environmental factors arguably do not meet ‘persecution’ requirements under the definition of ‘refugee’, an essential element when seeking to obtain refugee status.⁹⁴ Neither do they make up a recognised group to which the definition applies.⁹⁵ The connection to common environmental risk is insufficient,⁹⁶ and current case law⁹⁷ seems to uphold this restrictive definition.⁹⁸ International law does not otherwise support a right to unrestricted international movement.⁹⁹ The non-refoulement principle (that is, avoiding the forcible return of refugees or asylum seekers to a country where they are liable to be subjected to persecution),¹⁰⁰ whilst arguably a basis for supporting a claim for refugee status, is subject to the domestic immigration policies of the receiving state, none of which make provision for those claiming permanent climate change related immigration.¹⁰¹ Further, where there is a case for environmental migrants, causation is an issue. A range of causes may result in migration or displacement.¹⁰² While economic and growth in population density are often the final push in a degrading environment,¹⁰³ there must firstly be a link between climate change and the environmental change, and subsequently, a link between the environmental change and the decision to migrate.¹⁰⁴ These factors, as will be demonstrated, are relevant to Mr Teitiota’s case.

B *Negative Impacts of Displacement and Resettlement*

Irrespective of whether an instrument or framework offering protection for the climate displaced can be found, negative impacts can be attributed to resettlement for indigenous island populations¹⁰⁵ and need to be considered. Particularly in cross-border migration, there is the risk that the deprivation of customary land may not only lead to a loss of cultural identity¹⁰⁶

⁹² Albrecht and Plewa, above n 39, 80-81.

⁹³ Kruger and Maguire, above n 39, 212.

⁹⁴ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 1A(2); *AF (Kiribati)* [2013] NZIPT 800413 [72]-[75]; Boana, Zetter and Morris, above n 60, 10.

⁹⁵ Kruger and Maguire, above n 39, 206-207.

⁹⁶ *Ibid.*

⁹⁷ Leal-Arcas, above n 33, 93.

⁹⁸ Boana, Zetter and Morris, above n 60, 10.

⁹⁹ Leal-Arcas, above n 33, 92.

¹⁰⁰ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 33; UN High Commissioner for Refugees (UNHCR), *UNHCR Note on the Principle of Non-Refoulement* (November 1997) <<http://www.refworld.org/docid/438c6d972.html>>.

¹⁰¹ Leal-Arcas, above n 33, 92, 94.

¹⁰² See, eg, Jane McAdam, ‘Climate Change, Displacement and the Role of International Law and Policy’ (Paper presented at Climate Change, Environmental Degradation and Migration, International Conference Center Geneva (CICG), Geneva, Switzerland, 29-30 March 2011) 1, 4; Kruger and Maguire, above n 39, 202 (This literature highlights that there are multiple triggers and causes for displacement and it is hard to attribute it to a single cause which could then be encapsulated in new frameworks).

¹⁰³ See, eg, *AF (Kiribati)* [2013] NZIPT 800413, [8], [13], [15].

¹⁰⁴ Kruger and Maguire, above n 39, 202.

¹⁰⁵ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : Resolution / Adopted By The General Assembly*, 2 October 2007, A/RES/61/295, art 5, 9, 11; Von Doussa, Corkery and Chartres, above n 62, 166.

¹⁰⁶ Von Doussa, Corkery and Chartres, above n 62, 166.

and tradition,¹⁰⁷ but that displacement may cause a radical and fundamental change in how the population sustains itself. For example, Carteret Islanders relocating to mainland Bougainville plantations must abandon their traditional occupation as ‘fishermen’ and become agriculturalists.¹⁰⁸ Language, ‘religious practices’,¹⁰⁹ and ‘self-determination’ may also be affected.¹¹⁰ Moreover, comprehensive resettlement (and even the more critical ad hoc relocation¹¹¹ of refugees) still requires funding.¹¹² Communities also face the prospect of being economically worse off,¹¹³ so that as well as losing their cultural connections to land¹¹⁴ and being faced with the challenge of having to integrate into culturally and socially different communities,¹¹⁵ the homeland loses potentially one of its key resources – its people. For some, however, there is no other option,¹¹⁶ and so in Kiribati, as in other small island states, the prospect of resettlement has become a current reality.

In the case at hand, Mr Teitiota’s claim is indicative of the general search for a resettlement solution. In his reasons for seeking refugee status, Mr Teitiota highlights the difficulties I-Kiribati face with respect to climate change impacts. In 1931, Kiribati and South Tarawa had a combined population of 29 671.¹¹⁷ By 2012, the population had risen to 100 786.¹¹⁸ However, Kiribati itself has a land area of only 810 kilometres-square and, ‘under increasing climate induced sea level rise, the occurrence of extreme tide events is projected to increase’.¹¹⁹ The prospect for Kiribati in respect of climate change is increased coastal damage through erosion; infrastructure losses; reduced quality and quantity of water resources; damage to agriculture crops; and deterioration in public health.¹²⁰ It is perhaps no surprise then that Ioane Teitiota, a citizen of Kiribati having lived in New Zealand since 2007, was reluctant to return with his family to his homeland. Mr Teitiota’s solution was to make a claim to Immigration New Zealand for recognition as a refugee on the basis that the changes to the environment in Kiribati caused by sea-level-rise associated with climate change made remaining in Kiribati intolerable.

V A MATTER OF REFUGEE PROTECTION

When seeking refugee protection the UNHCR and its conventions become relevant. The UNHCR was established to safeguard the rights and well-being of refugees. Its actions, as previously highlighted, are based on understandings and obligations set out in the relevant *Conventions*. New Zealand and Australia have been contracting states to the 1951 *Convention* and the 1967 Protocol Relating to the Status of Refugees (which, in this note, we refer to

¹⁰⁷ Lilian Yamamoto and Miguel Esteban, ‘Vanishing Island States and Sovereignty’ (2010) 53 *Ocean and Coastal Management* 1, 1.

¹⁰⁸ *There Once Was An Island: Te Henua E Nnoho* (Directed by Brian March, On the Level Productions, New Zealand, 2010).

¹⁰⁹ Kruger and Maguire, above n 39, 209.

¹¹⁰ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1; Kruger and Maguire, above n 39, 208.

¹¹¹ United Nations High Commissioner for Refugees, above n 53, 11.

¹¹² Rakova, above n 25.

¹¹³ United Nations High Commissioner for Refugees, above n 53, 17.

¹¹⁴ Kruger and Maguire, above n 39, 208-209.

¹¹⁵ Rakova, above n 25.

¹¹⁶ *Ibid*; Caramel, above n 47.

¹¹⁷ Kiribati National Statistics Office, ‘Kiribati 2005 Census, Vol 2: Analytical Report’ (January 2007) 2.

¹¹⁸ The World Bank, ‘World Development Indicators’ <<http://databank.worldbank.org/data/views/reports/tableview.aspx>>.

¹¹⁹ Burton, Mustelin, and Urich, above n 65, 14.

¹²⁰ Climate and Development Knowledge Network, above n 22, 4; Nurse et al, above n 2, 1616-1617.

collectively as the ‘*Convention*’), since 1954 and 1973 respectively. As a party to the *Convention*, New Zealand has agreed to ensure that asylum seekers who meet the definition of a ‘refugee’ are not sent back to a country where their life or freedom would be threatened.

The term ‘refugee’ is defined in Article 1 of the *Convention* as someone, who:

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.¹²¹

There is a great deal contained in that definition. What is apparent, however, is that it does not explicitly offer protection to people that have been displaced by climatic disasters.¹²²

VI A MATTER OF APPLICATION

In the case of Mr Teitiota it was the important task of the refugee and protection officers and the New Zealand Courts to determine whether he met the requirements of Article 1 of the *Convention*. Two primary criteria needed to be met. Firstly, it was necessary to establish whether Mr Teitiota would be ‘persecuted’ on return to his country of nationality¹²³ and, if answered in the affirmative, the second issue was whether the persecution would be as a consequence of his race, religion, nationality, membership of a particular social group or political opinion. If Mr Teitiota could convince the Court of each, he could expect to be offered the protection generally proffered under the *Refugee Convention*.

A A Legal Term

There can be, however, a mismatch between common understandings and legal definition of the term ‘refugee’. The term ‘refugee’ evokes images of people, in distress, fleeing from war, from disasters, from famine, drought, and flood, but the novelty of Mr Teitiota’s case warranted careful consideration of the legal term. Arguably, and this appears to have been the position of the courts, to categorise people as being displaced because of the impacts of environment and climate as a ‘refugee’, misapplies the term. It must be recognised that ‘refugee’ is a legal term; that is, it has a fixed and known legal meaning that confines its application to certain factual circumstances. The term has been called a ‘legal term of art’,¹²⁴ and is set out in the *Convention* and interpreted in the relative jurisdictions. In having a legal definition, there are requirements or elements that must be satisfied in order for it to apply. It was in consideration of these requirements that the New Zealand courts found use of the term refugee in Mr Teitiota’s

¹²¹ *Convention Relating to the Status of Refugees* (adopted 28 July 1951, entered into force 22 April 1954) art 1A(2), read in conjunction with *Protocol Relating to the Status of Refugees* (adopted 31 January 1967, entered into force 4 October 1967).

¹²² Tim Kovach, ‘Stop Using the Term “Environmental Refugee”’ on *Tim Kovach* (13 May 2013) <<http://timkovach.com/wp/2013/05/13/stop-using-the-term-environmental-refugee/>>.

¹²³ *Convention Relating to the Status of Refugees* (adopted 28 July 1951, entered into force 22 April 1954) art 1A(2), read in conjunction with *Protocol Relating to the Status of Refugees* (adopted 31 January 1967, entered into force 4 October 1967).

¹²⁴ McAdam, ‘Climate Change, Displacement and the Role of International Law and Policy’, above n 102, 2.

circumstances to be conceptually inaccurate¹²⁵ and ‘misconceived’,¹²⁶ in that the factual circumstances provided no evidence to support the legal interpretation and ‘bring him within the *Convention*’.¹²⁷ On considering the definition, it was not difficult for the courts to conclude that Mr Teitiota did not satisfy the definition of a ‘refugee’ for the purposes of the *Convention* and was therefore not entitled to protection.

B *Voluntary Resettlement*

Before looking at how the court dealt with the term, one question that needs to be asked is whether Mr Teitiota’s situation was nothing more than that of a person internally displaced as opposed to that of an international refugee. A person can only become a refugee once that person has crossed an international border out of his or her country of origin, otherwise, it is a matter of internal displacement¹²⁸ and as previously raised, a matter for which responsibility lies with the person’s homeland government. After all, not all of Kiribati is prone to inundation. For example, the highest point on Banaba Island, which is part of Kiribati, is 81 metres high.¹²⁹ There were locations within Kiribati where Mr Teitiota would not be exposed to imminent danger. The New Zealand courts accepted that ‘there was no evidence establishing the environmental conditions Mr Teitiota faced or was likely to face on return to Kiribati were so parlous as to jeopardise his life or mean he and his family would be unable to resume their prior subsistence life with dignity.’¹³⁰

Clearly, Mr Teitiota had crossed an international border; after all, he made his claim while he was in New Zealand. It was also apparent that there might have been a basis to Mr Teitiota’s claim that he would be displaced because of the impacts of natural hazards affecting his home. The difficulty with the claim is this: might Mr Teitiota just as well have relocated himself internally (acknowledging that there would be issues with finding appropriate accommodation and employment) and in such a way that was not representative of, or in the nature of, refugee flight?

Mr Teitiota was outside his country when he made his claim. Nonetheless it must be asked whether there was a need for him to be outside his country or whether the protection he sought could not be equally afforded him in his own country. Equally, was it fear or simply personal choice that brought Mr Teitiota to New Zealand – that is, was Mr Teitiota’s relocation to New Zealand nothing more than voluntary adaptive migration?¹³¹ The *Convention* does not cover individuals simply in search of better living conditions. For someone who is faced only with internal displacement, it is the responsibility of that person’s homeland government to protect him or her under its domestic law. If an I-Kiribati is dissatisfied with his or her government’s response to the impacts of these natural hazards, then there are democratic mechanisms

¹²⁵ *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173, [17] (In the case, reference is made to the initial Immigration and Protection Tribunal decision that Teitiota faced and the point raised in the Tribunal decision, of the comparative difference between the sociological and legal term ‘refugee’).

¹²⁶ *Ibid* [22].

¹²⁷ *Ibid* [20]-[21].

¹²⁸ McAdam, ‘Climate Change, Displacement and the Role of International Law and Policy’, above n 102, 2.

¹²⁹ Matthew Gordon-Clark, ‘Paradise Lost? Pacific Island Archives Threatened by Climate Change’ (2012) 12 *Archival Science* 51, 58 <<http://link.springer.com/10.1007/s10502-011-9144-3>>.

¹³⁰ *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173, [20].

¹³¹ *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZIPT 800413, [49] - [65].

available to seek to effect change. Mr Teitiota's failure to engage in the use of these mechanisms could have reflected poorly on his decision to flee. In any respect, his protection, as we will see, was not something that a foreign government could provide under the *Convention*, regardless of the sympathy and concern it might have for the plight of Mr Teitiota. In Mr Teitiota's case, the New Zealand government simply did not have jurisdiction to act.

C *Basis for a Claim*

Although climate change is cited, when examining the content of Mr Teitiota's case, confusion can arise as to the exact basis from which the claim derived. It is apparent that 'the impacts of unmanaged urbanisation, a continuing crisis of inadequate sanitation, a lack of solid waste disposal controls and ineffective freshwater management'¹³² is a significant environmental issue in Kiribati. In Tarawa, freshwater resources particularly are affected by human impacts of development.¹³³ Taking an adversarial stance, one might suggest it was incorrect – in fact, it was invalid – to speak of climate change as being the cause of Mr Teitiota's desire to relocate. If the impact of climate on the environment in Kiribati is accepted, it must also be accepted that the impacts would only exacerbate his homeland's existing economic and environmental vulnerabilities. Perhaps it was not climate change from which Mr Teitiota was seeking refuge. Perhaps it was the degradation of the environment and the consequent economic pressure that it would put on Mr Teitiota from which he was seeking refuge. Climate change may bring the tipping point ever closer, but was it the cause of Mr Teitiota's flight? Perhaps Mr Teitiota was not a refugee at all. Perhaps Mr Teitiota was merely the unfortunate victim of economic and environmental hardship; certainly, his situation reflects one of the underlying issues of pinpointing climate change as the 'single phenomena' causing displacement in such circumstances.¹³⁴

In any event, and even if it were accepted that climate change was the cause of Mr Teitiota's troubles, it would become necessary to determine at what point these incremental impacts caused Mr Teitiota to become a climate-displaced person. At what point can it be said, 'As of today, Mr Teitiota has become a climate-displaced person and therefore must be afforded protection?' Certainly, if we are looking for specific indicators, there was no order issued for Mr Teitiota's arrest, no declaration that Mr Teitiota was of a certain class whose rights were restricted and whose safety was threatened. Does the fact that someone one day decides, 'This is intolerable, I am leaving!' define that person as a refugee and differentiate him or her from his or her neighbour who decides to remain and seeks to adapt in situ? It is also necessary to consider whether it matters that a person is fleeing from the impacts of climate change rather than the impacts of a single weather event.¹³⁵ The *Convention* provides no more protection from climate catastrophes than it does from inclement weather. It is within domestic law that we

¹³² Donovan Storey and Shawn Hunter, 'Kiribati: An Environmental "Perfect Storm"' (2010) 41 *Australian Geographer* 167, 167 <<http://www.tandfonline.com/doi/abs/10.1080/00049181003742294>>.

¹³³ *Ibid.*

¹³⁴ Jane McAdam, *Climate Change, Force Migration and International Law* (Oxford Scholarship Online, 2012) 187.

¹³⁵ Herve Le Treut et al, 'Historical Overview of Climate Change' in Susan Solomon et al (eds), *Climate Change 2007: The Physical Science Basis: Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2007) 104-105; See also, eg, McAdam, 'Climate Change, Displacement and the Role of International Law and Policy', above n 102, 1, 5; Kruger and Maguire, above n 39, 202 (This question, reflects on the difficulty that was earlier mentioned, for the pinpointing of causality of displacement and linking it to a single factor, and whether in fact it is necessary to be able to do so).

expect to find legal frameworks equipped to respond to environment-related movements and impacts from the slow onset process of climate change impacts, not the *Convention*.

D *A Persecutor*

To be found to be a refugee, Mr Teitiota was required to demonstrate, at the very least, that he had a ‘well-founded fear of being persecuted’.¹³⁶ Although it is accepted in the New Zealand context that the definition of refugee is deemed to be examined as a holistic one, it is still necessary to examine the elements of the definition and their relationships to each other.¹³⁷ In light of this, the term ‘persecution’ is not defined in the *Convention*, although it is articulated in domestic law.¹³⁸ Section 91R of Australia’s *Migration Act 1958* (Cth), provides a ‘statutory definition’¹³⁹ that suggests Article 1 of the *Convention* does not apply unless one of the reasons for persecution in the *Convention* is the essential and significant reason for the persecution. This is not the case in New Zealand, where s 129 of the *Immigration Act 2009* places no rider on the definition for persecution.

The persecution must also involve serious harm to the person, the fear of it must be ‘well-founded’,¹⁴⁰ and the persecution must involve systematic and discriminatory conduct affecting a human right. If any one of these elements is missing, a person cannot be found to be persecuted and therefore cannot be found to be a refugee. When we imagine persecution, we are driven to consider violations of human rights – serious violations. However, for persecution to occur, we need firstly ‘sustained and systemic violation of a core’¹⁴¹ or a ‘basic human right’¹⁴² that is at risk of restriction. We need to understand the nature and severity of that restriction, and we need to know what the likelihood is that the restriction will be imposed on the individual. What is the right held by Mr Teitiota that was being restricted? In what law, what treaty, what customary international law is the right enshrined? The case relied on a right to a ‘healthy environment’¹⁴³ and, while a developing concept, it is questionable whether it yet has the jurisprudential recognition sufficient to maintain the basis for such a claim.¹⁴⁴

Certainly, in the New Zealand context, human agency is the requisite¹⁴⁵ of a positive finding of persecution. Human agency requires someone to carry out the persecution, and in such a case, it can come about in the failure of a homeland government to take steps to reduce the risk of harm carried out by non-state actors.¹⁴⁶ The question here is, ‘Who is the persecutor?’

¹³⁶ *Convention Relating to the Status of Refugees* (adopted 28 July 1951, entered into force 22 April 1954) art 1A(2), read in conjunction with *Protocol Relating to the Status of Refugees* (adopted 31 January 1967, entered into force 4 October 1967).

¹³⁷ *Refugee Appeal No 74665/03*, RSAA (7 July 2004), [47]-[48].

¹³⁸ Kruger and Maguire, above n 39, 217 (The authors note at times the domestic interpretations can be narrow as implementation of treaty obligations are not outlined).

¹³⁹ *Refugee Appeal No 74665/03*, RSAA (7 July 2004), [42].

¹⁴⁰ *AF (Kiribati)* [2013] NZIPT 800413, [53] (The tribunal in this decision highlights, that NZ has adopted the Hathaway concept of ‘being persecuted’, which means the ‘risk of persecution must be well-founded’ in an objective sense, the Hathaway concept is outlined in *Refugee Appeal No 74665/03*, RSAA (7 July 2004).

¹⁴¹ *Ibid* [53]; Maguire and Kruger, above n 39, 206.

¹⁴² *Refugee Appeal No 74665/03*, RSAA (7 July 2004), [41].

¹⁴³ *AF (Kiribati)* [2013] NZIPT 800413, [60], [63].

¹⁴⁴ International Bar Association, above n 9, Ch 3.

¹⁴⁵ *AF (Kiribati)* [2013] NZIPT 800413, [51]-[52], [54].

¹⁴⁶ *Ibid* [54].

Mr Teitiota's argument is that the world's carbon emitters are his persecutor.¹⁴⁷ While agents of persecution may be state as well as non-state actors,¹⁴⁸ states that emit greenhouse gases do so typically to advance their own economic development, not to cause direct negative impacts on other states.¹⁴⁹ Even if the persecutor could be said to be the producer of greenhouse gas emissions leading to Mr Teitiota's suffering, it is more likely that such emissions originate from New Zealand¹⁵⁰ or Australia, rather than being directed on Mr Teitiota from a perpetrator within his homeland. In real terms, Kiribati is one of the lowest emitters in the world¹⁵¹ so it cannot be the persecutor, whereas The Land Court of Queensland in 2014 heard that the Alpha Mine in the Galilee Basin alone would ultimately produce 0.16 per cent of global greenhouse gas emissions,¹⁵² with Australia being generally responsible for about 1 per cent of the world's CO₂ emissions. Equally, the Kiribati Government had 'taken steps' to protect its citizens but was 'powerless to stop sea-level rise'.¹⁵³ It therefore cannot be valid to say that Mr Teitiota had suffered some indirect form of persecution because climate change is caused by humans. If the factual circumstances were different, such that environmental degradation had caused 'threats to security, violence, or were utilised for the purposes of oppressive conduct',¹⁵⁴ the case might have attracted an alternative outcome.¹⁵⁵

For the claim of persecution to have succeeded, Mr Teitiota would have had to have been 'targeted', or part of a specific class prescribed in the *Convention*. Climate change, however, affects everyone regardless of race, regime, nationality, membership, political opinion, and in this case, by Mr Teitiota's own admission, it affects the entirety of the Kiribati population in general.¹⁵⁶ That is to say, if an Australian resident were to relocate suddenly to Mr Teitiota's homeland, the person would be equally affected. Any 'persecution' in Mr Teitiota's case results solely from the fact of geographical circumstance and that is not a determinant for refugee status under the *Convention*. The point is that climate change is not targeted; it is indiscriminate, and it has yet to be demonstrated that it is in any way systematic.

We return to the question of timing and ask at what point it could be said that the persecution had occurred. Mr Teitiota was seeking to avoid the worst impacts of climate change - impacts yet to come. Arguably, Mr Teitiota could not yet obtain the status of a refugee because any persecution had yet to commence. The *Convention* does not provide for pre-emptive protection. Fear of persecution must be 'well-founded', not merely anticipated.

While climate change might be said to have a negative impact on any number of rights, the impact cannot be attributed to one of the grounds of the *Convention*. There is no form of motivation behind climate change, at least none that can be linked to one of the grounds. The

¹⁴⁷ *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173, [40]; See, eg, Kruger and Maguire, above n 39, 206.

¹⁴⁸ *AF (Kiribati)* [2013] NZIPT 800413, [59].

¹⁴⁹ See, eg, Stephanie Nebehay, 'UPDATE 2- Iraq Wins One-Year Reprieve On Gulf War Reparations Due To Crisis' *Reuters* (online), 18 December 2014 <<http://www.reuters.com/article/2014/12/18/mideast-crisis-iraq-un-idUSL6NOU22JM20141218>> (Incidents in the war in Kuwait perhaps provide one example of a rare exception).

¹⁵⁰ United Nations, Framework Convention on Climate Change, *Flexible GHG Data Queries* (2014) <<http://unfccc.int/di/FlexibleQueries/Event.do?event=go>>.

¹⁵¹ World Resource Institute, *Historical Emissions*, CAIT Climate Data Explorer <<http://cait.wri.org/historical>>.

¹⁵² *Hancock Coal Pty Ltd v Kelly & Ors and Department of Environment and Heritage Protection (No. 4)* [2014] QLC 12.

¹⁵³ *AF (Kiribati)* [2013] NZIPT 800413, [30].

¹⁵⁴ *Ibid* [59].

¹⁵⁵ *Ibid* [55].

¹⁵⁶ *Ibid* [31], [75].

law does not protect a person who is affected by environmental factors.¹⁵⁷ A person affected by environmental factors is not a refugee because that person is not targeted. There is no discrimination with climate change and, therefore, there is no persecution.

VII A MATTER OF JURISDICTION

It is questionable as to whether either a New Zealand or Australian court has the jurisdictional power to expand the scope of the definition of refugee beyond its original purpose. It is a matter for the ‘member states’, as parties to the *Convention*, to determine how the relevant articles are to be interpreted.¹⁵⁸ In New Zealand, the *Refugee Convention* is incorporated into the *Immigration Act 2009*.¹⁵⁹ Under the Act, a person must fall within the definition provided by the *Refugee Convention* to qualify for refugee status. The articles were drafted to ensure that persons suffering abuse and human rights violations could find protection in other states when their own government would not assist them. While undoubtedly climate change may have a significant impact on people, particularly those who reside in the small island states of the Pacific, there does not appear to be any evidence to support an argument that the drafters of the *Convention* envisaged protection against environmental degradation. Extending the definition of a ‘refugee’ to cover persons fleeing from natural disaster or other detrimental environmental impacts, including those caused by climate change, would constitute a significant alteration of the scope of the *Convention*.

The question then is whether the *Convention* should be extended? Perhaps, but with respect, that is a task that should not be carried out by a domestic court, but should be left to the nations of the world in the event that they believe a change to international law is required.

In Australia, it is even less likely that Mr Teitiota would have gained a positive outcome for his claim. Australia takes a slightly different approach in its incorporation of the relevant *Convention* articles into domestic law. Rather than leaving the interpretation of the relevant article open, it specifically defines the meaning of persecution,¹⁶⁰ relying on a narrower¹⁶¹ and potentially more ‘burdensome’¹⁶² interpretation. The purpose for the insertion of this definition, according to the Explanatory Notes, was to limit the expanding application of Article 1(2A),¹⁶³ to keep it in line with agreed international obligations, and to ensure that the interpretation did not ‘provide for circumstances that are clearly outside those originally intended’.¹⁶⁴ Such circumstances, it is stated, include situations ‘where hardship and serious inconvenience have been considered to be persecution’.¹⁶⁵ It is clear from Australia’s general policy on refugees and cross border migrants that an interpretation of the article with any degree of pliancy will not be countenanced.

¹⁵⁷ Ibid [56].

¹⁵⁸ Explanatory Memorandum, Migration Legislation Amendment Bill (No. 6) 2001 (Cth).

¹⁵⁹ *Immigration Act 2009* (NZ).

¹⁶⁰ *Migration Act 1958* (Cth) s 91R.

¹⁶¹ Asher Hirsch, ‘The Definition of Persecution: The Effect of s 91R of the Migration Act’ on *asher hirsch* (5 May 2014) <<http://asherhirsch.com/2014/05/05/the-definition-of-persecution-the-effect-of-s-91r-of-the-migration-act/>>.

¹⁶² *Refugee Appeal No 74665/03*, RSAA (7 July 2004), [42]. The Australian test, was adjudged in this decision, as more burdensome than that put forward in the New Zealand tribunal decisions).

¹⁶³ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

¹⁶⁴ Explanatory Memorandum, Migration Legislation Amendment Bill (No. 6) 2001 (Cth).

¹⁶⁵ Ibid.

VIII A MATTER OF CREATING RECOGNITION

For now, it is evident that the uncertainty and lack of an international legal framework to adequately respond to cross border displacement arising from climate change impacts presents what Jose Riera, senior advisor in the UNCHR, describes as a ‘gaping legal hole’.¹⁶⁶ One of the key difficulties is the fact that the phrase ‘climate refugee’ is not a term recognised in existing international law.¹⁶⁷ A number of alternatives have been proposed for the management of those displaced across international borders due to the effect of climate change.¹⁶⁸ It is unlikely, however, that there is a single solution,¹⁶⁹ or indeed a single source of solutions,¹⁷⁰ given the ‘inherent difficulty in conceptualizing and accurately describing the phenomenon’ of climate change-related movement.¹⁷¹ Each solution posed has its shortcomings.¹⁷²

A *Domestic Law*

Are there other provisions currently existing in domestic law that could cater for ‘climate change refugees’? In Australasia, ‘humanitarian provisions’ are present in legislation, although they have been tested only to a limited extent and offer no new precedent. In New Zealand for example, a statutory provision of the *Immigration Act 2009*¹⁷³ that allows for an appeal against liability for deportation on exceptional humanitarian grounds has recently been applied where climate change was raised as a factor.¹⁷⁴ However, the decision to allow the subject family to stay was based on a myriad of factors; with no one factor taking precedence.¹⁷⁵ The final discretionary decision revolved around the claimant’s close family ties in New Zealand, and related cultural norms associated with family.¹⁷⁶ ‘Deep concern’ was raised about the vulnerability of the applicant’s young children where, for example, they were unable to access suitable drinking water supplies,¹⁷⁷ although it was recognised that in this instance they could not be considered to be ‘arbitrarily deprived of life’ and that the government was ‘sensitised’

¹⁶⁶ ‘FEATURE: Should International Refugee Law Accommodate Climate Change?’ *UN News Centre* (online), 3 July 2014 <<http://www.un.org/apps/news/story.asp?NewsID=48201>>.

¹⁶⁷ See, eg, Stephanie Perkiss, Graham D Bowrey and Nick J Gill, ‘Environmental Refugees: An Accountability Perspective’ (Paper presented at 9th CSEAR Australasian Conference, Charles Sturt University, Albury Wodonga Australia, 2010) 3 (The difficulty extends also to the other interchangeable terms used such as ‘environmental refugee’, ‘ecologically displaced people’ and ‘environmental immigrants’).

¹⁶⁸ See, eg, Australian Government, Department of Immigration and Border Protection, ‘Environmentally-Related International Migration’ (November 2013) Irregular Migration Research Programme, Occasional Paper Series (Victoria Mence, Alex Parrinder, Marie McAuliffe) 12-17.

¹⁶⁹ McAdam, ‘Climate Change, Displacement and the Role of International Law and Policy’, above n 102, 5; Carol Farbotko and Heather Lazrus, ‘The First Climate Refugees? Contesting Global Narratives Of Climate Change In Tuvalu’ (2012) 22 (2) *Global Environmental Change*, 382, 388.

¹⁷⁰ Farbotko and Lazrus, above n 169, 388.

¹⁷¹ McAdam, ‘Climate Change, Displacement and the Role of International Law and Policy’, above n 102, 1.

¹⁷² See, eg, Australian Government, Department of Immigration and Border Protection, ‘Environmentally-Related International Migration’ (November 2013) Irregular Migration Research Programme, Occasional Paper Series (Victoria Mence, Alex Parrinder, Marie McAuliffe) 12.

¹⁷³ *Immigration Act 2009* (NZ), s 207.

¹⁷⁴ *AC (Tuvalu)* [2014] NZIPT 800517-520, [82]; *AD (Tuvalu)* [2014] NZIPT 501370-371, [1].

¹⁷⁵ ‘Tuvalu Climate Family Granted New Zealand Residency On Appeal’, *ABCNews* (online), 6 August 2014 <<http://www.abc.net.au/news/2014-08-05/an-tuvalu-climate-family-granted-nz-residency-on-appeal/5650584>>.

¹⁷⁶ Jane McAdam, ‘No “Climate Refugees” in New Zealand’ on *PlanetPolicy* (13 August 2014) <<http://www.brookings.edu/blogs/planetpolicy/posts/2014/08/13-climate-refugees-new-zealand-mcadam>>.

¹⁷⁷ Vernon J C Rive, ‘Climate Refugee, Protected Person And Complementary Protection Claims Under The Microscope In New Zealand’s Immigration And Protection Tribunal’ (2014) 29(9) *Australian Environment Review* 270, 271-272; McAdam, ‘No “Climate Refugees” in New Zealand’, above n 176.

to the needs of the children.¹⁷⁸ Australian immigration legislation¹⁷⁹ also provides for the issue of In-Country Special Humanitarian visas. Such visas are potentially available to those who are living in and subject to persecution in their home country, and have not been able to leave that country to seek refuge elsewhere.¹⁸⁰ To date, there have been no successful applications on the grounds that a persecution has arisen from the impacts of climate.¹⁸¹ Despite this, it may be reasonable when considering an application to take into account the wide humanitarian grounds for approval that climate change may present.

In New Zealand, there has been contention over whether the currently available ballot system is a mechanism for admitting those displaced by the impacts of climate change. While such a system may be an option and one that Australia could consider, the New Zealand government has made it clear that providing protection for ‘climate refugees’ is not its purpose.¹⁸² The current Pacific Access Visa Category offers an annual quota system for accepting peoples from Tonga, Tuvalu and Kiribati on grounds unrelated to those of climate change displacement.¹⁸³ This system requires a number of residence criteria to be met, including residency within one of the subject countries, and an offer of employment with sufficient income level, as well as meeting health and character requirements.¹⁸⁴ It is worth noting that it has been reported that, prior to Mr Teitiota’s claim, New Zealand had already accepted ‘environmental refugees’ from Kiribati,¹⁸⁵ but that is not entirely correct. A number of people from Kiribati, Tuvalu and Tonga have been chosen by ballot under the Pacific Access Category to settle in New Zealand each year,¹⁸⁶ but it has occurred under what has been described as ‘an economic rather than a humanitarian migration policy’.¹⁸⁷

Of course, individual nations can alter domestic laws to find their own solutions. To this end, Australia was urged in 2013 to ready itself for future cross border migration by preparing a ‘new migration category for those fleeing the effects of climate change’.¹⁸⁸ In 2006, Senator Bartlett introduced the Migration Legislation Amendment (Complementary Protection Visas) Bill 2006,¹⁸⁹ which sought to establish a new category of visa to deal with people who did not meet the definition for refugee under the *Convention*, but for humanitarian or safety reasons

¹⁷⁸ *AC (Tuvalu)* [2014] NZIPT 800517-520, [116]-[118].

¹⁷⁹ *Migration Regulations 1994* (Cth) Sch 2, Clause 201.1-202.1.

¹⁸⁰ Australian Government, Department of Immigration and Border Protection, ‘In-country Special Humanitarian visa (subclass 201) <<http://www.immi.gov.au/Visas/Pages/201.aspx>>.

¹⁸¹ Michael Shank and Emily Wirzba, ‘How Climate Change Sparked the Crisis in Syria’ *US News & World Report* (online), 13 September 2013 <<http://www.usnews.com/opinion/blogs/world-report/2013/09/13/syrias-crisis-was-sparked-by-global-warming-and-drought>> (It is interesting to consider whether, noting the significant evidential challenges, the impact of climate change on food security that subsequently led to persecution would be arguable grounds for seeking such a visa).

¹⁸² New Zealand Ministry of Foreign Affairs & Trade, ‘New Zealand’s Immigration Relationship With Tuvalu’ (December 2013) <<http://www.mfat.govt.nz/Foreign-Relations/Pacific/NZ-Tuvalu-immigration.php>>.

¹⁸³ Leal-Arcas, above n 33, 92.

¹⁸⁴ Immigration New Zealand, ‘How do I qualify for residence under the 2012 Pacific Access Category’ <<http://www.immigration.govt.nz/migrant/stream/live/pacificaccess/residence/default.htm>>.

¹⁸⁵ See, eg, Perkiss, Bowrey and Gill, above n 167, 12.

¹⁸⁶ See, eg, Immigration New Zealand, ‘Pacific Access Category’ <<http://www.immigration.govt.nz/migrant/stream/live/pacificaccess/>>; Jane McAdam, ‘Environmental Migration Governance’ *UNSW Law Research Paper No. 2009-1*, 1, 7.

¹⁸⁷ Farbotko and Lazrus, above n 169, 386.

¹⁸⁸ Bernard Lagan, ‘Australia Urged To Prepare For Influx Of People Displaced By Climate Change’ *The Guardian* (online), 16th April, 2013 <<http://www.theguardian.com/environment/2013/apr/16/australia-climate-change-refugee-status>>.

¹⁸⁹ Migration Legislation Amendment (Complementary Protection Visas) Bill 2006 (Cth).

could not return to their homeland.¹⁹⁰ Then in 2007, Senator Kerry Nettle for the Australian Greens, proposed an amendment to the *Migration Act 1958* (Cth) that would introduce a new visa category – climate change refugee visas – under the since lapsed Migration (Climate Refugees) Amendment Bill 2007 (Cth).¹⁹¹ Under Senator Nettle’s Bill, a person displaced because of ‘climate change induced environmental disaster’¹⁹² might find refuge under the new provision. The reason the Bill failed to pass was not that the parties felt Australia did not have a responsibility to assist those forcibly displaced – each of the parties voiced concern about this. The problem was the varied perceptions on levels of accountability and how to implement a solution.¹⁹³

B *International ‘Solutions’*

At an international level, alternative solutions have been proposed to fill the legal hole. Notably in the first instance, the language has changed and extended to incorporate those impacted by not only climate change, but by disaster.¹⁹⁴ In terms of instruments, while the initial focus was on expanding the definition of refugee at international law, the scope has now widened. Nonetheless, some support is still evident in academic circles for extending the ‘logic’ of the *Convention* definition to incorporate some climate impacted individuals.¹⁹⁵ Equally the creation of a new treaty instrument, or a protocol to the United Nations Framework Convention on Climate Change (‘UNFCCC’), has also been mooted. McAdam, among others, queries the efficacy of the treaty approach, in part due to difficulties evident in ‘defining those intended to be covered by it’, the misplaced focus on cross-border migration, as well as the ability to gain consensus and agreement by those who would be a party to it.¹⁹⁶ Instead, broader frameworks and initiatives, which incorporate not only individuals, but which recognise the multiple typologies of climate-affected persons, regional differences, and priorities and collective impacts, are called for.¹⁹⁷ In this vein, bilateral and regional agreements and soft-law declarations and principles may be more relevant.¹⁹⁸ The recently endorsed ‘Agenda for the Protection of Cross-Border Displaced Persons in the context of Disasters and Climate Change’, highlights the efforts some States have already made in adopting a more flexible approach, applying ‘regular migration categories’, granting ‘temporary stay arrangements’, and wider applications of current refugee law.¹⁹⁹ Despite the work completed to date, it is evident that analysis of appropriate mechanisms for managing displacement is still underway.

C *Loss and Damage Mechanisms*

As solutions are mooted for managing short and long-term climate displacement, a proposition has been put forward to create a governing body to develop arrangements concerning loss and damage related to climate change. The draft proposal, under review for the 21st Conference of the Parties (‘COP21’) to the UNFCCC, supports creation of a governing body to develop

¹⁹⁰ Commonwealth, *Parliamentary Debates*, Senate, Thursday 20 March 2008, 1446 (Senator Barlett).

¹⁹¹ Explanatory Memorandum, Migration (Climate Refugees) Amendment Bill 2007 (Cth), 2-3.

¹⁹² Migration (Climate Refugees) Amendment Bill 2007 (Cth) s 35A.

¹⁹³ Perkiss, Bowrey and Gill, above n 167, 6-7, 14.

¹⁹⁴ The Nansen Initiative, above n 42, 1-2.

¹⁹⁵ Lister, above n 58, 624.

¹⁹⁶ McAdam, ‘Climate Change, Force Migration and International Law’, above n 134, 188-190, 194, 198.

¹⁹⁷ Ibid 187, 194, 200; The Nansen Initiative, above n 42, 20-21; Albrecht and Plewa, above n 39, 79.

¹⁹⁸ McAdam, ‘Climate Change, Forced Migration and International Law’, above n 134, 211-212, 238-239; The Nansen Initiative, above n 42, 12, 19-20.

¹⁹⁹ The Nansen Initiative, above n 42, 11-13.

arrangements related to loss and damage through the establishment of a climate change displacement coordination facility.²⁰⁰ The mechanism on which it is based, the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts ('Loss and Damage Mechanism') promotes implementation of approaches to address loss and damage associated with the adverse effects of climate change, including facilitating action to address how impacts of climate change are affecting patterns of migration, displacement and human mobility.²⁰¹ The two options are to affirm the commitment to continuing to implement the Loss and Damage mechanism and; create a new mechanism with a mandate that includes creating the climate change related displacement coordination facility. The establishment of the facility could have tremendous influence on how members respond to and act to prevent climate change related displacement. Conclusions on the draft proposal will be unknown until COP21 has taken place in late 2015.

IX CONCLUSION

When Cyclone Heta struck Niue in January 2004, the island was devastated. Waves exceeded 50 metres in height, washing away whole buildings, destroying the island's biodiversity and its fishing grounds.²⁰² The post-crisis trauma of the cyclone would no doubt have been significant,²⁰³ but Heta formed and then dissipated within a matter of days.²⁰⁴ The winds subsided, the sea fell back, and the Niueans rebuilt. The onset of climate change induced sea level rise is slow. There is not the sudden onset of a cyclone,²⁰⁵ but neither does it end, and nor do the seas subside. There is nowhere to rebuild. The 'psychological trauma' of having to permanently relocate homes and an entire culture is likely to be 'severe'.²⁰⁶ It is little wonder then that people in Pacific small island states are looking to the international community in their pursuit of a solution. It is not surprising they would look for others who have been forcibly displaced from their homeland, and that they would see that the *Convention* had given those refugees protection. Nor is it surprising that I-Kiribati would seek protection for themselves under its articles.

What may be surprising to those exiled by climate change impacts, however, is that at international law there is no definitive instrument within the folios of which they can find shelter. Those fundamental 'rights' to life, food, and water that are disrupted by climate change become impalpable and obscure in the corpus of international law. The *Convention* is no exception. It is explicit and restrictive as to the category of person it protects, and the essential elements of the *Convention* are neither intended, nor designed, to accommodate those forcibly displaced by climate change. Those seeking refuge in Australia will find the door securely

²⁰⁰ Ad Hoc Working Group on the Durban Platform for Enhanced Action, 'Draft Negotiating Text for the Paris Agreement', para 36 <http://unfccc.int/files/bodies/awg/application/pdf/adp2-9_i3_11jun2015t1630_np.pdf>.

²⁰¹ United Nations, Framework Convention on Climate Change, *Loss and Damage* <http://unfccc.int/adaptation/workstreams/loss_and_damage/items/8132.php>.

²⁰² Jon Barnett and Heidi Ellemor, 'Niue After Cyclone Heta' (2007) 22(1) *The Australian Journal of Emergency Management* 3, 3.

²⁰³ UNICEF Pacific Office, 'Niue. A Situation Analysis of Children, Women and Youth' (2005) viii <http://www.unicef.org/pacificislands/Niue_Sitan_Report_Latest_pdf.pdf>.

²⁰⁴ Gary Padget et al, *Monthly Global Tropical Cyclone Summary* (January 2004) <<http://web.archive.org/web/20060822223953/http://www.australiasevereweather.com/cyclones/2004/summ0401.txt>>.

²⁰⁵ 'Aid Team Flies Gravely Injured Baby From Cyclone-Hit Niue' *The Sydney Morning Herald* (online), 9 January 2004 <<http://www.smh.com.au/articles/2004/01/08/1073437413342.html?from=storyrhs>>.

²⁰⁶ Justin T Locke, 'Climate Change Induced Migration In The Pacific Region: Sudden Crisis And Long Term Developments' (2009) 175(3) *Geographical Journal* 171, 177.

sealed by its immigration legislation, although it had never been opened by the *Convention* in any event. Nor can it be opened unless the signatories to the *Convention* agree to amend it.

People like Mr Teitiota and his family are worthy of protection, and the decision against him 'did not mean that environmental degradation resulting from climate change or other natural disasters could never create a pathway into the *Refugee Convention*'.²⁰⁷ Nevertheless, it is yet to be established that the *Convention* is a mechanism available to actually provide protection and in any event, the *Convention* is not a legal doctrine to be extended by domestic courts. Justices Stevens, Wild and Miller of the New Zealand Court of Appeal settled the matter, when their Honours confirmed that:²⁰⁸

... the effects of climate change ... do not bring Mr Teitiota within the Convention. That is the position even if the most sympathetic, ambulatory approach permissible to interpreting the Convention is taken. The Convention is quite simply not the solution to Kiribati's problem.

²⁰⁷ *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* SC7/2015 [2015] NZSC 107, [13].

²⁰⁸ *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173, [21].