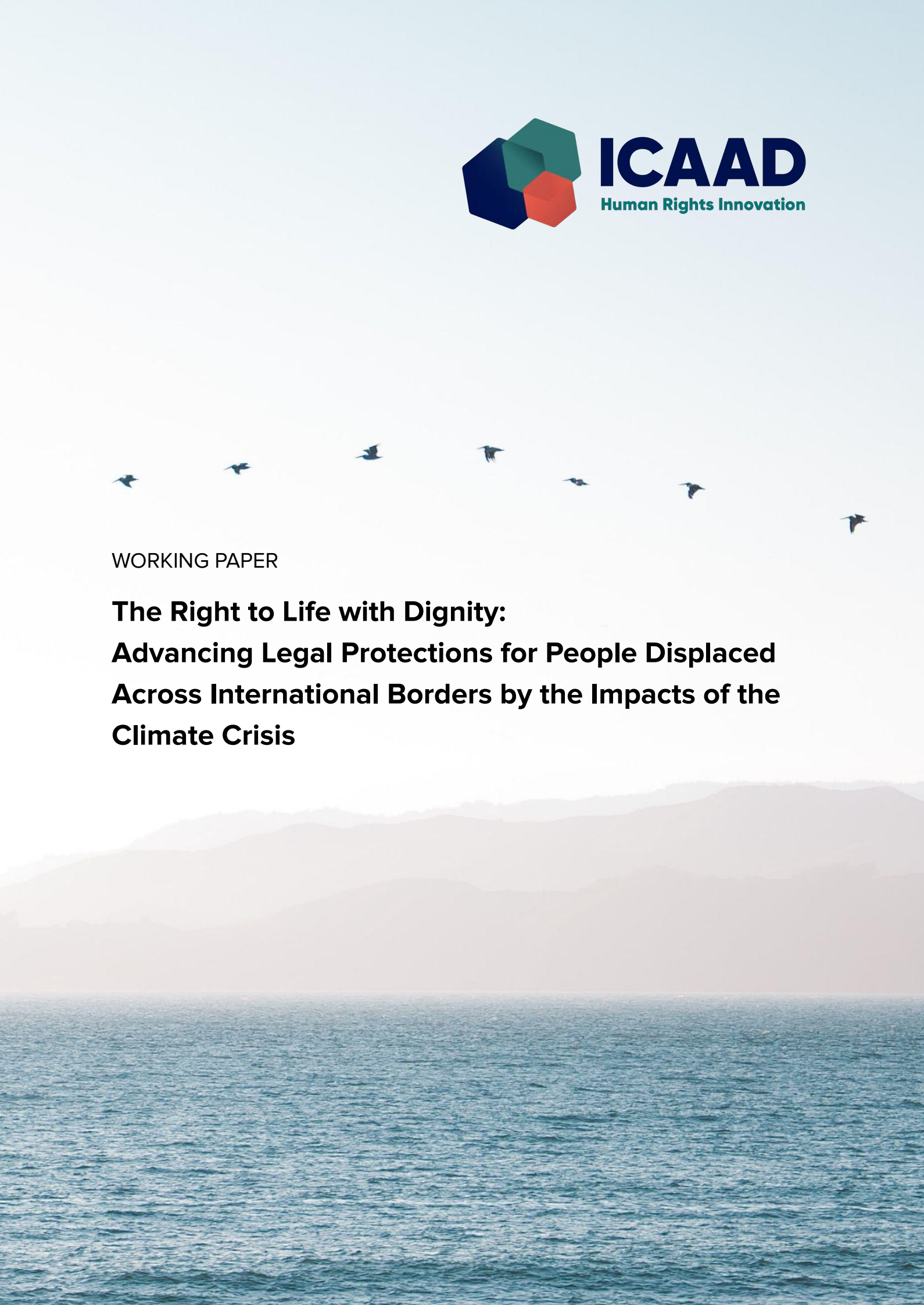

ICAAD
Human Rights Innovation

WORKING PAPER

The Right to Life with Dignity: Advancing Legal Protections for People Displaced Across International Borders by the Impacts of the Climate Crisis

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ACKNOWLEDGEMENTS

This working paper was prepared by ICAAD (International Center for Advocates Against Discrimination) to share a working report on our Right to Life with Dignity program. This research, analysis, and multidisciplinary collaboration involved ICAAD staff and advisors with experience in asylum and refugee law, climate science, social science, corporate law, artificial intelligence, and international law as well as climate frontline and activist collaborators. The team was also supported by law firms Clifford Chance and King, Wood, & Mallesons.

This working paper will be followed at a later date by the publication of a full technical paper that will set out the legal standard in more detail as well as pathways to implementation. It will also include a global analysis of the legal applications of dignity, an exploration on modeling climate data to support the evidentiary standard, and other pathways to use this framework to advance protections for people displaced by the climate crisis.

EXECUTIVE SUMMARY

The effects of the climate crisis are becoming increasingly evident, amplifying the intensity and frequency of natural disasters and contributing to widespread environmental degradation. The failure of major carbon emitters to respond with climate action continues to exacerbate these impacts. Large ocean states[1] and communities residing along coastlines are especially vulnerable to the impacts of climate change, facing challenges including rising sea levels, stronger cyclones, high tides, and the damaging effects of coral bleaching.[2]

The impacts of the climate crisis have already led to migration and displacement, not to mention anticipated impacts. We will use the term **climate mobility** to describe the movement of people due to the impacts of climate change or environmental degradation and barriers to such movement. Climate mobility includes temporary displacement due to disasters, the planned relocation of communities within state borders, and individual migration across borders, among the range of ways in which people move. Across these different modalities, cross-border migration has presented the greatest challenge in protecting human rights.[3]

The UN Special Rapporteur on the promotion and protection of human rights in the context of climate change, Ian Fry, submitted his report on protecting the human rights of persons displaced across international borders due to climate change in April 2023. The report emphasized that "*it is now time to put aside this denial and accept the fact that a large number of people are being displaced across international borders due to climate change and that there is an international legal responsibility to properly protect them.*"[4]

Climate frontline communities urge states to not see climate mobility as a replacement for mitigation and decisive action. To date, states have failed to meaningfully reduce greenhouse gas emissions, phase out fossil fuel extraction[5], or address the loss and damage already caused by climate change. Among these and other demands in the Kioa Climate Emergency Declaration[6] is the call for **urgent and decisive action to ensure the just, safe, and dignified movement of people in the context of climate change**.

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[1] *See generally* United Nations, *Expert Group Meeting on Oceans, Seas and Sustainable Development: Implementation and Follow-up to Rio+20* (April 18-19, 2013), https://sustainabledevelopment.un.org/content/documents/1772Ambassador%20Jumeau_EGM%20Oceans%20FINAL.pdf.

[2] Intergovernmental Panel on Climate Change (IPCC), *Special Report on the Ocean and Cryosphere in a Changing Climate*, at 659-660 (2019), https://www.ipcc.ch/site/assets/uploads/sites/3/2019/11/11_SROCC_CCB9-LLIC_FINAL.pdf.

[3] *See Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights in the contact of climate change, Ian Fry, Providing legal options to protect the human rights of persons displaced across international borders due to climate change,* A/HRC/53/34, at 8 (Apr. 18, 2023), https://www.ohchr.org/en/documents/thematic-reports/ahrc5334-providing-legal-options-protect-human-rights-persons-displaced.

[4] *Ibid. [emphasis added]*

[5] *See* the *Fossil Fuel Non-Proliferation Treaty Initiative*, https://fossilfueltreaty.org/mission.

[6] *Kioa Climate Emergency Declaration*, Pacific Civil Society Based on Kioa Talanoa (Oct. 19, 2022), https://drive.google.com/file/d/1vhUOKWEgRyf1cmCkFqNBqpkkzmsb0r8J/view.

Those who make the difficult and complicated decision to move should be able to. Cross-border migration has long been fraught with political tension. The Global North has plundered the Global South of resources to become High Income Countries as they continue to profit from the exploited labor of the Global Majority. Maintaining this status quo requires the enforcement of borders. Harsha Walia frames the global migration crisis as a "dual crisis of displacement and immobility organized through capitalist dispossession and imperialist power."[7]

> Strict immigration policies actively shape a national identity based on racial distinctions. The contemporary concept of the nation-state is deeply rooted in preserving "state sovereignty," frequently serving to safeguard the racial identity and imperial interests of the dominant powers in these discussions, namely countries of the Global North.[8]

While depending solely on the United Nations to counter the imperial and national priorities of Global North countries poses challenges, international human rights law offers a critical pathway to declare and safeguard protections for climate-induced migrants. Establishing a clear international standard ensures both consistency and adaptability to various contexts. Such a collaborative endeavor has historical precedence, seen in the significant efforts to pass the 1951 Convention Relating to the Status of Refugees (Refugee Convention) and recent progress like the passing of the Right to a Safe, Clean, Healthy, and Sustainable (R2HE) at the Human Rights Council in July 2022.[9]

As explained in this working paper, the **right to life with dignity** presents a powerful vision for protecting climate-induced migrants. Alongside a range of collaborators from climate frontline communities and climate justice activist groups in the Pacific, ICAAD's multidisciplinary team substantiates what a legal standard needs to have to provide protections for those moving across borders in the context of climate change.

METHODOLOGY

The methodology for this research is based on design justice principles, which is an approach that centers marginalized communities and aims to challenge, rather than reproduce, structures of power and inequity. The Pacific region is the focus given the location of the two primary cases explored in the legal analysis, brought before tribunals in New Zealand and Australia and subsequently heard at the UN Human Rights Committee. In building out a methodology to engage collaborators, Indigenous Pacific ways of knowing and diverse cultural traditions play a central role in how dignity is considered within the legal standard,

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[7] Harsha Walia, *Border and Rule: Global Migration, Capitalism, and the Rise of Racist Nationalism*, at 240, Haymarket Books (Apr. 19, 2021).
[8] *Ibid.*
[9] Office of the High Commissioner for Human Rights (OHCHR), *What is the Right to a Healthy Environment? Information Note* (Jan. 2023), https://www.undp.org/sites/g/files/zskgke326/files/2023-01/UNDP-UNEP-UNHCHR-What-is-the-Right-to-a-Healthy-Environment.pdf.

alongside international law. This meant a focus on relationship-building with and among collaborators, an emphasis on honoring lived experience, and a commitment to reciprocity with those who participated via capacity building and collaborative advocacy.

In addition to a series of virtual discussions with over 44 climate frontline and activist collaborators,[10] we are routinely engaging in discussions and consultation with local and Indigenous climate activists in Fiji, Kiribati, Marshall Islands, Samoa, Guam, Tuvalu, Niue and New Zealand. This has led to the development of case studies which are used to support the legal standard, and are used by our partners as tools for advocacy at local, national and regional levels. For additional technical support, to ensure our efforts can effectively advance what our collaborators are calling for, law firms Clifford Chance and King, Wood, & Mallesons have partnered with us pro bono to help pressure test our legal theories.

FRAMING CLIMATE MOBILITY

Much of the literature on climate mobility points to the many interconnected reasons why people decide to or are forced to relocate. For example, it is difficult to disconnect the environmental drivers of migration from the socio-economic factors.[11] Further, political will in some jurisdictions or individual financial resources can allow some, and not others, to relocate.[12] Indigenous peoples in particular express their identity through the land which frequently results in a voluntary reluctance to move and leave their ancestral lands.[13]

For many of our collaborators who are climate activists, fighting climate inaction and extractive industries is a priority, and climate displacement is a devastating consequence of government policy that prioritizes unfettered economic growth over people and the environment. **While conversations about climate mobility are important, we must recognize that they also involve acutely traumatic realities for climate frontline communities.**

Collaborators also identified a disconnect between what constituents want in terms of actionable policy and climate policy rhetoric being advanced by governments. As an example, constituents in a country might be interested in the government pursuing diplomatic relationships to create bilateral pathways for cross-border migration, while the government is

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[10] The series of virtual discussions took place between February 2021 and June 2022 and functioned to build relationships with and among frontline climate activists and distill the developing legal standard to allow for constructive conversations. Most virtual discussions took place over 90 minutes and were typically with 3-4 collaborators. Those who participated in a discussion often invited others to join in subsequent discussions, and some joined in multiple discussions. In total, there were 18 virtual discussions with a total of 44 unique collaborators.

[11] Michael B. Gerrard and Gregory E. Wannier, *Ch 1: The Relationship among Climate Change, Environmental Degradation, and Migration* in "Threatened Island Nations: Legal implications of Rising Seas and a Changing Climate," Cambridge University Press (2013).

[12] Sophie Pascoe, *Sailing the Waves on Our Own: Climate Change Migration, Self-determination and the Carteret Islands* in the Queensland University of Technology Law Review (2015), https://lr.law.qut.edu.au/article/view/610.

[13] Carol Farbutko, *Voluntary immobility: indigenous voices in the Pacific* in Forced Migration Review (2018), https://www.fmreview.org/syria2018/farbotko.

concerned about brain drain and is fixated only on internal relocation. In any jurisdiction, there is a diversity of perspectives; however, the range of political interests around borders, national identity, and access to labour play a significant role in policy level discussions.

Collaborators also emphasized that climate migration will always include economic factors, and the ongoing colonial legacies of extraction and underdevelopment cannot be disconnected from the economic drivers of migration. Further, collaborators living in diaspora communities also pointed to the challenges of economic precarity, social exclusion, and limited support for maintaining cultural identity function as major challenges to the dignity of climate-displaced persons, even if they were to be granted protection.

There are a number of possible directions for implementing the right to life with dignity legal standard. It could inform how courts intervene when countries threaten to send back migrants. Alongside movements for social, environmental, and economic justice, the proposed legal standard outlined in this working paper can inform a consistent framework at the level of international law to ground climate mobility conversations in human rights and the experiences of climate frontline communities. **We are eager to explore implementation possibilities with other advocates, academics, and government officials active in this space.**

LACK OF LEGAL PROTECTIONS FOR PEOPLE DISPLACED BY THE CLIMATE CRISIS

Climate-displaced persons are already in need of protections to safeguard their human rights, but these legal protections do not yet exist. There are long-term estimates that by 2050 there will be 290,000 people within the Pacific region that will need to be relocated due to the adverse impacts of climate change in the absence of adequate adaptive or protective measures (or 160,000 people if enhanced adaptation measures are put in place).[14]

There have already been a number of migrants, displaced by the impacts of climate change, who have fought to preserve their dignity through other migration pathways, navigating neoliberal and securitized immigration systems with mixed success. There is a small and growing number of regional, bilateral, and national efforts to expand legal protections for persons displaced in the context of climate change.[15] These efforts vary in their emphasis on human rights and dignity. Without dignified migration pathways, we risk the lives and human rights of those displaced by the climate crisis.

Further, while there is movement in the right direction, this piecemeal approach lacks accountability to address the disparity in the response to displacement to date. In 2018,

[14] Frank Biermann and Ingrid Boas, *Preparing For A Warmer World: Towards A Global Governance System To Protect Climate Refugees* in Global Environmental Politics (2010) at 10, https://direct.mit.edu/glep/article-abstract/10/1/60/14455/Preparing-for-a-Warmer-World-Towards-a-Global?redirectedFrom=fulltext.

[15] *See* the Central America Four Free Mobility Agreement; the Protocol on Free Movement of Persons in the Intergovernmental Authority on Development Region in East Africa; and temporary protections on humanitarian grounds by a number of countries.

estimates indicate that just ten countries, primarily in the Global South, host over 60 percent of the world's refugees – the entire Global North hosts only 15 percent.[16]

> "... the countries that are historically the most responsible for the climate crisis spend more money securing their borders to keep migrants out than on tackling the crisis that forces people from their homes in the first place."[17]

National discourses in countries in the Global North emphasize climate mobility in light of national security concerns, access to low-wage and temporary labour, climate adaptation strategies, and – at times – broader development and humanitarianism.[18] As an example, research with migrants from Kiribati and Tuvalu in New Zealand suggests that legal protection, in the form of visas, are reserved for the "self-sufficient, self-protecting migrant – who can provide exploitable low-wage labour – while hostility is extended to the 'non-ideal' climate migrant, who makes claims to welfare or citizenship."[19]

Human rights and the dignity of those displaced must be at the center of climate mobility policy making, especially by major carbon emitting countries who disproportionately contribute to the impacts of climate change. This international problem requires international solutions.

WHERE WE'VE COME

The entrenchment of borders and the neoliberalism underpinning their maintenance via the racist and punitive immigration policies makes the transformative change necessary feel exasperating. It is important to remember the paths that have already been charted, in their own seemingly insurmountable moments, offer possibilities and guidance for how to meet the challenges of the present moment.

There are parallels in history to the passing of the Refugee Convention in 1951. The agreement was a response to the aftermath of World War II and the mass violence and displacement within Europe. While the definition of "refugee" was limited, the goal was to ensure that individuals forced to flee their countries due to well-founded fears of persecution would not be sent back into harm's way should they seek asylum in a new country. The

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[16] James C. Hathaway, *The Global Cop-Out on Refugees* in International Journal of Refugee Law (2019), https://academic.oup.com/ijrl/article/30/4/591/5310192.
[17] *Supra* note 3.
[18] Olivia E. T. Yates, Shiloh Groot, Sam Manuela, and Andreas Neef, *'There's so much more to that sinking island!'—Restorying migration from Kiribati and Tuvalu to Aotearoa New Zealand* in Journal of Community Psychology (2023), https://onlinelibrary.wiley.com/doi/full/10.1002/jcop.22928.; Catherine Dyer and Andreas Neef, *The evolution of Aotearoa New Zealand's policy discourses on Pacific climate mobilities from 2006-2021* in Frontiers in Climate (2023), https://www.frontiersin.org/articles/10.3389/fclim.2022.1000632/full#B55.; *See also* migration pathways on humanitarian grounds inclusive of natural disasters in Argentina, Brazil, Bolivia, and Canada.
[19] Olivia E. T. Yates, Shiloh Groot, Sam Manuela, and Andreas Neef, *'There's so much more to that sinking island!'—Restorying migration from Kiribati and Tuvalu to Aotearoa New Zealand* in Journal of Community Psychology (2023), https://onlinelibrary.wiley.com/doi/full/10.1002/jcop.22928.

cooperation of states, driven by the urgency of the humanitarian need at the time, led to the Refugee Convention which was an international law response to unprecedented times.[20]

If an individual in a receiving country can demonstrate a real risk of persecution in their home country, with the persecution arising for one of "Convention grounds", (a) race, (b) religion, (c) nationality, (d) political opinion and (e) membership of a particular social group, then the principle of non-refoulement applies and the receiving country cannot return the individual to their home country. There have been attempts to expand the definition of "refugee" including the 1969 Organization for African Unity Convention and the 1984 Cartagena Declaration which broadened the threats to include foreign aggression, occupation, internal conflict, and massive violations of human rights.

Attempts to expand the use of the Refugee Convention to climate-displaced persons seeking to cross international borders have proven unsuccessful. However, it gives us a precedent for expanding rights through international collaboration when new threats persist.

Recent developments in international law indicate that this momentum is building, especially as it relates to climate change and human rights. In 2022, the UN Human Rights Committee passed a resolution recognizing "the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights" and noted that "the right to a clean, healthy and sustainable environment is related to other rights and existing international law". While this is non-binding, it represents the defining of new boundaries for customary international law with regard to climate justice.

> The **Right to a Clean, Healthy and Sustainable Environment (R2HE)** includes clean air, a safe climate, access to safe water and adequate sanitation, healthy and sustainable produced food, non-toxic environments in which to live, work, study and play, and healthy biodiversity and ecosystems.[21]

When it comes to setting the terms at the international level and offering a consistent framework for national governments to strive towards and for advocates to rely on, **there is work that must be done on the international level**. In identifying the gaps that exist, the Environmental Justice Foundation has recommended, alongside other academics and advocates, that the international community "develop precise, legally-worded definitions to describe types of climate-induced displacement which inform and enable targeted policy measures".[22]

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[20] Harsha Walia, *Prefiguring Border Justice: Interview with Harsha Walia* in Critical Ethnic Studies (2020), https://www.jstor.org/stable/48628941?seq=18.
[21] *See* G.A. Res. 76/300, *The Human Right to a Clean, Healthy and Sustainable Environment* (July 28, 2022).
[22] Environmental Justice Foundation, *Falling Through The Cracks: A briefing on climate change, displacement and international governance frameworks*, (2014), https://ejfoundation.org/resources/downloads/EJF-Falling-Through-the-Cracks-briefing.pdf.

OPPORTUNITIES TO ADVANCE LEGAL PROTECTIONS

Existing case law at the intersection of international law and climate mobility highlight a number of opportunities to forge a new pathway for legal protections. The International Covenant on Civil and Political Rights (ICCPR), in particular, offers a number of provisions potentially relevant to the protection of people displaced by the climate crisis. There have been two cases before the Human Rights Committee via the ICCPR Optional Protocol that offer insight into potential directions for international human rights law and climate mobility.

International Covenant on Civil and Political Rights (ICCPR) Article 6

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.

The notion of a right to life (Art. 6) *with dignity* and the role of dignity in international human rights law is a legal and political question that has animated discussion[23] since the creation of the Universal Declaration of Human Rights. A historical and contemporary examination of "dignity" reveals that it functions as a means to adapt or broaden rigid definitions set out within the human rights framework.

Simply put, dignity animates the spirit of international human rights law by allowing policymakers and adjudicators to extend rights to those most vulnerable and "whose human dignity is imperiled."[24] Given this precedent, it is unsurprising that a substantive definition for the right to life with dignity has not emerged. However, the climate crisis and cross-border climate mobility warrant a re-assessment of the human rights framework to ensure rights are extended to the most vulnerable.

Further, in its General Comment No. 6 on the right to life, the Committee stated explicitly that the right to life "is a right which should not be interpreted narrowly . . . [as] [i]t concerns the entitlement of individuals to be free from acts . . . [that] may cause their unnatural or premature death, as well as to enjoy a life with dignity".[25] More recently, the Committee's General Comment No. 36 described climate change as one of "the most pressing and serious threats to the ability of present and future generations to enjoy the right to life".[26]

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[23] *See* Paolo G. Carozza, *Human Dignity* in The Oxford Handbook of International Human Rights Law 345, 353-56 (2013).
[24] *Win v Minister for Immigration & Multicultural Affairs* [2001] FCA [Federal Court of Australia] 132 at 19.
[25] Office of the High Commissioner for Human Rights (OHCHR), *CCPR General Comment No. 6: Article 6 (Right to Life)*, (Apr. 30, 1982), https://www.refworld.org/pdfid/45388400a.pdf.
[26] Office of the High Commissioner for Human Rights (OHCHR), *CCPR General Comment No. 36: Article 6 (Right to Life)*, (Sept. 3, 2019), https://www.refworld.org/docid/5e5e75e04.html.

There are two recent decisions from the Human Rights Committee that highlight how jurisprudence has developed to meet the challenge of the climate crisis and where it has failed to date. Those are the Teitiota decision[27] and the Torres Strait decision.[28]

Teitiota Decision

Teitiota and his wife migrated to New Zealand in 2007 because they wanted to start a family and believed there would be no future for them in Kiribati.[29] After the expiration of their visas, Teitiota applied for refugee status seeking protection for himself and his family based on environmental degradation in Kiribati related to climate change, including sea-level rise.

The Immigration and Protection Tribunal (IPT) ruled that he did not qualify for refugee status but recognized that environmental degradation could "create pathways into the Refugee Convention."[30] In its examination of the facts, the Tribunal considered the scarcity of fresh water due to saltwater contamination and overcrowding; the erosion of habitable land risking housing insecurity and interpersonal violence; and the threat to food sources and livelihoods due to land contamination. [31]

Torres Strait Decision

In May 2019, a group of eight Torres Strait Islander people submitted a complaint against the Australian Government to the UN Human Rights Committee, alleging that Australia's failure to protect them from climate impacts was a violation of their rights under the ICCPR, Art. 6 (Right to Life), Art. 17 (Right to be free from arbitrary interference with privacy, family and home, and Art. 27 (Right to Culture).[34] This was the first legal action brought by Indigenous peoples of low-lying islands against a nation state and the first climate change litigation brought against the Australian federal government on human rights grounds.

The Torres Strait Islands are a group of more than 100 islands off the northern tip of Queensland, Australia, between the Australian mainland and Papua New Guinea. Home to First Nations peoples who have inhabited the region for thousands of years. Rising sea levels and coastal erosion are threatening homes and livelihoods and have already damaged

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[27] Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016,* CCPR/C/127/D/2728/2016 (Jan. 7, 2020) ("the Teitiota Decision"), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f127%2fD%2f2728%2f2016&Lang=en. Prior to the review by the Committee, the claimant had exhausted all his domestic remedies in New Zealand, culminating with a Supreme Court decision.

[28] Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019*, CCPR/C/135/D/3624/2019 (Sept. 22, 2022) ("the Torres Strait Decision"), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220923_CCPRC135D36242019_decision.docx.

[29] *Supra* note 27.

[30] *AF (Kirbati)* [2013] NZIPT 800413, 25 June 2013, at 55.

[31] *Supra* note 27, at 3

[34] Maria Antonia Tigre, *United Nations Human Rights Committee finds that Australia is violating human rights obligations towards Torres Strait Islanders for climate inaction*, Sabin Center for Climate Change Law (Sept. 27, 2022), https://blogs.law.columbia.edu/climatechange/2022/09/27/u-n-human-rights-committee-finds-that-australia-is-violating-human-rights-obligations-towards-torres-strait-islanders-for-climate-inaction/.

Though the IPT found evidence of environmental degradation, it was not considered "so perilous that [Teitiota's] life will be placed in jeopardy, or that he and his family will not be able to resume their prior subsistence life with dignity."[32] Furthermore, the IPT did not find any evidence to suggest that Kiribati was not taking adequate steps to protect its citizens. Therefore, Teitiota was not found to fall within the refugee definition of the Convention.[33]

This ruling was upheld by the High Court, Court of Appeals, and Supreme Court in 2015. Each of these bodies stated that the Refugee Convention was not the body of law that would provide a solution to the particular problem raised by Teitiota. The case was appealed to the Human Rights Committee via the Optional Protocol to the ICCPR. The Human Rights Committee did not find an Art. 6 violation, but dissenting opinions identified potential circumstances in which it would be invoked.

burial grounds and sacred cultural sites. There is a high likelihood that some of these islands will become uninhabitable within the coming decades.[35]

While this case does not concern cross-border migration, the Human Rights Committee does explore Art. 6 as it relates to an assessment of imminence and State's duty of care in regard to climate change. In the landmark decision, the Committee found Australia to be in violation of the rights to family and culture under Articles 17 and 27 of the ICCPR. However, regarding Art. 6, only a minority found that the Government was in violation of the right to life with dignity with the majority opinion finding there was a lack of "real and foreseeable risk." The need for a legal standard to determine a threshold for when the right to life with dignity is violated under Art. 6 is further underscored by this recent decision.[36]

Both decisions feature a number of challenges and opportunities in the interpretation of the ICCPR in the context of the climate crisis. In both decisions, the Committee navigated causality and the burden of proof in a manner that fails to capture States' responsibility in contributing to the climate crisis and their positive duty to take steps to ensure rights are protected.

The Torres Strait decision differs from the Teitiota case in that it does not involve cross-border migration. As such, the complaint from Billy et al. in the Torres Strait case included a number of ICCPR article violations including Article 17 (right to privacy) 27 (right to culture) which apply because it is an internal domestic matter, as opposed to the question of non-refoulement[37] in

[32] *Supra* note 30, at 74.
[33] *Supra* note 30, at 97.
[35] Andy Park, Alex McDonald and Jenny Ky, *For these Torres Strait Islanders, climate change is already here — and they're urging the government to do more*, ABC Australia (Apr. 18, 2021), https://www.abc.net.au/news/2021-04-19/torres-strait-islanders-climate-change-impacts-uninhabitable/100069596.
[36] *Supra* note 28.
[37] The legal concept of non-refoulement, preventing sending a person seeking asylum back to their country, is firmly established in the Refugee Convention. It has been elevates to the status of customary international law meaning all states are obligated to uphold this right. In simple terms, under international human rights law, non-refoulement means not sending someone away, regardless of their status, when there are strong reasons to believe they could face serious human rights violations like threats to life or torture and other cruel treatment.

the Teitiota decision. Under international law, Art. 6 (and Art. 7) provide more enhanced protection than other articles. There is general consensus that the right to life and freedom from cruel, inhuman or degrading treatment are rights that states cannot derogate from, meaning there is no justification to violate them. Comparatively, states can make the argument that, for example, the right to privacy can be violated temporarily.

As it relates to Art. 6, the authors in the Torres Strait complaint outlined many of their concerns related to dignity as a component of the right to life. The authors detail their "feelings of insecurity engendered by a loss of predictability of seasonal weather patterns, seasonal timing, tides and availability of traditional and culturally important food sources" among many other causal arguments between the impacts of climate change and key components of dignity.[38] While the Committee did not find an Art. 6 violation, the violations related to culture were grouped under Art. 27. The Committee noted that "their claim that the health of their land and the surrounding seas are closely linked to their cultural identity" and cited a violation because the State Party did not take timely and adequate adaptation measures to prevent harm.[39]

> "The Committee further recalls that Article 27 of the Covenant, interpreted in the light of the United Nations Declaration on the Rights of Indigenous Peoples, enshrines the inalienable right of indigenous peoples to enjoy the territories and natural resources they have traditionally used for their subsistence and cultural identity."[40]

The Torres Strait decision is instructional in terms of the future direction of climate litigation in terms of state responsibility for internal climate displacement; however, read alongside the Teitiota case in the context of climate mobility, we come back to Art. 6. In a joint dissenting opinion in the Torres Strait decision, Committee Members highlighted how the majority opinion agreed that Article 6 should not be interpreted restrictively, yet their decision to employ the 'real and foreseeable risk' standard, borrowed from refugee cases, was a restrictive interpretation.[41] They go on to argue that the right to life with dignity must go beyond a simple reference by the Committee and that, if used progressively, can clarify "the direct connection between environmental harms, the right to life, and the right to life with dignity."[42]

Defining a Risk Threshold

These two decisions have maintained a narrow threshold for violations of the right to life with dignity that have failed to fit the context of the climate crisis, but reasoning in the decisions and dissenting opinions suggest there are pathways to advance jurisprudence. In the Teitiota decision, the complaint leaned on Art. 6, with less emphasis on the dignity component than

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[38] Daniel Billy, et al. *Communication Under the Optional Protocol to the International Covenant on Civil and Political Rights*, at 36 (May 13, 2019).
[39] *Supra* note 28 at 16.
[40] *Ibid*.
[41] *Ibid.* at 22.
[42] *Ibid.* at 23.

the Torres Strait complaint. In the Teitiota decision, the Committee found no right to life violation because they did not find the threats to be imminent and correspondingly they found Kiribati to be successfully meeting its positive obligation through its climate adaptation programs.

In the Teitiota decision, the Committee fell back on the individualized nature of risk from refugee law without fully considering the nature of the impacts of climate change being widespread. Similarly, in the Torres Strait decision, the Committee narrowed the risk of a right to life violation to "adverse impacts to their own health or a real and reasonably foreseeable risk of being exposed to a situation of physical endangerment or extreme precarity that could threaten their right to life, including their right to life with dignity."[43]

Both cases expose this lack of an evidentiary standard for risk in the context of climate change. In the Teitiota decision, a Committee Member argued that conditions in Kiribati "resulting from climate change [were] . . . significantly grave, and pose[d] a real, personal and reasonably foreseeable risk of a threat to his life" and that the threshold for 'extreme cases' "should not be too high and unreasonable."[44] The Committee in the Torres Strait decision echoed thinking in the Teitiota decision noting that "[t]he conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realised" due to the nature of slow-onset processes, like sea level rise, salinzation, and land degradation.[45]

State's Positive Duty and the Burden of Proof

In both cases, the assessment of ICCPR violations were weighed against the State Party's positive duty to prevent such violations. In the Teitiota decision, the Kiribati government's national adaptation program submitted under the UNFCCC was sufficient to meet its positive obligation to protect its communities. The Committee explicitly honors the "time left for the Kiribati authorities and the international community to intervene and the efforts already underway to address the very serious situation . . ."[46]

In a dissenting opinion, a Committee Member argued that the burden of proof for climate claims should be reversed, so that "it falls on the State Party, not the author, to demonstrate that the author and his family would enjoy access to safe drinking water (or even potable) water in Kiribati, to comply with its positive duty to protect life from risks arising from known natural hazards."[47] This is a critical point because unlike refugee law, the governments in question in these cases are the direct drivers of adaptation and mitigation efforts to address the risk of human rights violations from the impacts of climate change.

Climate law is advancing to encompass this reality. In the case of the *Urgenda Foundation v. State of the Netherlands*, the Dutch environmental group sued the government on the basis

[43] *Supra* note 28.
[44] *Ibid*.
[45] *Ibid*. at 13.
[46] *Supra* note 27 at 15.
[47] *Supra* note 27.

of negligence in the Dutch Civil Code. The ruling established that the Dutch government does have an obligation to protect the right to life with dignity and to prevent foreseeable loss of life from the impacts of climate change.[48] This opinion was cited in the Torres Strait decision in a dissenting opinion:

> "As highlighted by the Urgenda Foundation v. the State of Netherlands case, the State Party is tasked with an obligation to prevent a foreseeable loss of life from the impacts of climate change, and to protect the authors' right to life with dignity."[49]

In the Torres Strait decision, the Committee found that the Australian government had failed to meet the low threshold for their positive duty in terms of "timely" and "adequate" climate adaptation based on their own national climate adaptation targets in the Torres Strait Islands. In the same dissenting opinion, the committee member highlighted not just the lack of "timely adequate adaptation measures," but also the failure of the State Party to take "any measures to reduce greenhouse gas emissions and cease the promotion of fossil fuel extraction and use, which continue to affect the authors and other islanders, endangering their livelihood, resulting in the violation of their rights under article 6 of the Covenant."[50] Since then, the Special Rapporteur has explicitly stated that climate change should be understood in terms of responsibility and causality.[51]

These openings suggest that discussions at the highest levels are confronting the gaps in legal protections for people displaced by the climate crisis. Existing provisions applied from other sources of law, like refugee law, fail to capture the widespread impacts of climate change. This misalignment also represented how the Committee continues to place the burden of proof on climate frontline communities to prove the failures of states to mitigate and adapt to climate change. States' efforts to adapt and mitigate the impacts of climate change should be a factor in these cases, and may be a component of redress, but this alone cannot overturn their responsibility to protect those displaced by the climate crisis.

Recent case law and ancillary discourse in UN bodies suggest that ICCPR jurisprudence can advance to stop, at least signatory states, from deporting persons displaced by the climate crisis. The lack of a clear legal standard for the right to life with dignity including an evidentiary standard for risk that suits the context of climate mobility has presented this opportunity for human rights advocates to offer a grounded perspective. Additionally, these challenges in international law are being confronted beyond the ICCPR, so this proposed framework is a contribution to broader discussions about protecting human rights in the context of climate mobility.

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[48] *Urgenda Foundation v. The State of Netherlands*, C/09/456689/HA ZA 13-1396, (Oct. 9, 2019).
[49] *Supra* note 28 at 18.
[50] *Ibid*.
[51] *Supra* note 3 at 8.

PROPOSING A NEW LEGAL FRAMEWORK

There are a number of pathways to expand international law to protect persons displaced by the climate crisis. The following proposed legal standard is grounded in the experiences of climate frontline communities and activists who collaborated to develop the conceptual basis and the expertise of the ICAAD team, which included staff and advisors with experience in asylum and refugee law, climate science, social science, corporate law, artificial intelligence, and international law.

The proposed right to life with dignity legal standard aims to offer a substantive definition to advance ICCPR jurisprudence and broader climate mobility policy. By connecting the right to life with dignity to the R2HE as well as centering culture and context in determining what "dignity" means, the proposed legal standard draws on perspectives from climate frontline communities and activists to define what is necessary and what is strategic to protect people displaced by the climate crisis.

The framework also includes an evidentiary standard responding to the gaps in existing case law and drawing on the limitations in international law as identified by our climate frontline and activist collaborators.

Importantly, the aim of this report is to open the conversation to more key collaborators. ICAAD is looking to develop further partnerships as we develop some of the technical components of the framework including a global analysis of the legal applications of dignity, modeling climate data for the evidentiary standard, and using this framework among other pathways to advance protections for people displaced by the climate crisis.

Proposed Legal Standard

> *A climate-displaced person's right to life with dignity is violated if they are deprived of, or are at risk of being deprived of:*
>
> - *Life or access to basic necessities of life, including but not limited to potable water, food, or shelter;*
> - *Security from serious illness or injury, whether physical or psychological;*
> - *Something that is fundamental to the identity, conscience, or the exercise of human rights of the applicant and of a particular social group to which the applicant belongs, including but not limited to the ability to engage in cultural practices vital to the particular social group.*

This broad interpretation of dignity can be clearly connected to climate impacts, whether access to basic necessities such as clean water or the ability to engage in cultural practices. For our climate frontline collaborators, this is an important consideration given that for many Indigenous frontline communities, connection to ancestral lands and biodiversity are key components of dignity.

These components of dignity in this legal standard also resonate with the R2HE. For example, threats to biodiversity are also threats to cultural rights and risk food security, traditional medicines, and ecological health for many Indigenous and rural people.

Opportunity to Collaborate

How do you interpret the right to life with dignity in the context of climate mobility?

The second part is open-ended and recognizes that other aspects of the human experience can also be integral to dignity depending on culture, beliefs, and personal circumstances. By tying the concept of dignity to each applicant's sense of self and membership in a particular social group, the standard makes the determination of whether an applicant faces a threat to their dignity dependent on the particular social, economic, and cultural context in which the applicant lives. This leveraging of human diversity ensures that the meaning of dignity is construed to be inclusive of differing cultural groups and communities on the international stage.[52]

Proposed Evidentiary Standard

> *An applicant is entitled to protection and non-refoulement if there is a* ***reasonable chance*** *that the applicant will suffer,* ***in the applicant's lifetime****, a violation of their* ***right to life with dignity****. In cases where multiple similarly situated applicants with familial or community ties apply for protection, some of whom satisfy this reasonable chance standard and some of whom do not,* ***complementary protection*** *should be extended to a non-qualifying applicant if denying protection to the non-qualifying applicant would violate any applicant's RTLWD.*

Reasonable Chance

In the context of refugee law, an applicant must prove that a threatened harm is "more likely than not" to occur should their application be denied. The standard of reasonable chance

[52] *Cf.* The Yakye Axa Indigenous Community v Paraguay [2005] Series C no 125 (Inter- American Court of Human Rights) (members of indigenous community were deprived of right to a "decent life" by being denied "access to their traditional means of subsistence, as well as to use and enjoyment of the natural resources necessary to obtain clean water and to practice traditional medicine to prevent and cure illnesses").

appears in the UNHCR Handbook[53], the U.S. Supreme Court[54], and the United Kingdom and other common law jurisdictions.[55]

In keeping with the prevailing view, this reasonableness standard should not be tied to a fixed percentage value. Instead, tribunals should consider the totality of the evidence presented by the applicant, the host country, and other interested parties regarding the probability that particular effects of climate change will come to fruition and what impacts those climate outcomes would have on an applicant's life and living conditions.

Temporal Proximity (Within the Applicant's Lifetime)

Calculating the likelihood of an event cannot be determined without fixing a time period within which that event could occur. For example, the probability of a sea-level rise rendering a particular island uninhabitable might be quite low during the next five to ten years but could be quite high over the next fifty.[56]

Tribunals have occasionally suggested that a threatened harm must be imminent before it can justify a grant of protection, often by arguing that the country of origin may have the capacity to mitigate or eliminate threatened harms that are not immediate. As legal scholars have persuasively demonstrated, such an imminence requirement is misplaced in the context of international human rights law because the standards for asylum and non-refoulement that lie at the heart of refugee law are inherently forward-looking and uncertain in nature.[57]

An imminence requirement would be particularly inapt in the context of persons whose lives and dignity are threatened by harms that unfold over longer timeframes and have multiple sources of uncertainty.[58] This includes the effects of climate change, which may unfold slowly,

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[53] *See* UN High Commissioner for Refugees (UNHCR), *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees,* (April 2001),https://www.refworld.org/docid/3b20a3914.html. ("It is generally agreed that persecution must be proved to be "reasonably possible" in order to be well-founded.").

[54] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (quoting *INS v. Stevic*, 467 U.S. 407, 424-25 (1984) (emphasis added). *See also ibid.* ("There is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening.").

[55] *See, e.g.*, *R. v Secretary of State for the Home Department ex parte Sivakumaran* ("[T]he requirement that an applicant's fear of persecution should be well founded means that there has to be demonstrated a reasonable degree of likelihood that he will be persecuted."). *See generally* UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, at 4 (Dec. 16, 1998), (noting a "substantial body of jurisprudence . . . in common law countries" that "[t]o establish 'well-foundedness', persecution must be proved to be reasonably possible," and need not be "more probable than not).

[56] *See, e.g.*, *2022 IPCC Technical Summary 62* (discussing various risks to coastal and island communities due to sea-level rise over different timescales ranging from 2030 to 2100).

[57] Adrienne Anderson, et al., *Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection* in International Comparative Law Quarterly (2019).; Jane McAdam, *A Well-Founded Fear of Being Persecuted … But When?* In the Sydney Law Review (2020).

[58] *Ibid.*

making it difficult to draw a line between threats that are imminent and those that are not.[59] Moreover, even if a particular climate-related harm is not immediate, a climate-displaced person's country of origin may lack the means to adapt to the local effects of climate change or mitigate the associated harms (much less eliminate the underlying causes) even if the country purports to be doing so. Even if the country of origin has committed to taking climate action, choices should nonetheless not be determined by pledges. **The basis for determining climate impacts should instead prioritize the information within IPCC assessments as well as the lived experience of climate realities on the ground.**

A person displaced by the climate crisis should be entitled to protection so long as they can establish that there is a reasonable chance that a threatened harm to their right to life with dignity will occur *within the applicant's lifetime*. A standard tied to the applicant's life expectancy has the benefit of both being a familiar metric[60] and one that provides a definitive end point past which the threat of future harm becomes immaterial with respect to a given applicant.

The length of an applicant's remaining lifetime should be based on the applicant's life expectancy if their application was granted. So, for example, if the life expectancy of the applicant would be 75 if the applicant were allowed to migrate but 65 if they remained in their country of origin, the relevant inquiry is whether there is a reasonable chance the right to life with dignity violation would occur if they remained in their country of origin until age 75.

Complementary Protection

Future host countries will be faced with applications based on common fact patterns—that is, people living in similar situations and facing similar climate-induced threats—from groups of individuals with various family and community ties. Given the timescales over which the effects of climate change will unfold, and the fact that our proposed standard is tied to the life expectancy of the applicant, situations will arise where younger applicants from a given community will qualify for asylum while similarly situated older applicants will not.

Take as an example a hypothetical Community Y where multi-generational families living in the same village is the norm. Say that there is a 1% chance that rising seas will inundate Community Y in the next 5 years, but a 25% chance that such an inundation will occur in the next 30 years. Under our proposed standard for granting protection to individuals, a 20-year-old resident of Community Y probably faces a reasonable chance of a climate-induced infringement on their dignity within their lifetime. That individual's

[59] *See* UNHCR, *International Protection People Fleeing Effects of Climate Change and Disasters*, at 4-5 (determining whether well-founded fear of persecution may arise in climate-change displacement cases involves "a forward-looking assessment of all relevant facts and circumstances of each case," recognizing "that impacts may emerge suddenly or gradually; overlap temporally and geographically; vary in intensity, magnitude and frequency; and persist over time.")

[60] The WHO and other institutions publish general life expectancy calculations for every state, and determining an individual's remaining life expectancy is a common exercise in both legal and commercial spheres.

otherwise identically situated 75-year-old grandparent, however, likely does not. Applying the reasonable chance standard to both applicants individually would result in the younger resident being granted protection while the older resident would be forced to remain in their country of origin.

This example illustrates that the granting of asylum to one individual may affect, sometimes quite profoundly, the lives of other asylum applicants who have relationships with that individual. Without further refinement, a rigid case-by-case application of the standard could result in the separation of individuals who share close familial or other ties.

Depending on the contextual significance of those ties within a given community, such a separation could *itself* violate an applicant's right to life with dignity. Whether complementary protection is appropriate would therefore depend, like the meaning of dignity itself, on social and cultural context. Different communities have different conceptions of the meaning and significance of family and community ties.

IMPLEMENTATION PATHWAYS

By responding to a number of legal challenges at the highest levels of international law, the proposed framework has a number of pathways for implementation that are not mutually exclusive. The insights from and alignment with climate frontline and activist collaborators also means that this framework can be of use in other creative pathways as well.

Strategic Litigation

The proposed legal framework was built in response to climate mobility cases heard before the UN Human Rights Committee. As such, applying it to a test case is an obvious strategy for implementing it in jurisprudence. This would require identifying a test case that would sit at the tension of some of these legal questions with the aim of setting a new precedent through these legal arguments.

Regional and National Policy

One of the benefits of advocacy at the international level is that it sets a consistent benchmark for national governments. Even when provisions are non-binding, they can still be advocacy tools to advance regional and national policy. The right to life with dignity standard weaving in the R2HE makes this framework even more powerful in terms of demanding states uphold their existing commitments to international human rights law as they connect to climate mobility.

Optional Protocol to the Refugee Convention

In April 2023, the Special Rapporteur on the promotion and protection of human rights in the context of climate change offered a number of recommendations including the development

of an optional protocol to the Refugee Convention which would address specifically the needs of persons displaced by climate change.[61] This optional protocol would function similarly to the optional protocol for the ICCPR in that it can serve as an authority to file a claim under the Refugee Convention.

The shortcomings of the Refugee Convention in the context of climate change are clear, and many on the frontlines are calling for more consistent and regular migration pathways. However, should the Human Rights Council begin negotiations on this optional protocol, the proposed right to life with dignity legal framework offers a novel approach that could lead the optional protocol to address some of the shortcomings of the Convention in the context of climate change and meet the needs of persons displaced.

WHERE TO FROM HERE

This working paper has functioned to share out the status of this work to date and to offer advocates the latest analysis in the space of international law and cross-border climate mobility. Importantly, **this stage is about continuing to open the conversation to more key collaborators**. Our next step will be publishing a full technical paper that will serve the pathways to implementation. Part of that paper will include a global analysis of the legal applications of dignity, an exploration of modeling climate data for the evidentiary standard, and other pathways to use this framework to advance protections for people displaced by the climate crisis.

If you're interested in getting involved with the Right to Life with Dignity initiative, email ICAAD at info@icaad.ngo.

[61] *Supra* note 3.


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