

POLICY BRIEF

Right to Life with Dignity for Climate- Displaced Persons:

**Proposing a Legal Standard
Based on International
Human Rights Norms & Local
and Indigenous Peoples'
Perspectives**





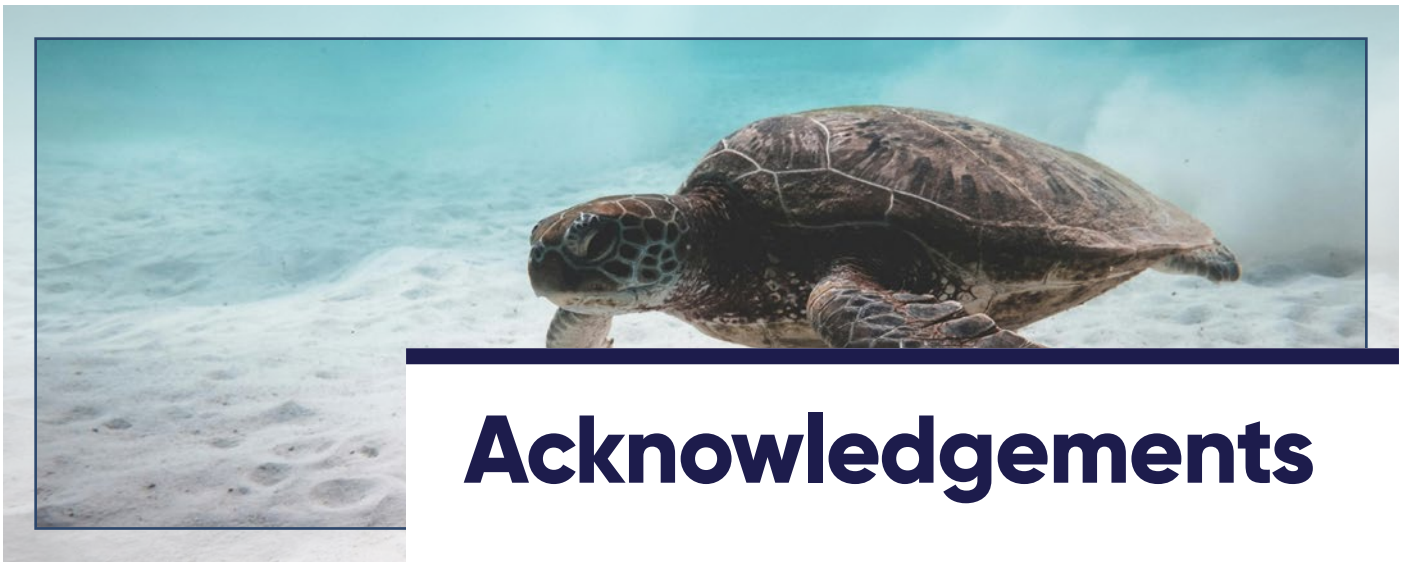
International Center for Advocates Against Discrimination (ICAAD) is a human rights advocacy center working at the intersection of legal innovation and design justice to create evidence-based programs with organisations and communities to combat structural discrimination. By leveraging multidisciplinary teams and taking an integrated approach, we are able to improve resilience, safety, and equity across systems.

For any inquiries, further information, or to discuss any aspect of this report, please feel free to reach out to Hansdeep Singh, hansdeep@icaad.ngo. Your feedback and questions are highly valued.

"ICAAD's report incorporates lived-experience testimony and in depth cross-disciplinary research to propose an innovative and, most importantly, practicable legal standard for the right to life with dignity for climate-displaced persons. It outlines an evidentiary standard for violations of said legal standard, and goes so far as to provide a guide to incorporating scientific modelling into future cases. The legal standard and overall thesis proposed is one that Earth Refuge would readily support and indeed seek to apply in pursuance of the rights of climate-displaced people. It provides the practical, conscientious answers to the questions that those working in this field, and those experiencing these travesties, have been asking for years."

- Yumna Kamel
Co-founder & Executive Director
Earth Refuge

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Acronyms

CAT - Convention Against Torture and Other Cruel, Inhuman, & Degrading Treatment

CIDT – Cruel, Inhuman, & Degrading Treatment

CRPD - Convention on the Rights of Persons with Disabilities

GBV - Gender-based Violence

ICCPR – International Covenant on Civil and Political Rights

ICESCR - International Covenant on Economic, Social, & Cultural Rights

IPT - Immigration and Protection Tribunal

RTCHSE - Right to a Clean, Healthy, & Sustainable Environment

RTLWD – Right to Life with Dignity

SIDS - Small Island Developing States

UDHR - Universal Declaration of Human Rights

UNHCR- the UN Refugee Agency

Table of Contents

I. INTRODUCTION	7
II. TEITIOTA CASE	10
New Zealand Court Decisions	10
U.N. Human Rights Committee (“The Committee”) Decision	11
U.N. Human Rights Committee (“The Committee”) Dissenting Opinions	12
Why is Teitiota Important?	12
III. DESIGN JUSTICE	14
Methodology	16
IV. INDIGENOUS & FRONTLINE PERSPECTIVES	18
A Conversation No One Wants to Have	19
Lessons from the Past	19
V. DEFINING DIGNITY	20
Dignity in Ancient and Early Modern European History	20
Dignity in Non-European Traditions	21
Usage in International Law	22
Proposed Definition	24
VI. EVIDENTIARY STANDARD FOR DETERMINING A VIOLATION OF RTLWD	27
Probability (Reasonable Chance)	27
Temporal Proximity (Within the Applicant’s Lifetime)	28
Hypothetical Case Study	30
Complementary protection	31
VII. MODELLING CASE STUDY	33
Proposed Process	34
Case Study: Freshwater Lenses in Kiribati	36
VIII. POLICY IMPLICATIONS	38
National Immigration Policies & Bilateral Agreements	38
Internal Relocation	38
Torres Strait Islander Complaint	39
CONCLUSION	41
APPENDIX: Asylum Case Law in the Pacific Island Region Around Climate-Displaced Persons	42



I. Introduction

The devastating impact of climate change is being felt globally, and natural disasters are being amplified by worsening climate conditions. Human activity has led to harmful environmental impacts at a global scale and evidence reveals projections of greater harm in the future. Low-lying small island developing states (SIDS) and coastal communities are particularly vulnerable to the impacts of climate change including sea level rise, high intensity cyclones, king tides and coral bleaching.¹ Many island communities, especially indigenous communities, live under the constant threat of losing their cultures and identities as environmental degradation rapidly erodes traces of their very existence.² Moreover, women and girls and those living with disabilities face a heightened state of vulnerability due to environmental disasters.³ No state, no city, no community should have to live with a sword of Damocles hanging over them. For many, the very notion of the right to life with dignity (RTLWD)⁴ is already in peril.

If the dignity of climate-displaced persons is to be safeguarded, States must be prepared to protect both externally displaced persons—those who have relocated to foreign shores seeking a future clear of grave existential threats—and internally displaced persons—those who have relocated within a country's borders

to a location disconnected from their ancestral lands and as a result of the relocation have also become disconnected from their environment. Currently, however, legal protections for those facing climate-induced displacement are limited, representing a significant gap within international law. Although a plethora of policies, data, and technology seek to address climate change, there is no clear legal threshold for recognising when environmental degradation (exacerbated by climate change) has reached the point where rejecting people's claims for asylum because of climate-induced displacement violates international human rights norms, or when a State violates its positive obligation under international law to implement effective planned relocation policies for communities whose access to basic necessities will become compromised.⁵

On January 7, 2020, the United Nations Human Rights Committee (“The Committee”) issued a decision that provides a potential, though narrow, avenue for redress for climate-displaced persons. In the case in question (“the *Teitiota* case”),⁶ Ioane Teitiota and his family sought to remain in New Zealand after migrating from Kiribati. Though the claimant identified how environmental degradation and its downstream impacts would violate his family's right to life with dignity, the majority of the Committee did not find that returning the claimant to Kiribati

¹ 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.

² IPCC, *Special Report: Climate Change and Land*, at 353 (2019), https://www.ipcc.ch/site/assets/uploads/sites/4/2022/11/SRCCL_Chapter_4.pdf; United Nations Development Programme (UNDP), *Human Development Report: The Next Frontier: Human Development and the Anthropocene*, at 72 (2020), <https://hdr.undp.org/system/files/documents/hdr2020pdf.pdf>.

³ UN Women, *Explainer: How Gender Equality and Climate Change are Interconnected*, <https://www.unwomen.org/en/news-stories/explainer/2022/02/explainer-how-gender-inequality-and-climate-change-are-interconnected>.

⁴ General Comment No. 36 of the International Covenant on Civil and Political Rights (ICCPR) builds on the concept of art. 6 of the ICCPR (right to life) by emphasising that art. 6 is not only about preserving life, but that environmental degradation, and other factors, could undermine one's dignity by affecting their living condition, health, cultural rights etc. United Nations Human Rights Committee, General Comment No. 36, art. 6 (Right to Life), 124th sess, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019) (“hereinafter GC No. 36”).

⁵ States have obligations to safeguard and prevent risk to the health and physical integrity of individuals; this obligation emerges from the right to life and the individual's right to have their life respected and protected by law, as enshrined in art. 6 of the ICCPR and art. 2 of the European Convention on Human Rights; United Nations High Commissioner for Refugees, *Planned Relocation Disasters and Climate Change: Consolidating Good Practices and Preparing For The Future Report*, March 12-14, 2014.

⁶ *Teitiota v. New Zealand*, Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication* No. 2728/2016, U.N. Doc. CCPR/C/127/D/2728/2016 (Sept. 23, 2020) (“*Teitiota*”), 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.

would violate the International Covenant on Civil and Political Rights (ICCPR), citing a lack of individualised and imminent harm.⁷ Nevertheless, the Committee did provide a significant opening by recognising that environmental degradation could be so severe as to violate Art. 6, right to life (with dignity), and Art. 7, cruel, inhuman, and degrading treatment (CIDT). This policy brief’s analysis centres on Art. 6, right to life with dignity, by first looking at the origin of the term “dignity” in legal contexts and how it should be applied today when considering climate-induced displacement.

This brief is grounded in a notion of a right to dignity that can be found in the Universal Declaration of Human Rights (UDHR). Written in 1948, just after World War II, the UDHR aspired to set forth a common and universal vision for humanity. It begins, “[w]hereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...”⁸ What is striking is that “inherent dignity” precedes the terms inalienable rights, freedom, justice, and peace. Scholars have wondered what gives this concept of “dignity” its preeminent place within the UDHR, ICCPR, International Covenant on Economic, Social and Cultural Rights (ICESCR), The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment (CAT), Convention on the Rights of Persons with Disabilities (CRPD) etc. What makes it so fundamental to the enjoyment of human rights? A historical and contemporary examination of the term reveals that it functions as a means to adapt or broaden rigid definitions set out within the human rights framework.⁹ Simply put, it animates the spirit of the law by allowing policymakers and adjudicators to extend rights to those most vulnerable and “whose human dignity is imperilled.”¹⁰ In practice, this

is what advocates have been pushing for when they seek to expand the protections offered by the Refugee Convention (1951). However, one critique of this approach is the argument that the drafters of the Convention did not specifically envision protections to be extended to “climate refugees,” and therefore, any inclusion of climate-displaced persons within the Convention may serve to dilute it.¹¹ Another critique is that the Refugee Convention (1951) was only intended to protect individuals fleeing persecution, thus there must be an actor who is committing the act of persecution, typically the State, but also private actors who the State is unable or unwilling to control.¹² Nevertheless, the law around climate-displaced persons and state obligations remains unresolved and creates a significant protection gap in international law.

Since its adoption in 1951, the Refugee Convention has provided protection for those seeking asylum from another country on the basis of fear of future persecution based on specific protected categories, including belonging to a “particular social group.”¹³ Even though the interpretation of persecution has evolved over time to include, for example, domestic violence survivors where the State has failed to protect them, it has been narrowly interpreted by courts for those seeking protection because of climate displacement. So far, no successful claims have been brought under the Refugee Convention for climate-displaced persons involving the crossing of international borders.

Drawing on the centrality of dignity, the goal of this policy brief is to argue for the application of human rights protections to climate-displaced persons by building on the reasoning provided by the *Teitiota* case. As we develop a framework for defining these protections, we use design justice¹⁴ as a guide to formulating an intervention that centres the voices and concerns of those

⁷ *Id.* at para 9.6.

⁸ Universal Declaration of Human Rights (UDHR), UNGA res 217 A(III), at Preamble (adopted 10 December 1948).

⁹ Paolo G. Carozza, *Special Report: Human Dignity and the Foundations of Human Rights*, The Heritage Foundation, at 7 (Dec. 31, 2020) (“[human dignity] is not a single coherent idea, but represents the intersection of a variety of different traditions of thought . . .”)

¹⁰ *Win v Minister for Immigration & Multicultural Affairs* [2001] FCA 132 at 19.

¹¹ Docherty & Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 *Harvard Environmental Law Review* 393 (2009) (“changing the purpose of the Refugee Convention will dilute protection for traditional refugees”), <https://journals.law.harvard.edu/elr/wp-content/uploads/sites/79/2019/07/33.2-Docherty-and-Gianni.pdf>.

¹² *Id.* at 393.

¹³ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), at Art. 1.

¹⁴ These principles arise from the Design Justice Network and take the form of 10 principles, <https://designjustice.org/>.

most vulnerable to climate change. First, we integrate research and interviews focused on elevating the lived experience and knowledge of indigenous and local communities on what the right to life with dignity means to them. Next, we identify concrete examples of what dignity means under international human rights law both historically and within global contemporary case law. Combining both perspectives, we fashion a legal standard that provides a more equitable framework for determining whether a climate-displaced person's right to life with dignity has been violated. Several of the themes that make up dignity from our analysis include: physical and psychological integrity, inherent moral and self-worth, self-respect, self-determination, reputation, privacy, equity, access to justice, communal interconnectedness, reverence, education, owning property, and basic necessities of life (food, water, shelter, sanitation etc.).¹⁵ This policy brief on climate-displaced persons seeks to propose a legal standard that could establish a threshold for courts/ tribunals to articulate when the right to life with dignity has been violated. Finally, we suggest a methodology for using rigorous scientific modelling to help demonstrate that returning a climate-displaced person to their country of origin would violate their right to life with dignity.

Identifying when the right to life with dignity has been violated would help answer some fundamental questions: 1) when must courts intervene to protect climate-displaced persons from being sent back to their country of origin?; 2) what adaptation policies should be prioritised when thinking about internal relocation?; and 3) how can local and regional policies balance the need to preserve the culture/tradition of displaced persons while ensuring that host countries develop the infrastructure needed to support and fulfil their human rights obligations through planned relocation strategies? These questions will be touched upon in the policy brief, but a further exploration of each question is beyond the scope of this policy brief.



¹⁵ These themes come from legislation, national and regional case law, constitutions, and treaties covering: Oceania: Australia; Europe: European Court of Human Rights, Charter of Fundamental Rights of the European Union, Convention for the Protection of Human Rights, European Social Charter, France, Ireland, Italy, Germany, Portugal, Spain, Hungary, Poland, U.K., Norway, Greece, Belgium, Georgia; Americas: Inter-American Court of Human Rights, American Convention on Human Rights, American Declaration of the Rights and Duties of Man, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, United States, Canada; Asia: China, India, Japan, Malaysia, Pakistan; Africa: African Commission on Human and People's Rights, African Charter on Human and People's Rights, South Africa, Namibia, Uganda; Middle East: Israel



II. TEITIOTA CASE

New Zealand Court Decisions

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.¹⁶ Their three children were born in New Zealand but were not eligible for citizenship because neither of their parents were citizens and their birth took place after January 1, 2006.¹⁷ After the expiration of their visas, Teitiota applied for refugee status under the Immigration Act 2009 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 recognised that environmental degradation could “create pathways into the Refugee Convention.”¹⁸ In its examination of the facts, the Tribunal considered the expert testimony of a PhD candidate researching climate change in Kiribati, John Corcoran. His findings identified poor/infertile soil quality that compromised crop yields because of saltwater intrusion, high unemployment, population boom over the last 60+ years of 30x, limited infrastructure development (e.g. sanitation), and increasing social tension with land becoming more scarce due to coastal erosion. Moreover, increased storm intensities led to frequent flooding of certain areas by breaching seawalls in Kiribati, making certain locations uninhabitable and compromising the freshwater supply that was already taxed because of the population

¹⁶ *Teitiota*, *supra* note 6, at para. 2.5.

¹⁷ New Zealand, Citizenship Act 1977, at Part I 6(1)(b)(i) (“a person is a New Zealand citizen by birth if . . . the person was born in New Zealand on or after 1 January 2006, and, at the time of the person’s birth, at least one of the person’s parents was—(i) a New Zealand citizen . . .”).

¹⁸ *AF (Kiribati)* [2013] NZIPT 800413, at 55 (June 25, 2013).

boom. Sixty percent of the population obtained its freshwater from rationed supplies provided by the public utilities board, which made it quite evident that with freshwater supplies already severely compromised, further sea water inundations of the freshwater lens would put a severe strain on inhabitants.¹⁹

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.”²⁰ 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 Refugee Convention.²¹

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. However, the Supreme Court did reiterate the point made by the IPT that other circumstances could potentially create a pathway into the Refugee Convention.²²

Going back to 2000, there is a long list of Pacific Islanders seeking refugee protection in New Zealand and Australia based on arguments centred around climate change.²³ So far, they have all failed to move the courts into recognising

protections for climate-displaced persons under international human rights law.²⁴ This is what makes the findings in the *Teitiota* case to the U.N. Human Rights Committee so important.

U.N. Human Rights Committee (“The Committee”) Decision

The Committee recognised that the principle of non-refoulement²⁵ may go further than the Refugee Convention, and that the complementary protection may attach when there is a risk of an Art. 6, right to life violation. However, the Committee found that the threat must be personal, not a generalised country condition, and must be in a situation where the threshold to prove irreparable harm is high.²⁶ The Committee, citing International Covenant on Civil and Political Rights, General Comment No. 36, articulated the importance of people to enjoy a life with dignity and “to be free from acts or omissions” that could cause early death.²⁷ Moreover, the Committee acknowledged that environmental degradation can compromise the right to life with dignity as recognised by the Inter-American Court of Human Rights.²⁸ This is consistent with General Comment No. 36 where the focus is not only on the preservation of life but also preservation of the enjoyment of life with dignity within the context of natural disasters.²⁹

Although the Committee identified the possibility of extending complementary protections of non-refoulement under Art. 6 (Right to Life) of

¹⁹ *Teitiota*, *supra* note 6, at para 3. Kiribati imports a significant portion of its water supply. During drought conditions in June of 2022, Kiribati declared a state of disaster and required international assistance to provide enough potable drinking water for its population. In 2023, in South Tarawa, an area with approximately half the population, piped water was available for approximately two hours every second day, and is becoming unsafe to drink due to high salinity. See *The Other Side of La Niña: Providing Support During The Drought In Kiribati*, RedR Australia (March 20, 2023), <https://redr.org.au/australia-assists/deployees-in-the-field/the-other-side-of-la-nina-providing-support-during-the-drought-in-kiribati/>.

²⁰ *AF (Kiribati)*, *supra* note 18, at 74.

²¹ *Id.* at 97.

²² *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107, at 12 (July 20, 2015).

²³ Refugee Appeal No 72185 [2000] NZRSAA (10 August 2000); Refugee Appeal No 72186 [2000] NZRSAA 336 (10 August 2000); Refugee Appeal Nos 72189–72195 [2000] NZRSAA 355 (17 August 2000); Refugee Appeal Nos 72179–72181 [2000] NZRSAA 385 (31 August 2000); Refugee Appeal No 72313 [2000] NZRSAA 491 (19 October 2000); Refugee Appeal No 72314 [2000] NZRSAA 492 (19 October 2000); Refugee Appeal No 72315 [2000] NZRSAA 493 (19 October 2000); Refugee Appeal No 72316 [2000] NZRSAA 464 (19 October 2000); *Mohammed Matahir Ali v Minister of Immigration* [1994] FCA 887; 0907346 [2009] RRTA 1168 (10 December 2009) (Kiribati); 1004726 [2010] RRTA 845 (30 September 2010) (Tonga); Refugee Appeal No 70965/98, NZRSAA (27 August 1998) (Fiji).__

²⁴ See Appendix for case law around asylum claims for climate-displaced persons.

²⁵ States are prohibited from removing individuals from the country when they may face irreparable harm or human rights violations upon their return.

²⁶ *Teitiota*, *supra* note 6, at para. 9.3.

²⁷ *Id.* at para. 9.4.

²⁸ *Id.* at para. 9.4, fn 23.

²⁹ GC No. 36, *supra* note 4, at para. 26.

the ICCPR, they did not believe Teitiota's claim rose to meet that threshold. First, the Committee argued that Teitiota did not face imminent risk or arbitrary deprivation of life upon his return to Kiribati; rather, the risk of land disputes because of population growth was a generalised risk. Second, the Committee found that the current availability of freshwater, even if rationed, would not **“produce a reasonably foreseeable threat of a health risk that would impair his right to enjoy life with dignity”** or cause an early death.³⁰ Third, the Committee noted that there was insufficient evidence to find a reasonably foreseeable risk of food scarcity that would undermine his **“right to a life with dignity.”**³¹ And finally, relying on the expert witness testimony in 2016 that Kiribati would likely be uninhabitable within 10-15 years, the Committee found that such conditions may become “incompatible with the right to life with dignity” before such a risk is realised.³² Nevertheless, the Committee found that the time-frame of 10-15 years allowed for the opportunity of “intervening acts” by the State, and therefore, New Zealand did not violate Teitiota's rights under Art. 6 of the ICCPR.³³

U.N. Human Rights Committee (“The Committee”) Dissenting Opinions

One of the Committee members, Vasilka Sancin, noted that freshwater or potable water could not necessarily be equated with “safe drinking water” and that microorganisms in potable water can still be dangerous to health, especially for Teitiota's children who had only known New Zealand as their home.³⁴ This was underscored by one of Teitiota's children suffering from blood poisoning upon being deported to Kiribati, which formed into boils all over the child's body.³⁵ Moreover, the Special Rapporteur on safe drinking water and sanitation noted in her report in 2012 that Kiribati's national plans around water had not been implemented, and thus, the burden should have been on the State and not

Teitiota to prove that the State was fulfilling its positive duty to provide safe drinking water.

The second dissenting opinion came from Duncan Laki Muhumuza, who argues that “difficulty in accessing freshwater because of environmental conditions, should be enough to reach the threshold” showing that a right to life with dignity has been compromised.³⁶ And further, just because others in the country might be facing a similar reality, did not make the living conditions faced by Teitiota “more dignified”.³⁷

Why is Teitiota Important?

Long-term forecasts indicate 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).³⁸ If we broaden the lens, the International Organization for Migration suggests that there could be over 200 Million climate-displaced persons globally by 2050. Unfortunately, the current regime of refugee law, to this point, has not been interpreted by national jurisdictions to afford protections to climate-displaced persons.

However, General Comment No. 36 states that:

“[t]he duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may eventually give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity”³⁹

Hence, General Comment No. 36 interprets the protection of the right to life to include enjoyment of a life with dignity and allows climate-displaced persons to make compelling arguments in the context of environmental

³⁰ *Teitiota*, *supra* note 6, at para. 9.8

³¹ *Id.* at para 9.9

³² *Id.* at para. 9.11

³³ *Id.* at para. 9.11

³⁴ *Id.* at Annex 1, para. 3.

³⁵ *Id.* at Annex 2, para. 2.

³⁶ *Id.* at Annex 2, para. 4.

³⁷ *Id.* at Annex 2, para. 5.

³⁸ Frank Biermann and Ingrid Boas, *Preparing For A Warmer World: Towards A Global Governance System To Protect Climate Refugees*, (2010) 10 *Global Environmental Politics*.

³⁹ GC No. 36, *supra* note 4, at para. 30.

degradation, which has strong links to climate change. Therefore, identifying potential thresholds for when the right to life with dignity is compromised becomes important for future climate-induced displacement cases especially when State parties must take “appropriate measures to address . . . direct threats to life or prevent individuals from enjoying their right to life with dignity.”⁴⁰

Some of the direct threats identified by the Committee that are relevant to climate-displaced persons and place a positive obligation on the State focus on “degradation of the environment,” “deprivation of land, territories and resources of indigenous peoples,” and providing basic needs like water, food, sanitation, and shelter.⁴¹ Additionally, the State must have disaster management plans in place to address cyclones, floods, fires, droughts etc. which may affect the enjoyment of the right to life.⁴²

Further support for climate-displaced persons living a life with dignity comes in the dissent of the Teitiota case. In contrast to the majority opinion, the dissent argues that because many others in a community face, and will likely continue to face, situations that are inconsistent with the “standards of dignity,” this does not automatically negate Teitiota’s case or make it any less relevant.⁴³ For the dissenting member, the difficulty of accessing freshwater in itself meets the threshold of risk. Deaths occurring regularly is not the standard, threats to a life with dignity are sufficient.⁴⁴

Taking the position that the Teitiota case fails to clarify the proper standard or threshold of when the right to life with dignity has been violated, the policy paper will examine the process ICAAD has taken to develop a proposed legal standard that would account for families like Teitiota who face the uncertainty of international legal protections and climate impacts.



⁴⁰ GC No. 36, *supra* note 4, at para. 26.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Teitiota*, *supra* note 6, at Annex 2 para. 6 (dissenting opinion).

⁴⁴ *Id.* at Annex 2 para. 6. (dissenting opinion).



III. DESIGN JUSTICE

Before proposing a legal standard, ICAAD researched what a violation of someone’s right to life with dignity would look like in the Pacific. The two primary cases explored in our legal analysis were brought before tribunals in New Zealand and Australia and subsequently heard at the UN Human Rights Committee. Subsequently, ICAAD ran a series of virtual convenings inspired by design justice and Pacific research methodologies.



Design justice is the primary framework that ICAAD uses in its programmatic work. It is focused on how the design of systems impacts “the distribution of risks, harms, and benefits among various groups of people” in ways that resist and/or reproduce the matrix of domination which is composed of “white supremacy, heteropatriarchy, capitalism, and settler colonialism.”⁴⁵ In terms of climate-induced displacement, design justice is a useful framework to consider how the risks, harms, and benefits are unevenly distributed across groups and the way the systems that underlie visa allocation and refugee status, for example, are designed. It is also a useful framework to critically examine where well-intended designs fall short.

Design justice originated in U.S. scholarship and highlights the importance of place-based knowledge and centering the leadership of local communities. For the current research, it is critical to engage climate justice advocates in the Pacific who hold the knowledge as well as the anticipated risks, harms, and benefits of re-designed approaches to climate migration.

There are several Pacific research methodologies that derive from Indigenous epistemologies, and many are country and ethnic group specific.⁴⁶ For example, the Kakala research framework is specific to Tonga.⁴⁷ The Talanoa Research Methodology also originated in Tonga but has since been applied across the Pacific. While some have argued against the pan-Pacific approach to Pacific research methodologies, there are common principles that underpin Pacific research methodologies that can provide a useful framework for pan-Pacific research.⁴⁸ This research in particular suggests that a phenomenological approach, one that emphasises lived aspects of a concept, derived from the framework of design justice and underpinned by the common principles

of Pacific research methodologies will best facilitate the inquiry around the right to life with dignity in the Pacific.

The three primary shared principles among Pacific research methodologies relevant to this research are relationships, empathic apprenticeship, and cultural competency. Meaningful relationships are essential in all Pacific research methodologies, meaning that the process of doing research is honoured over the outcome of the research. Relationship-centred engagement is not only important for collecting rich data, given how our assumptions influence what information we share,⁴⁹ but it also comes back to the deeper question of the purpose of research. Particularly for the research at hand, it is the relationships developed in this process that will allow any real change to be manifested. While each collaborator sets the terms of engagement following each interaction, the aim is to build relationships to last.

The second principle is empathic apprenticeship which is a term coined by Farrelly and Nabobo-baba⁵⁰ that describes how Pacific storying and narratives operate cross-culturally in a phenomenological approach. There will always be gaps in cross-cultural understanding, but empathic apprenticeships is a shift from trying to understand a positivist reality to trying to understand and attune ourselves to the lives and lived experiences of our collaborators. This involves consideration of collaborators’ broader social existence including kinship, ethics, and customs. It also involves questioning our own interpretations and seeking to better attune our understanding by building accountability into the research process, for example, by confirming that we interpreted something correctly. This element also requires us to move past our conceptions of “reliability” and “validity,” which are common in positivist approaches, to one that prioritises the relationships and trustworthiness

⁴⁵ Costanza-Chock, S., *Design Justice: Towards an Intersectional Feminist Framework for Design Theory and Practice*, Massachusetts Institute of Technology, at 529 (2018), <https://dl.designresearchsociety.org/cgi/viewcontent.cgi?article=1554&context=drs-conference-papers>.

⁴⁶ Konai Helu Thaman, *Nurturing Relationships and Honouring Responsibilities: A Pacific Perspective* (2008); Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (1999).

⁴⁷ Konai Helu Thaman, *Kakala*, Mana Publications (1993).

⁴⁸ See that some disagree with a pan-Pacific application of the Talanoa Research Methodology. Tunufa’i, L., *Pacific Research: Rethinking the Talanoa “Methodology,”* *New Zealand Sociology*, at 31(7), 227–240 (2016).

⁴⁹ Vaioleti, T. M., *Talanoa Research Methodology: A Developing Position on Pacific Research*, *Waikato Journal of Education*, at 12 (2006).

⁵⁰ Farrelly, T., & Nabobo-Baba, U., *Talanoa as Empathic Apprenticeship*. *Asia Pacific Viewpoint*, at 55(3), 319–330 (2014), <https://onlinelibrary.wiley.com/doi/10.1111/apv.12060>.

of information by focusing on cultural meaning.⁵¹

The third principle which brings together empathic apprenticeships and the focus on relationships is cultural competency. Pacific scholars Fa'avae et. al.⁵² use cultural competency to describe the skill of being able to learn how things work in a given context. It is crucial for building relationships and practising empathic apprenticeship, and it is a process that does not translate smoothly across contexts. Cultural competency is practised through building relationships, identifying and challenging assumptions, and maintaining agility and humility in learning how things work.

Using Pacific research methodologies as non-Pacific researchers bears significant responsibility and cultural humility. For this work, we have foregrounded the principles of Pacific methodologies to create a highly relevant methodology to practise design justice for collaborative knowledge building.

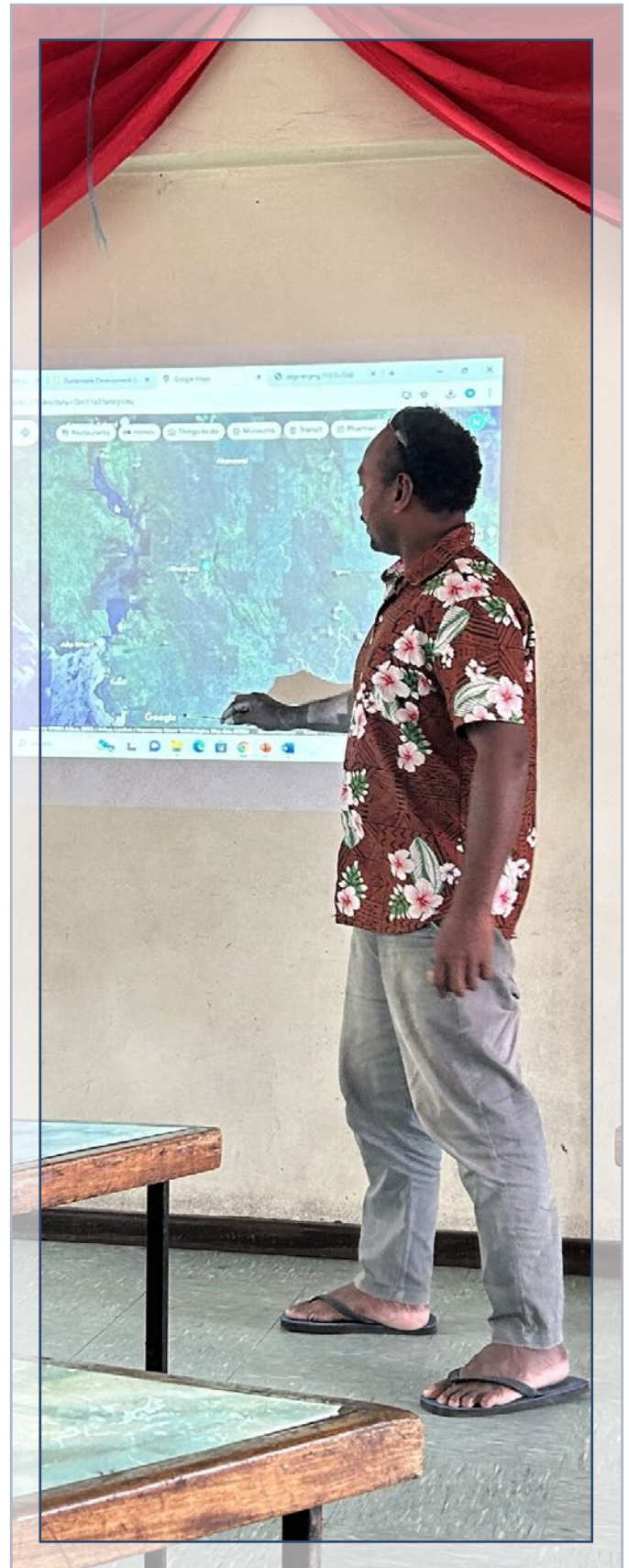
Methodology

In practice, this involved a series of virtual discussions from February 2021 to June 2022 that functioned to build relationships with and among frontline climate activists and distil, at the time, a 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 44 unique collaborators.

In each discussion, the facilitator spent time introducing the project and where it was at that point in time, offering questions about what the developing legal standard or modelling would mean for frontline communities, and building relationships among the collaborators. At the end of each convening, collaborators were asked about the strategy of the project as a whole and

ways to improve the virtual discussion series.

The collaboration with discussion participants extended to the review of a preliminary Working Paper on key developments. The relationships between the ICAAD team and the discussion collaborators are ongoing, and two of them resulted in unique separate projects.



⁵¹ Suaalii-Sauni, T., & Fulu-Aiolupotea, S. M., *Decolonising Pacific Research, Building Pacific Research Communities and Developing Pacific Research Tools: The Case of the Talanoa and the Faafaletui in Samoa*, *Asia Pacific Viewpoint*, at 55(3), 331–344 (2014), <https://onlinelibrary.wiley.com/doi/10.1111/apv.12061>.

⁵² Fa'avae, D., Jones, A., & Manu'atu, L., *Talanoa'i 'a e Talanoa - Talking about Talanoa*, *AlterNative: An International Journal of Indigenous Peoples*, 12(2), 138–150 (2016).

IV. INDIGENOUS & FRONTLINE PERSPECTIVES

Before commencing the virtual discussion series, a literature review of Pacific perspectives on climate migration helped to frame the key points of tension between the current limited policy and the wellbeing and interests of frontline communities. Much of the literature on climate migration points to the many interconnected reasons why people decide to or are forced to relocate. For example, it is challenging to disconnect the environmental drivers of migration from the socio-economic factors.⁵³ Further, political will in some jurisdictions or individual financial resources can allow some, and not others, to relocate.⁵⁴ Indigenous peoples in particular express their identity through the land which frequently results in a reluctance to move and leave their ancestral lands.⁵⁵

In addition to the fraught decisions around whether or not to relocate, the question of how cultural identities and self-determination can be preserved in new locations is a pressing one.⁵⁶ For some, adaptation in place is still the preferred choice.⁵⁷ Yet, climate inaction is still an ongoing and long-term threat to the right to life with dignity on the frontlines, and the gap in legal protections for those displaced or facing the threat of displacement in their lifetimes is glaring.

Indigenous peoples are acutely affected by the climate emergency. As noted at the First Peoples' and Indigenous Peoples' Declaration in October 2018, “[f]oundationally, Indigenous communities rely on local species, habitats, and ecosystems that are impacted by climate change. But those risks are elevated due to the long-term effects of colonialism, institutionalised racism, and histories of forced relocation.”⁵⁸ From a design justice and intersectional perspective, we note that centering the experiences of those most marginalised result in the best outcomes for all.

Communities experiencing the most severe impacts of the climate crisis on the frontlines urge states to not see climate mobility as a replacement for mitigation and decisive action. In the Kioa Climate Emergency Declaration 2022⁵⁹, which emerged from a gathering of Pacific civil society representatives, climate frontline communities emphasised how states have failed to meaningfully reduce greenhouse gas emissions, phase out fossil fuel extraction⁶⁰, and address the loss and damage already caused by climate change. **The call for urgent and decisive action to ensure the just, safe, and dignified movement of people in the context of climate change** was one demand among the wider calls to the international community for climate mitigation.

⁵³ Gerrard, M. B., and Wannier, G. E. Ch 1: *The Relationship among Climate Change, Environmental Degradation, and Migration in “Threatened island nations: Legal implications of rising seas and a changing climate”* (2013).

⁵⁴ Sophie Pascoe, *Sailing the Waves on Our Own: Climate Change Migration, Self-determination and the Carteret Islands*, Queensland University of Technology Law Review (2015).

⁵⁵ Carol Farbutko, *Voluntary Abandonment of the Movement: Indigenous Pacific Voices*, Forced Migration Review (2018).

⁵⁶ Farbutko, *supra* note 54.

⁵⁷ See generally Alexandra Nichols, *Climate Change, Natural Hazards, and Relocation: Insights from Nabukadra and Navuniivi villages in Fiji*, Regional Environmental Change (2019).

⁵⁸ First Peoples' and Indigenous Peoples' Declaration October 2018 and Report on the Convening, at 14 (2018).

⁵⁹ *Kioa Climate Emergency Declaration*, Pacific Civil Society Based on Kioa Talanoa (Oct. 19, 2022), <https://drive.google.com/file/d/1vhUOKWEgRyf1cmCkFqNBqpkkzmsb0r8J/view>. ICAAD participated in the drafting of the landmark Kioa Climate Emergency Declaration, which features the climate demands most pressing for climate frontline communities in the Pacific: including greater action on mitigation and adaptation, and ensuring the just, dignified and safe movement of people in the context of climate change. The Declaration brings a sense of urgency to RTLWD and the need to expand legal protections for climate-affected people.

⁶⁰ See the *Fossil Fuel Non-Proliferation Treaty Initiative*, <https://fossilfuel treaty.org/mission>.

A Conversation No One Wants to Have

The gravity of the conversation around losing one's ancestral lands to sea level rise was raised in almost every discussion. For many climate activists in the Pacific, fighting climate inaction and extractive industries is a priority, and climate displacement is a devastating consequence of government policy that prioritises unfettered economic growth over people and the environment. There was a resounding sense that these conversations around climate migration, while important, are about really traumatic realities for frontline communities.

At the policy level, collaborators also noted in four different jurisdictions, a disconnect between government policy, rhetoric, and what constituents actually want. For example, constituents in a country might be interested in the government pursuing diplomatic relationships to create pathways for external migration, while the government is concerned about brain drain and is fixated only on internal relocation. In any jurisdiction, there is a diversity of perspectives, but several collaborators acknowledged general dissonance between several Pacific governments and frontline communities.

Lessons from the Past

Several collaborators pointed to past examples of displacement where lessons for the future can be derived. There are a number of villages in Fiji that have undergone planned internal relocation. A Tuvaluan village was relocated as a community to Niue. In a parallel sense, the displacement of the Banabans by phosphate mining and the Marshallese by nuclear testing also extend important lessons for how we move forward.

In particular, the examples in Fiji and Niue raised the importance of community cohesion and collectivism in the process of planned relocation. For the Marshallese who were displaced, many now living in the U.S., questions were raised around what a right to life with dignity looks like in a host country. For Banabans living on Rabi Island in Fiji and in New Zealand, one of the main questions was around the right of return and the difficulties many face in accessing their ancestral lands on Banaba. Similarly, because of their immigration status under the Compact of Free Association, many Marshallese live precarious lives as a result of inaccessibility to government support services.

Economic, Social, and Cultural Rights

Several collaborators living in diaspora communities emphasised the challenges that still remain in host countries around upholding the right to life with dignity for immigrants of all types. Economic precarity, social exclusion, and limited support for upholding cultural identity function as major limiting factors for climate-displaced persons in host countries even after being granted protection.

Further, some collaborators brought up the often simplistic way that people talk about climate migration. 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. These discussions often led groups of collaborators to suggest that the ways the international legal community thinks about borders and immigration need to be changed dramatically in response to the climate crisis.

The impact of the climate crisis on cultural rights was a prevalent point of discussion. Threats to biodiversity, in particular, threaten not only food security and ecological health but also cultural identity and livelihoods. In Niue, the yellow hihi is a snail shell that is used primarily by women in global handicraft exchanges and is now threatened by climate change. The yellow hihi is specific to Niue and is a crucial component of Niuean identity and culture. Similar cultural impacts extend to traditional medicines as well.

The discussion series took place throughout the process of developing the legal standard which allowed for ongoing iteration. The insights raised in the discussions helped shape the direction of the proposed legal standard and modelling efforts. Examples from frontline communities helped the team test the standard in theory and explore what variables would be the most effective in substantiating an argument based on the violation of one's right to life with dignity.



V. DEFINING DIGNITY

“Human dignity” is a term that is so pervasive in international human rights law that its use often passes without notice. Despite its appearance in most of the postwar treaties and conventions that form the foundation of modern international human rights law, and the existence of numerous books discussing the concept from a variety of perspectives, there is little agreement on what human dignity means. Indeed, it remains unclear whether “dignity” has any substantive legal meaning at all.

The Teitiota case underscored this continuing source of ambiguity. In the case, the Committee ruled against Teitiota’s claim that environmental degradation threatened his right to life with dignity based on insufficiency of evidence rather than on categorical substantive grounds. In so doing, the tribunal implicitly affirmed life with dignity as a legally binding right, but the majority opinion illuminated neither the substance of that right nor the evidentiary standard Teitiota would have had to meet to establish a violation of it.⁶¹

In this section, we propose a substantive definition of human dignity as well as an evidentiary standard for determining when the right to life with dignity has been violated. Our proposed definition reflects the diversity of human experiences by climate-displaced persons and centres culture and context in determining what “dignity” means. While physical harms such as torture, sexual violence, or deprivation of food, water, or other necessities of life certainly qualify as violations of dignity, dignity is not (and should not be) limited to physical harms, nor should it exclusively center the human experience of those in the Global North. Rather, to ensure that the meaning of “dignity” is not unduly constrained, the cultural perspective of persons and groups seeking asylum should play a central role in determining whether or not a person’s right to life with dignity is under threat.

Dignity in Ancient and Early Modern European History

The etymology of “dignity” lies in the Latin term *dignitas*, a Roman social concept tied to social status and prestige. The term, most often associated with politically powerful males, carried a distinctly comparative and class-based meaning, denoting “high social status and the honours and respectful treatment that are due to someone who occupied that position.”⁶² The great Roman orator, writer, and politician Cicero did refer to the human race as a whole as having dignity, but only as compared to lower forms of animal life.⁶³

⁶¹ *Supra* note Part I at 11-12.

⁶² Michael Rosen, *Dignity: Its History and Meaning*, at 11 (2012).

⁶³ Cicero, *De Officiis [On Duties]*, Book I, Translated by Walter Miller. Harvard University Press (Loeb Classical Library) at section 106 (1913) (“[H]ow far superior man is by nature to cattle and other beasts: they have no thought except for sensual pleasure and this they are

The idea of all humans having an equal, shared dignity would have been foreign to Cicero and his contemporaries.

From late antiquity through the early modern period, Judeo-Christian influence imbued the concept of dignity with a more universalist flavour. This was due primarily to the concept of *tzelem elohim* or *imago dei*—the belief that all humans are created in God’s image.⁶⁴ This contrasted, however, with the reality of strictly class-based feudal society that dominated Europe throughout the Middle Ages and, in some regions, well into the modern era.

In the eighteenth century, a more coherent and firmly universalist meaning for the term arose as Enlightenment thinkers called traditional class-based distinctions into question. In his 1785 tract *Groundwork of the Metaphysics of Morals*, Kant used the concept of *Würde*, traditionally translated in English as dignity, to convey the idea that all humans, without exception or degree, are autonomous beings with an innate moral worth. That worth, however, is not the same as a *price* in the economic sense; on the contrary, Kant framed the concept of dignity as one that “admits of no equivalent” and thus cannot be earned, bargained for, or forfeited.⁶⁵ Kant’s philosophy holds that all humans are bound to respect each other’s autonomy and dignity by ensuring that they do not treat others as mere means to an end.

The writings of the French Revolution likewise used the concept of dignity (*dignité*) with universalist tones echoing Kant’s contemporaneous writings. This opened the door for marginalised groups in French society to invoke the concept of dignity as a fundamental human quality available to all citizens. During the debates regarding the *Declaration of the Rights of Man and of the Citizen*, a group of Parisian

Jews, who had been persecuted for centuries under the *ancien regime*, urged the National Assembly to explicitly recognise Jews as citizens in the declaration, arguing that, “[i]n restoring to man his primordial dignity, in re-establishing him in the enjoyment of his rights, it was not [the Assembly’s] intention to make any distinction between one man and another. This title [‘citizen’] belongs to all members of society, and the rights that flow from it thus belong to us equally.”⁶⁶ While the *Declaration of the Rights of Man and the Citizen* did not mention Jews or other long-persecuted groups explicitly, it nevertheless reaffirmed that dignity was something shared by “all citizens,” who, “being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations.”

Dignity in Non-European Traditions

As described above, the word “dignity” itself has Latin roots, and its incorporation into foundational international human rights law is generally recognised as invoking its use in European philosophical traditions. But non-European philosophies and cultures have their own conceptions of dignity. These conceptions undoubtedly influence how different signatories and stakeholders understand the term.

Some non-European dignity analogues bear a striking resemblance to the Enlightenment-era concept. In the Haudenosaunee confederacy of North America (known by the exonym “Iroquois”), the Great Binding Law of Peace (GBLP) proclaims equality between human beings and genders, and peace with foreign nations – comparable to values of inherent human dignity and universal human rights much later expressed in the Universal Declaration of Human Rights.⁶⁷ In East Asia, Daoist philosophy views each being, as well as nature itself, as having ethical relevance and a

impelled by every instinct to seek. . . . From this we see that sensual pleasure is quite unworthy of the dignity of man.”).

⁶⁴ Ruedi Imbach, *Human dignity in the Middle Ages (twelfth to fourteenth century)*, in *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives*, at 64-65 (2014); Yair Lorberbaum, *Human Dignity in the Jewish Tradition*, in *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives*, at 135-43 (2014).

⁶⁵ See Immanuel Kant, *Groundwork of the Metaphysics of Morals*, Translation by Mary Gregor Cambridge Univ. Press, at 42 (1997), <https://cpb-us-w2.wpmucdn.com/blog.nus.edu.sg/dist/c/1868/files/2012/12/Kant-Groundwork-ng0pby.pdf>; Thomas E. Hill, *Kantian Perspectives on the Rational Basis of Human Dignity*, in *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives*, at 215 (2014).

⁶⁶ Address Presented to the National Assembly by the Jews Residing in Paris, August 26, 1789, transl. Mitchell Albidor, <https://www.marxists.org/history/france/revolution/1789/juifsresidansaparis.htm>. Original French text available at <https://gallica.bnf.fr/ark:/12148/bpt6k466586> (accessed September 30, 2021).

⁶⁷ Lars Kirkhusmo Pharo, *The Concepts of Human Dignity in Moral Philosophies of Indigenous Peoples of the Americas*, in *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives*, at 147, 150 (2014).

uniqueness that deserves respect.⁶⁸ The Islamic concept of *karamat al-insan* similarly holds that Allah bestows a certain honour or preference upon all humans, elevating them above other forms of life—although people can possess it to greater or lesser degrees depending on their level of devotion.⁶⁹

A popular Sikh conception is that all human beings have dignity before Waheguru (wondrous light that dispels the darkness), similar to the universalist tones from post-Enlightenment Europe. However, an ideal person is expected to not only protect their own dignity, but also the dignity of all humanity (*sarbat da bhala*).⁷⁰ Moreover, the Guru Granth Sahib (Sikh religious text) emphasises the importance of extinguishing duality and seeing the divine in all, including nature.⁷¹ Through such spiritual practice, the individual obtains the state of “supreme dignity” because any distinction between the divine and oneself no longer exists.⁷²

Other religious and philosophical traditions recognise concepts akin to human dignity, but with principles that differ markedly from the post-Enlightenment European use of the term. Some Hindu texts, for instance, extoll various concepts analogous to the humanistic concept of dignity—some of which are arguably even broader than the European conception (all beings, not just humans, have dignity), while others are different or narrower (such as in the Laws of Manu, where dignity is presented as graduated and intertwined with a person’s social status).⁷³ Mahayana Buddhist philosophers have emphasised the reciprocity of spiritual and moral duties: “all living things possess dignity because they participate in the Buddha-essence, and

as such should be respected in the sense that others have the duty to support them in striving to end suffering.”⁷⁴ Confucius viewed dignity as something that is obtained and revealed through integrity and righteous conduct: to live a dignified life is to “care for one’s fellow people without desiring anything in return, to accept the responsibilities related to one’s particular social role and to act on these, and to endorse these ethical ideals even—or especially—in situations in which the strength of one’s character is put to the test.”⁷⁵

Usage in International Law

After the Second World War, the international community began to draw up the documents that would form the foundation of international human rights law. The term “dignity” appeared frequently in these documents, in a manner evoking the Enlightenment-era universalist meaning of the term. The Universal Declaration of Human Rights opens by recognising “the inherent dignity and ... the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world,” and its first operative article declares that “[a]ll human beings are born free and equal in dignity and rights.” The preamble to the International Covenant on Civil and Political Rights states that the “equal and inalienable rights of all members of the human family . . . derive from the inherent dignity of the human person.” The first principle of the Declaration of the UN Conference on the Human Environment (Stockholm Declaration) affirms “the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits **a life of dignity** and well-being.”⁷⁶

⁶⁸ Qiao Qing-Ju, *Dignity in Traditional Chinese Daoism*, in *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives*, 182, 185-86 (2014). This is because under Daoism, *Dao* is present in all individual things and it is *Dao*, rather than the individual beings and things it inhabits, that is dignified and deserving of respect. *Id.* at 182-83.

⁶⁹ Miklos Maroth, *Human Dignity in the Islamic world*, in *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives*, 155, 155-56 (2014).

⁷⁰ Dr. Arvinder Singh, *Sikhism: A Quest for Human Dignity in International Journal of Research*, at 8-9 (2015).

⁷¹ Guru Granth Sahib at 223, 226 (The term “supreme status” and “supreme dignity” are used interchangeably in the translations), <https://www.sikhithothemax.org/ang?source=G&ang=223>, <https://www.sikhithothemax.org/ang?source=G&ang=226>.

⁷² *Id.*

⁷³ Jens Braarvig, *Hinduism: the Universal Self in a Class Society*, in *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives*, at 163, 163-67 (2014); George Bühler, *The Sacred Laws of the Âryas*; Prasna 1, Patala 2, Khanda 6, in *Sacred Books of the East* (vol. 2), <https://www.sacred-texts.com/hin/sbe02/sbe0209.htm>.

⁷⁴ Jens Braarvig, *Buddhism: Inner Dignity and Absolute Altruism*, in *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives*, at 170, 173 (2014).

⁷⁵ Luo An’xian, *Human dignity in Traditional Chinese Confucianism*, in *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives*, at 177, 179-81 (2014).

⁷⁶ *Declaration of the UN Conference on the Human Environment (Stockholm Declaration)*, Principle 1 (June 16, 1972)

International human rights bodies and tribunals have generally reinforced the foundational documents' use of dignity to evoke a general sense that all people have an irreducible core of humanity that entitles them to certain rights. The United Nations Human Rights Committee, for example, considers the right to "life with dignity" to be an implicit component of the right to life under international human rights law.⁷⁷ Paolo Carrozza has identified several areas of international law where the phrase "dignity" is invoked and examined with particular frequency:

- Inhumane and degrading treatment (especially of individuals under state control)
- Discrimination
- Deprivation of basic necessities of life
- Contexts relating to human freedom more generally⁷⁸

No consensus has emerged, however, regarding a definition of "dignity," or even of whether the term implies the existence of rights other than those separately established under international law.

In fact, the frequent use of the term in human rights documents may owe itself to the ambiguity regarding its meaning. As Carozza has noted:

It represents the intersection of a variety of different ethical traditions, each of which provides a distinct grounding for the human rights listed in the document, but all of which can converge on a limited and general affirmation of the equal moral worth of all human persons.... The capaciousness of the word 'dignity' allows it to represent an affirmation belonging to a wide array of different traditions, while the generality of the term, standing alone without further elaboration, does not decisively signify any one of those traditions.⁷⁹

On one level, this seems inadequate—the concept of dignity is of limited practical utility to a tribunal if it is devoid of substance, and is instead merely a rhetorical trick designed to create the impression of consensus. On the other hand, the wide variety of different meanings that could be attached to "dignity" actually point to a way of interpreting it —precisely by incorporating the somewhat subjective nature of dignity into the term's definition and embracing the possibility that dignity might entail different things to different cultures in different contexts.

Such a culture and context-dependent approach to dignity is hardly novel; on the contrary, it can be seen in asylum cases from a number of jurisdictions. In 2001, an Australian court stated that a denial of civil rights amounts to persecution "when that denial is so complete and effective that it actually and seriously offends a real aspiration so held by an asylum seeker that it can be fairly said to be integral to his or her human dignity."⁸⁰ One of the most powerful enunciations of the need for a contextual approach to dignity comes from a 1999 Canadian Supreme Court decision:

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalised, ignored, or devalued, and is enhanced when laws recognise the full place of all individuals and groups within Canadian society.⁸¹

(emphasis added).

⁷⁷ GC No. 36, *supra* note 4.

⁷⁸ See Paolo G. Carozza, *Human Dignity*, in *The Oxford Handbook of International Human Rights Law*, at 345, 353-56 (2013).

⁷⁹ *Id.* at 349.

⁸⁰ *Win v Minister for Immigration & Multicultural Affairs* [2001] FCA 132 (Australia)

⁸¹ *Law v. Canada* (Minister of Employment and Immigration) [1999] 1 SCR 497

Proposed Definition

We propose the following legal standard for determining whether a climate-displaced person's right to life with dignity has been violated:

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.*

The first two items in this list are universal and objective; being deprived of life, health, or physical safety is a violation of human dignity regardless of cultural context.⁸² The last item, however, is open-ended and recognises that other aspects of the human experience can also be integral to dignity depending on culture, beliefs, and personal circumstances.

The phrase “fundamental to identity, conscience, or the exercise of one’s human rights” is drawn from prevailing interpretations of another open-ended term in refugee law: “membership in a particular social group.” To claim refugee status, a person must demonstrate that they are being persecuted on the basis of race, religion, nationality, political opinion, or membership in

a particular social group.⁸³ The UNHCR defined the lattermost term in guidelines it issued in 2002:

[A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.⁸⁴

The UNHCR guidelines implicitly tie this formulation to the concept of human dignity, describing this approach to refugee status as covering both “immutable” characteristics as well as those characteristics that are “so fundamental to human dignity that a person should not be compelled to forsake it.”⁸⁵

A violation of dignity only occurs, however, when someone is “deprived” of one of the items in the formula. The term “deprived” implies an *externally* imposed denial of something.⁸⁶ Consequently, this standard does not encompass voluntary practices or modes of living (e.g., an uncontacted community that depends on hunting and gathering, or a deeply ascetic religious order) that would constitute violations of RTLWD if forced upon an individual by others or by circumstances. Indeed, if those practices or modes of living are central to a person’s identity or conscience, forcing that person to give them up could itself constitute a violation of their dignity.

⁸² As described further below, however, the term “deprived” implies an *externally* imposed denial of something, rather than voluntarily forgoing it.

⁸³ Convention Relating to the Status of Refugees, 189 *U.N.T.S.* 137, at art. I.A(2) (adopted 28 July 1951, entered into force 22 April 1954).

⁸⁴ UNHCR, *Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/02)*, at para. 11 (May 7, 2002) (hereinafter, “*Guidelines*”). The UNHCR’s use of the phrase stems, in turn, from U.S. and Canadian asylum cases. See, e.g., *In re Acosta*, Interim Decision 2986 (BIA 1985) (noting that the common thread running through the various asylum-eligible grounds of persecution is that each is “aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed”).

⁸⁵ *Id.*, at para. 6.

⁸⁶ “Deprive.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/deprive>. Accessed 7 Nov. 2022 (listing first two definitions of “deprive” as “to take something away from” and “to stop from having something”).



Incorporating this phrase into the proposed legal standard for deprivations of dignity serves a number of crucial purposes. 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.⁸⁷

Relatedly, the definition also gives courts and tribunals flexibility when assessing claims of asylum. By extending protection to all identities and belief systems, regardless of whether international tribunals have ruled on or even encountered them before, this standard avoids the need to develop strict doctrinal definitions of what sorts of harms and threats constitute a violation of RTLWD. Technological, social, and economic expectations and norms change over time, and within and across cultures and regions. As such, flexibility is crucial to ensuring that tribunals are not handcuffed by outmoded or unduly rigid standards when adjudicating novel asylum claims.

Lastly, this definition finds support in the right to a clean, healthy, and sustainable environment (RTCHSE), which the United Nations General Assembly formally recognised in 2022.⁸⁸ Supranational adjudicative decisions and regional state practice affirm that the RTCHSE is a necessary prerequisite to various economic, social and cultural rights (such as rights to health, adequate food, safe drinking water, sanitation, and participation in cultural life).⁸⁹ In other words, without a clean, healthy and sustainable environment, one cannot attain the economic, social and cultural rights that constitute the basic necessities of life. General Comment No. 36 of the Human Rights Committee confirms that these basic necessities – such as potable water and reliable sources of food – are central to the right to life with dignity.⁹⁰ Similarly, General Comment No. 26 of the Committee on the Rights of the Child affirms (in the context of children's rights) that States should effectively implement environmental standards (such as those relating to air quality, water quality, food safety, and greenhouse gas emissions) in order to uphold the right to life with dignity.⁹¹ Loss of access to those necessities is a key consequence of the environmental degradation whose effects the RTCHSE is meant to manage.⁹²

⁸⁷ 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 practise traditional medicine to prevent and cure illnesses”).

⁸⁸ See G.A. Res. 76/300, *The Human Right to a Clean, Healthy and Sustainable Environment*, U.N. Doc. A/RES/76/300 (July 28, 2022) (hereinafter “RTCHSE”). The passage of G.A. Res. 76/300 supports an argument that the RTCHSE exists as a norm of customary international law; it manifests the collective state practice of more than 150 member states who voted in favour. It also builds on existing regional and national state practice. The right is recognised in regional treaties ratified by over 120 states, as well as the national legislation and constitutions of over 100 states: David R. Boyd (Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment), *Right to a Healthy Environment: Good Practices: Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, at para. 10. The language used in G.A. Res. 76/300 is indicative of *opinio juris*, as it links the “right to a clean and healthy and sustainable environment” to “other rights”, “existing international law” and international environmental law. Alternatively, G.A. Res. 76/300 is nonetheless significant as a soft law instrument formally recognising the RTCHSE as a standalone human right.

⁸⁹ Advisory Opinion OC-23/17, *Inter-Am. Ct. H.R. (ser. A) No. 23, Requested by the Republic of Colombia: The Environment and Human Rights*, Inter-American Court of Human Rights (IACrHR), at paras. 59-60 (November 15, 2017); Organization of American States (OAS), Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, O.A.S.T.S. No. 69, at art. 11 (16 November 1999); Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria (Communication No. 155/96), Afr. Comm'n H.P.R., at paras. 50-51 (27 May 2002); ASEAN Human Rights Declaration, art. 28 (November 19, 2012).

⁹⁰ GC No. 36, at para. 26; International Covenant on Economic, Social and Cultural Rights (ICESCR), art. 15(1)(a); Committee on Economic, Social and Cultural Rights, General Comment No. 21, *Right of Everyone to Take Part in Cultural Life*, art. 15(1)(a)), 43rd sess, U.N. Doc. E/C.12/GC/21, at para. 16(a) (Dec. 21, 2009) (The CESCR considered the right of everyone to take part in cultural life on the basis of equality and non-discrimination. The CESCR stated that the full realisation of this right requires the availability of “nature's gifts, such as seas, lakes, rivers, mountains, forests and nature reserves, including the flora and fauna found there, which give nations their character and biodiversity”).

⁹¹ Committee on the Rights of the Child, General Committee No. 26 on children's rights and the environment, with a special focus on climate change, 93rd sess, UN Doc. CRC/C/GC/26, para. 20 (22 August 2023).

⁹² See Declaration of the UN Conference on the Human Environment (Stockholm Declaration), Principle 1, June 16, 1972 (people have “the fundamental right to freedom, equality and adequate conditions of life, in an environment of

VI. EVIDENTIARY STANDARD FOR DETERMINING A VIOLATION OF RTLWD

Even if we accept a working legal definition of life with dignity, the question remains: what standard should a tribunal use to determine whether or not the right to life with dignity has been violated? For the reasons described in this section, we propose that tribunals use the following standard when adjudicating climate-displaced persons' applications for protection:

*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.*

Having addressed the meaning of dignity in the previous section, we now turn to the other three

components of this proposed standard.

Probability (Reasonable Chance)

The legal consensus is that a threatened harm need not be *more likely than not* for an applicant to be entitled to refugee protection, so long as the applicant demonstrates that there is a reasonable chance that they will suffer intolerable conditions if their application is denied (if they would be deported to their country of origin—as a suggestion of the full consequence). The UNHCR Handbook states that an applicant's "fear of persecution is well-founded if it can be established, *to a reasonable degree*, that her or his continued stay in the country of origin has become, or would become, intolerable."⁹³ The United States Supreme Court has similarly indicated that "it is enough that persecution is a *reasonable possibility*" for an asylum applicant to be entitled to protection,⁹⁴ and the United Kingdom and other common law jurisdictions follow the same rule.⁹⁵ As recent UNHCR guidance suggests,⁹⁶ the same standard should

a quality that permits a life of dignity and well-being."); David R. Boyd (Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment), *Right to a Healthy Environment: Good Practices: Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, at para. 38-112, delivered to the Human Rights Council, U.N. Doc. A/HRC/43/53 (Dec. 30, 2019) (discussing access to healthy and sustainably produced food, clean water, and adequate sanitation as components of the RTCHSE); Solène Kerisit & Martha F. Davis, *Recognizing the Human Right to a Healthy Environment: Annotated Bibliography*, NE Univ. L. Rev. Extra Legal (Jan. 27, 2023), <http://nulawreview.org/extralegalrecent/2023/1/10/recognizing-the-human-right-to-a-healthy-environment-annotated-bibliography>.

⁹³ U.N. High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, at para. 223 (1979, re-edited 1992) (emphasis added). See also 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> (accessed Feb. 20, 2023) ("It is generally agreed that persecution must be proved to be "reasonably possible" in order to be well-founded.").

⁹⁴ *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 *id.* ("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.").

⁹⁵ See, e.g., *R. v. Sec'y of State for the Home Dep't, ex parte Sivakumaran*, [1988] A.C. 958 (H.L.) ("[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").

⁹⁶ See UNHCR, *Legal Considerations Regarding Claims for International Protection Made in the Context of the*

apply to “climate refugees”: a climate-displaced person should be entitled to protection so long as they can demonstrate a *reasonable chance* that they will suffer a loss of dignity.⁹⁷

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 asylum applicant’s life and living conditions.

Temporal Proximity (Within the Applicant’s Lifetime)

It is our view that scientific modelling can be used to help calculate the probabilities associated with particular climate-related harms, and thus shed light on whether the evidence establishes that an applicant faces a reasonable chance of suffering a loss of dignity due to the effects of climate change. But in order to calculate such probabilities, the standard must answer another question: what period of time should be used as a basis for probability calculations?

Choosing a timeframe is essential for making such calculations, because the probability of a particular event occurring cannot be determined without fixing a period of time over which that probability will be calculated. To use an extreme example, it is almost certain that someday, on the timescale of thousands or tens of thousands of years, there will be a supervolcanic eruption somewhere in the world that renders particular regions uninhabitable and causes major planetwide climate disruptions, such as the Lake Toba eruption did 75,000 years ago. But the odds of such an event in the next 50 years are quite

low, and the odds that such an event will occur in any given region of the world during the next 50 years are lower still. Whether the eruption of the supervolcano is viewed as a high-probability or low-probability event thus depends on the timeframe used as the basis for the calculation.

Similarly, calculating the probability of a particular climate-change-related event requires specifying a time frame during which the event might occur. The probability of a sea-level rise sufficient to render a particular island uninhabitable might be quite low during the next five to ten years, but could be quite high over the next fifty.⁹⁸

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 academics such as Jane McAdam 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.⁹⁹

As McAdam has argued, 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.¹⁰⁰ This includes the effects of climate change, which may unfold slowly, making it difficult to draw a line between threats that are imminent and those that are not.¹⁰¹ 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

Adverse Effects of Climate Change and Disasters, Int’l. Journal of Refugee Law, at 5 (Oct. 27, 2021) (the totality of the circumstances “will determine how the enjoyment of human rights are affected and whether a reasonable possibility of being persecuted in the country of origin exists”), <https://www.refworld.org/policy/legalguidance/unhcr/2020/en/123356>.

⁹⁷ Our use of the term “chance” should not be read as carrying a different meaning than “degree” or “possibility.” “Chance” simply is a term that is more easily understood in statistical, as well as legal, contexts.

⁹⁸ See, e.g., Intergovernmental Panel on Climate Change, *Technical Summary*, at 62 (2022) (discussing various risks to coastal and island communities due to sea-level rise over different timescales ranging from 2030 to 2100).

⁹⁹ Jane McAdam, *A Well-Founded Fear of Being Persecuted ... But When?*, 42 Sydney L. Rev. 155, 156-58 (2020).

¹⁰⁰ *Id.*, at 174-80 (pointing to cases involving children, slow-onset impacts of climate change, armed conflict, and health deterioration as examples where a longer timeframe for analysis is particularly appropriate)

¹⁰¹ See UNHCR, *Supra* note 92, 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,” recognising “that impacts may emerge suddenly or gradually; overlap temporally and geographically; vary in intensity, magnitude and frequency; and persist over time.”)



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, as they are far from sufficient and largely are not on track to being met.¹⁰² The basis for determining climate impacts should instead prioritise the information within IPCC assessments as well as the ‘status quo’ climate realities on the ground.

For these reasons, no rigid temporal proximity limitation should be imposed, and climate-displaced persons 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 (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) and one that provides a definitive end point past which the threat of future harm becomes immaterial with respect to a given applicant. It thus supplies a more solid basis for probability calculations than the flexible-but-vague “reasonably foreseeable future” approach adopted by the High Court of Australia.¹⁰³

The possibility that intervening events, including mitigation and adaptation efforts, may attenuate or eliminate the threatened harm should not be treated as possibilities that *per se* preclude the granting of protection, nor should countries’ claims that such efforts will succeed be accorded a presumption of truth. Rather, the possible implementation and effects of mitigation and adaptation should simply be treated as factors affecting the probability that the harm will come to fruition.

Hypothetical Case Study

For example, say that an applicant comes from a community in Country X where residents face threats to their life with dignity from rising sea levels, but that those threats could, in principle, be completely eliminated by the very expensive and labour-intensive construction of seawalls. For the sake of simplicity, assume that aside from such seawalls, no other adaptation or mitigation measures could avert the dignitary harms that the applicant would suffer if the sea levels continue to rise. Here, there are two major sources of uncertainty that affect the probability that the applicant will suffer harm to their dignity:

- A. Whether and when a sea level rise sufficient to threaten the applicant’s life with dignity will occur;
- B. Whether and when Country X’s government (or third party donors) will make the necessary investment to construct the seawalls.

The tribunal should consider both of these sources of uncertainty when determining whether the applicant faces a threat to their life with dignity. Thus, if there is a very high confidence that sufficient sea level rise will occur in the applicant’s lifetime, then the only source of uncertainty would be whether the needed seawalls will be constructed before that sea level rise occurs. In such a scenario, the tribunal should find that the applicant faces a reasonable chance of a loss of dignity unless there is strong evidence that the seawalls are likely to be completed before the sea level rise reaches the threshold where it will harm the applicant’s right to life with dignity.

Conversely, if construction of a seawall is already underway and the tribunal deems it almost certain that the seawall will be completed before rising seas could plausibly affect the applicant’s community, the tribunal might find that there is no reasonable chance that any harm associated with rising seas would actually occur.

¹⁰² United Nations Climate Change, *Climate Plans Remain Insufficient: More Ambitious Action Needed Now* (Oct. 26, 2022), <https://unfccc.int/news/climate-plans-remain-insufficient-more-ambitious-action-needed-now>.

¹⁰³ See generally McAdam, *supra* note 99.

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 RTLWD violation would occur if they remained in their country of origin until age 75.

Complementary protection

The global and pervasive nature of climate change means that entire communities—and even entire states or regions—are being threatened with climate-induced displacement. Consequently, 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 otherwise identically situated 75 year-old grandparent, however, likely does not. Applying the reasonable chance standard to both applicants individually thus 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 dignity.

To avoid creating such violations of dignity, we propose including the following in the legal standard:

In cases where multiple similarly situated individuals with familial or community ties apply for protection, some of whom satisfy the standard for individual protection and some of whom do not, *complementary protection* should be extended to an otherwise non-qualifying applicant if denying such protection would violate any applicant's RTLWD.

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. If a particular relationship is central to an individual's identity or conscience, then the tribunal considering the individual's claim for refugee protection must account for that relationship in its decision, regardless of the host country or tribunal's own conceptions of the significance of such relationships. Thus, if an indigenous culture has an expectation that children will personally care for their parents in old age, then separating a parent from a child might violate the parent's (or the child's) RTLWD. The fact that paid caregivers commonly take on that role in other countries, cultures, or communities should not override the applicant's conception of the parent/child relationship.

This principle extends to any relationships that may exist in a society or community: If an applicant demonstrates that a particular relationship, irrespective of kinship or marriage, is central to their identity, conscience, or human rights, then a tribunal must respect that relationship as fundamental to the applicant's dignity, and adjudicate the application accordingly.

This standard was crafted to adjudicate the unique circumstances that climate-induced displacement is already creating, and will create with increasing frequency and severity in the coming years. There is, however, no particular reason to confine the proposed definition of life with dignity, or the evidentiary standard for adjudicating when it is violated, to the use case of climate-induced displacement. The same standards could readily be applied to asylum applications in other cases. The proposed definition of life with dignity would help ensure that tribunals give proper regard to applicants' personal circumstances and cultural context. The evidentiary standard could help bring clarity and precision to the role of temporal factors, which has generated considerable confusion in adjudicating asylum applications. The legal framework set forth above could therefore help enhance both the fairness and the consistency of standards applied to asylum applications in a variety of contexts.



VII. MODELLING

To establish that a climate-displaced person’s RTLWD would be violated by returning them back to their country of origin, it is helpful to rigorously demonstrate how extensively conditions in the displaced person’s country of origin will likely degrade in the coming years and decades. Here, we present a starting point for how one might establish the scientific basis for an infringement of RTLWD due to climate change.

Importantly, the process we are proposing is for modelling climate change’s impacts on the country of origin of *a specific climate-displaced person* (or a small group of climate-displaced persons). This is not to be confused with the line of scholarly work connecting environmental degradation and climate change to patterns of mass migration. Such work is concerned with questions about migration writ large: “Given that certain environmental changes occur, how do migration patterns change?” But that is only tangentially related to the question a tribunal

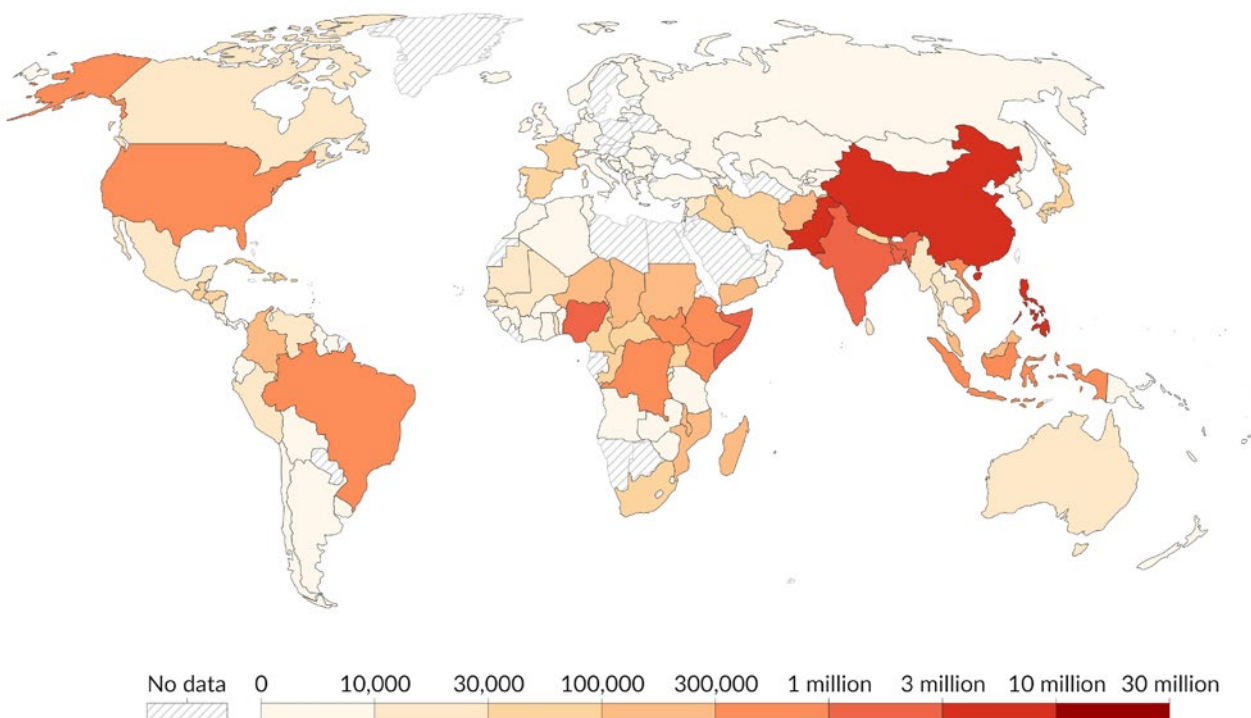
would be concerned with: “Given that this person, family, or community has *already migrated*, what would happen to them, specifically their RTLWD, if they were returned?” The approach we propose aims to answer this question by modelling future effects of climate change on factors that directly affect residents’ RTLWD in the country of origin.

We will also present a case study on how we attempted to apply our process to modelling water resources in Kiribati. The case study, like the method, should be seen as suggestive, not authoritative. Indeed, it was only by attempting this case study that we developed the process, and the case study was not fully successful. Nonetheless, our experiences suggest valuable insights regarding what elements are necessary and what obstacles may surface.

People displaced internally by natural disasters, 2022



Internally-displaced persons are defined as people or groups of people who have been forced or obliged to flee or to leave their homes or places of habitual residence, as a result of natural or human-made disasters and who have not crossed an international border.



Data source: Multiple sources compiled by World Bank (2024)

OurWorldInData.org/natural-disasters | CC BY

Proposed Process

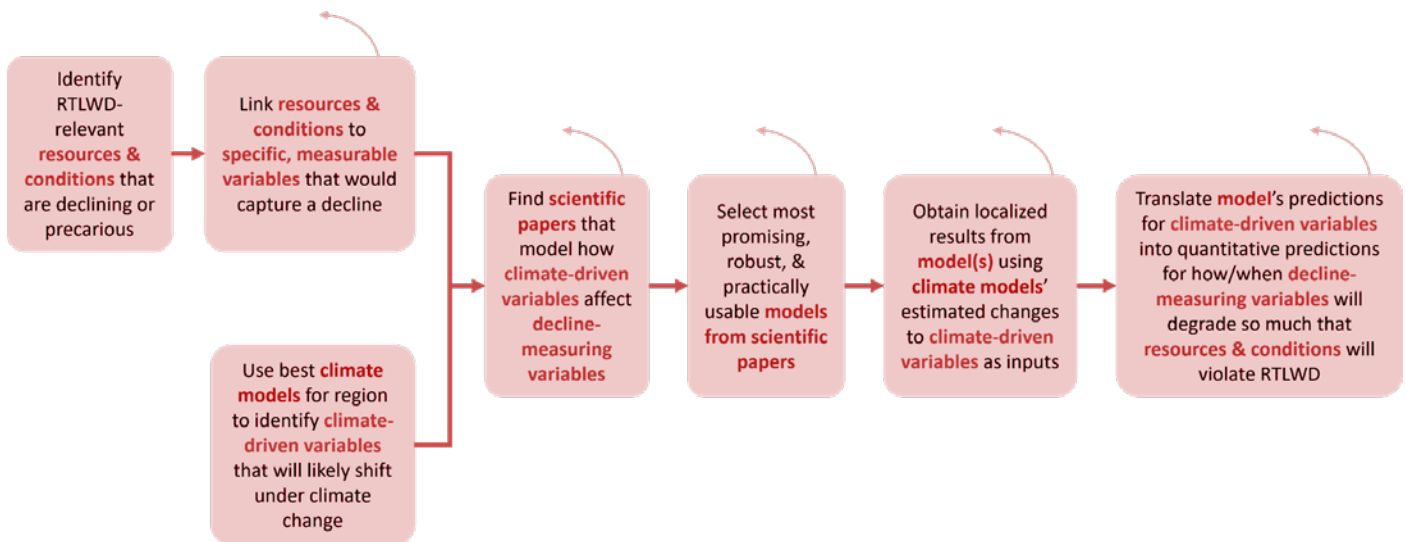


Figure 1: Our proposed process entails identifying RTLWD-relevant, climate-driven variables; applying existing scientific models to make localized predictions of those specific, measurable variables; and using the predictions to understand when, how, and with what probability conditions will likely violate RTLWD. Curved arrows indicate places where findings may suggest or necessitate reconsidering earlier decisions.

The steps we propose, shown in Figure 1, are largely sequential, but the initial stages allow and even benefit from some parallel work. In practice, the process will also likely require iteration, where downstream discoveries force earlier questions to be revisited (as denoted by the curved arrows). The steps will likely need to be adjusted on a case-by-case basis depending on the extensiveness of prior literature, the availability of data, and the variables of interest.

The process starts with identifying a few broad categories of natural resources and conditions that affected communities consider central to their RTLWD and that are declining or precarious. Such resources and conditions should be identified through interviews with affected communities (see sections III and IV for useful frameworks) and literature reviews. Examples might include freshwater (quantity and quality), food harvests (including both agricultural productivity, both large and small scale, and wild caught or foraged foods), physical infrastructure (stability and security), health and disease, and outdoor weather that affects ability to work. It is helpful even at this stage to search specifically for conditions that are likely to be affected by climate change, though later steps may reveal that some conditions will be affected more or

less than expected.

Once resources and conditions of concern have been identified, they must be linked to concrete, rigorous variables that measure changes. These variables will provide the empirical link between predictive models of climate impacts and the affected communities' RTLWD. For example, freshwater is frequently a resource of concern. Fresh water lenses (FWL) form beneath the surface of an island or coastal area and maintain a barrier from the saline water. An FWL forms due to rainfall and other inland sources that may percolate from porous rocks or soil.¹⁰⁴ Depending on the hydrology of the area of interest, variables related to surface water volume or composition, groundwater volume or composition, and/or precipitation quantity or timing may be the most relevant to assessing changes in freshwater quality or quantity due to climate change.

When the goal is to show that climate change in particular will lead to conditions incompatible with RTLWD, it is essential to understand the relationship between climate and the variables of interest. This rests on identifying the most up-to-date, reliable, and high-resolution climate models available for the region. These models will offer predictions of changes to climate-

¹⁰⁴ United States Geological Survey (USGS), *Guam's Water Resources: How do Climate and Humans Impact Freshwater Resources, and How can we Plan for Change?* (Sept. 2019), https://www.pacificrisa.org/wp-content/uploads/2019/10/Pacific-RISA-Guam-water-resources-handout_Sept-2019.pdf.

driven quantities such as rainfall quantities, wind speed, and ocean temperatures, which in turn will drive changes to the variables measuring the decline of conditions and resources of interest.

We strongly recommend identifying and consulting the climate models as early as possible in the process, perhaps in parallel with establishing the conditions of interest and the decline-measuring variables. This is because the choices of resources and conditions, decline-measuring variables, and climate models are tightly intertwined, and findings about each may substantially inform what choices are feasible for the others.

Returning to our earlier example, if groundwater volume is the most relevant variable for freshwater availability, but the best climate models for the region predict an increase in precipitation (and thus presumably in groundwater), it may

be necessary to look to other variables when assessing whether a RTLWD violation will occur. Another solution may be to switch to studying a condition or resource that communities ranked second or third in importance, but which is more closely related to negative impacts of climate change or which can be forecast with greater accuracy or precision. Of course, further exploration might reveal more nuanced or even paradoxical effects: the timing and intensity of the precipitation could cause runoff and siltation that degrades groundwater, or precipitation might decrease while intense storms increase, leaving an area subject to both more drought and more flooding. In such cases, groundwater might be an excellent focal point, after all. To weigh such considerations, one must have conditions and resources, measurable variables, and localised climate model predictions all on the table together.

Resources or Conditions	Potential variables to model/link to climate. These variables are particularly important to SIDs communities.
Freshwater	rainfall per year/rainy season, frequency of overtopping events/storm surges, FWL recovery times from overtopping, rise in eustatic sea levels that could compress FWLs
Agriculture	rainfall (amount and timing), soil salinity, heat, extreme events (e.g. wind, flood, drought)
Wild foods	predicted population levels; ecosystem integrity related to sea/stream/forest temperature or rainfall
Physical infrastructure	eustatic SLR, ¹⁰⁵ storm surge size/frequency, extreme wave height frequency, extreme wind frequency
Health	range shifts of vector-borne disease, temperature (i.e. heat related health impacts), prevalence of local parasites, water quality

¹⁰⁵ Eustatic SLR indicates global average increase of oceans. This can occur for two reasons, 1) increase in volume of water (i.e. glacier melt) or 2) decrease in volume of ocean basins. Woods Hole Oceanographic Institution, *Sea Level Rise: Eustatic v. Local*, <https://www2.whoi.edu/site/coastalgroup/about/what-we-study/primers/sea-level-rise/>.



Armed with a variety of variables that measure declines in the resources and conditions of interest, one can look for scientific papers that analyse the likely impacts of the changes in climate-driven quantities on the decline-measuring variables. By evaluating the models and discussing them with their authors, the most promising, robust, and practical models can be selected. Models or studies may not need to be specific to the region in question, as long as they can be realistically rerun for the region and the necessary data to do so either already exist or can be gathered cost-effectively.

The results from the chosen model(s) can be obtained either by requesting them from the authors, if the models have already been run for the location of interest, or by rerunning the models as needed in collaboration with the authors. The detailed models will generally rely on the climate-driven quantities predicted by localised climate models. It may be appropriate to run the models for several climate scenarios—e.g., with low, moderate, and high sea level rise. Scientists can then work with the legal team to translate model outputs for climate-driven variables into quantitative predictions for impending RTLWD violations (e.g., >X% probability of Y months per year with Z crop conditions). It is critical to coordinate with the legal team *before* getting too far into a specific modelling approach to ensure that the outputs will provide information of a form that will be useful for establishing these assertions.

Scientific models and data including climate models are typically presented with some measure of uncertainty (confidence interval, significance level, probability etc.), and there are guidelines that scientists use to determine what they are willing to accept or present (e.g., 95% confidence interval, P-values). However, the levels of certainty required for legal purposes are not necessarily the same as what would be acceptable to a scientific audience. Thus, it is important to present and discuss uncertainty throughout the modelling process with the legal team.

Case Study: Freshwater Lenses in Kiribati

We developed the framework outlined above as an improvement on the process we followed ourselves in an initial case study. For our exercise, we selected Kiribati based on the Teitiota case, the island's known vulnerability to climate impacts, and the relative availability of data. Based on 18 interviews with 44 Pacific Islanders, including Kiribati residents, we selected several potential resources or conditions of interest: food security, freshwater availability, housing security, and biodiversity (specifically culturally significant resources). We then identified variables or models that could affect these: cyclone frequency, amount of sea level rise, quantity and timing of precipitation, temperature, and organism range shifts.

After reading about 20 modelling and data-related papers on water resources in Kiribati and other atolls (both in the Pacific and elsewhere), we settled on FWL as a key resource in Kiribati that was vulnerable to and already experiencing degradation. Several of the papers specifically modelled FWL behaviour in the wake of washover events, storms, or other adverse circumstances that might increase with climate change. After examining several models, we contacted the authors to delve into the details of the models to see whether and how we could adapt them to our purposes.

For each of the two or three most promising FWL models, we realised that a critical driver was the frequency of the overtopping events that were presumed to contaminate the FWLs in the first place. It was only at this point that we turned to climate models' predictions of how these frequencies would shift with climate change. We found that these predictions were very inconclusive: generally, climate change is expected to increase the intensity and reduce the frequency of cyclones (a primary driver of storm surges), but Kiribati is currently largely shielded from cyclone effects, and it is not yet known how strongly affected storm locations and routes will be.¹⁰⁶ Additionally, climate change is projected to increase net precipitation in Kiribati.¹⁰⁷ Furthermore, the most thorough modelling efforts to date on Kiribati's

¹⁰⁶ The World Bank Group, Climate Risk Country Profile: Kiribati, at 10 (2021), https://climateknowledgeportal.worldbank.org/sites/default/files/country-profiles/15816-WB_Kiribati%20Country%20Profile-WEB.pdf.

¹⁰⁷ *Id.* at 8-9.

future water resources¹⁰⁸ demonstrate that the most significant factor is water management decisions; any effects of overtopping may be dwarfed by water usage changes.

This is the point at which iteration would be needed: we had determined that it would be difficult to demonstrate a violation of RTLWD based on climate impacts on FWLs, so an RTLWD case would have to be based on other variables. For example, coastal flooding from sea level rise combined with normal wave activity can threaten lives, structures, and livelihoods in Kiribati.¹⁰⁹ Due to resource constraints, we did not explore such alternative possibilities further. However, we would likely have been able to investigate other avenues had we looked into the climate models earlier: We would have realised sooner that the models' predictions for storm frequency in Kiribati were too inconclusive to be helpful. Had we switched sooner to, e.g., coastal flooding or agricultural production, which are more clearly linked to near-term climate change impacts, we may have been able to predict impending RTLWD violations in Kiribati in a clear-cut, quantitative fashion.



¹⁰⁸ See generally Bosserelle et al., Bonriki Inundation Vulnerability Assessment: Assessment of Sea-level rise and inundation effects on Bonriki Freshwater Lens, Tarawa Kiribati - Groundwater Modelling Report (2015), https://biva.gsd.spc.int/files/BIVA_GW_Field_Investigations_Report_FINAL.pdf.

¹⁰⁹ The World Bank Group, *supra* note 102, at 12.

VIII. POLICY IMPLICATIONS

As the climate crisis intensifies, adopting this proposed legal standard in international law would increase legal protection for climate displaced persons, thus allowing greater climate mobility for those most vulnerable to environmental degradation.

More broadly, the number of climate cases being brought on human rights grounds is growing, and this type of litigation is set to continue. Annalisa Savaresi and Joana Setzer from LSE's Grantham Institute have identified more than 100 climate cases that rely on human rights arguments to promote action on climate change.¹¹⁰

One of the cases is *De Conto v. Italy and 32 other states* before the European Court of Human Rights, which alleges that the respondents have violated human rights by failing to take sufficient action on climate change. Another is *Tsama William and Others v. Uganda's Attorney General* which alleges that the respondents have failed to address known landslide risks in Bududa district, leading to the violation of applicants' fundamental rights including the right to life with dignity following a landslide in 2019. This has been argued on the basis that the region is increasingly vulnerable to climate change impacts, which are likely to worsen landslides. While the government developed a resettlement plan in 2010 – recognising the risk to communities – it failed to carry out the relocation. This underlines the relationship between displacement, the right to life with dignity, and climate impacts. The proposed legal standard for the right to life with dignity may impact such cases brought on human rights grounds in the future by providing a critical context specific lens in which to objectively measure whether the right to life with dignity has been violated.

National Immigration Policies & Bilateral Agreements

The proposed legal standard could also be adopted in national immigration policies, bilateral immigration policies, and internal relocation policies. International human rights law sets a consistent benchmark for national governments. The proposed legal standard can be a powerful tool in shaping immigration and internal displacement policies to uphold states' existing commitments to international human rights law as they relate to climate displacement.

Another pathway to increasing mobility for climate displaced communities is through bilateral agreements. To uphold the right to life with dignity, these agreements must provide accessible pathways to citizenship for climate-displaced persons as well as the right to return to their country of origin. A shared understanding of the breadth and depth of dignity violations will help clarify the need for and development of such agreements.

Internal Relocation

In the Pacific, internal relocation policies vary widely in terms of priorities, risk profiles, and formality. The two most comprehensive policies are the Vanuatu Displacement Policy and the Fiji Planned Relocation Guidelines. Many countries in the region are in the process of developing national policies around internal relocation. For existing policies, international human rights instruments are incorporated to varying degrees. These policies account for Indigenous knowledge ways of being in both planning relocation and resettling communities, and there is plenty of alignment with the proposed legal standard. Developing policies could benefit from the proposed legal standard as a threshold to help define decision making around planned relocation while honouring the self-determination of communities. The recent Torres Strait Islander

¹¹⁰ London School of Economics and Political Science, *A First Global Mapping of Rights-Based Climate Litigation Reveals a Need to Explore Just Transition Cases in More Depth*, Grantham Research Institute on Climate Change and the Environment (Mar. 29, 2022), <https://www.lse.ac.uk/granthaminstitute/news/a-first-global-mapping-of-rights-based-climate-litigation-reveals-a-need-to-explore-just-transition-cases-in-more-depth/>.

case at the UN Human Rights Committee is illustrative in how the RTLWD could address the challenges of risk assessment by the national government in climate mitigation and relocation policies.

Torres Strait Islander Complaint

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).¹¹¹ This was the first legal action brought by inhabitants 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 is threatening homes and livelihoods and has already damaged burial grounds and sacred cultural sites. There is a high likelihood that some of these islands will become uninhabitable within the coming decades.¹¹²

In a 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. 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.¹¹³ In the Committee's decision, the right to life dignity was not found to have been violated in the context of climate inaction due to lack of "real and foreseeable risk."

The Committee noted that if the island becomes uninhabitable, it may expose individuals to a violation of Art. 6, as if the country becomes submerged – conditions of life will be incompatible with the right to life with dignity. However, owing to Australia's adaptation and mitigation measures in place, it did not find Australia in violation of Art. 6. The same lack of "real and foreseeable risk" as seen in *Teitiota* was again referenced here by the majority.¹¹⁴

Several Committee members wrote dissents, with Committee Members Arif Bulkan, Marcia V. J. Kran, and Vasilka Sancin arguing that there is indeed sufficient evidence of a "reasonable foreseeable threat" based on the impacts already being felt by islanders, which would constitute a violation of Art. 6.¹¹⁵ 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." Since then, the Special Rapporteur has explicitly stated that climate change should be understood in terms of responsibility and causality.¹¹⁶

These openings suggest that discussions at the highest levels are confronting the gaps in legal

¹¹¹ 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 (September 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/>.

¹¹² 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 (April 18, 2021), <https://www.abc.net.au/news/2021-04-19/torres-strait-islanders-climate-change-impacts-uninhabitable/100069596>.

¹¹³ *Daniel Billy and others v. Australia (Torres Strait Islanders Petition)*, Human Rights Committee, *Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 3624/2019*, U.N. doc. CCPR/C/135/D/3624/2019 (Sept. 2022), https://ccprcentre.org/files/decisions/CCPR_C_135_D_3624_2019_34335_E.pdf.

¹¹⁴ *Id.* at para. 8.6.

¹¹⁵ *Id.* at Annex III para. 3.

¹¹⁶ 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>.

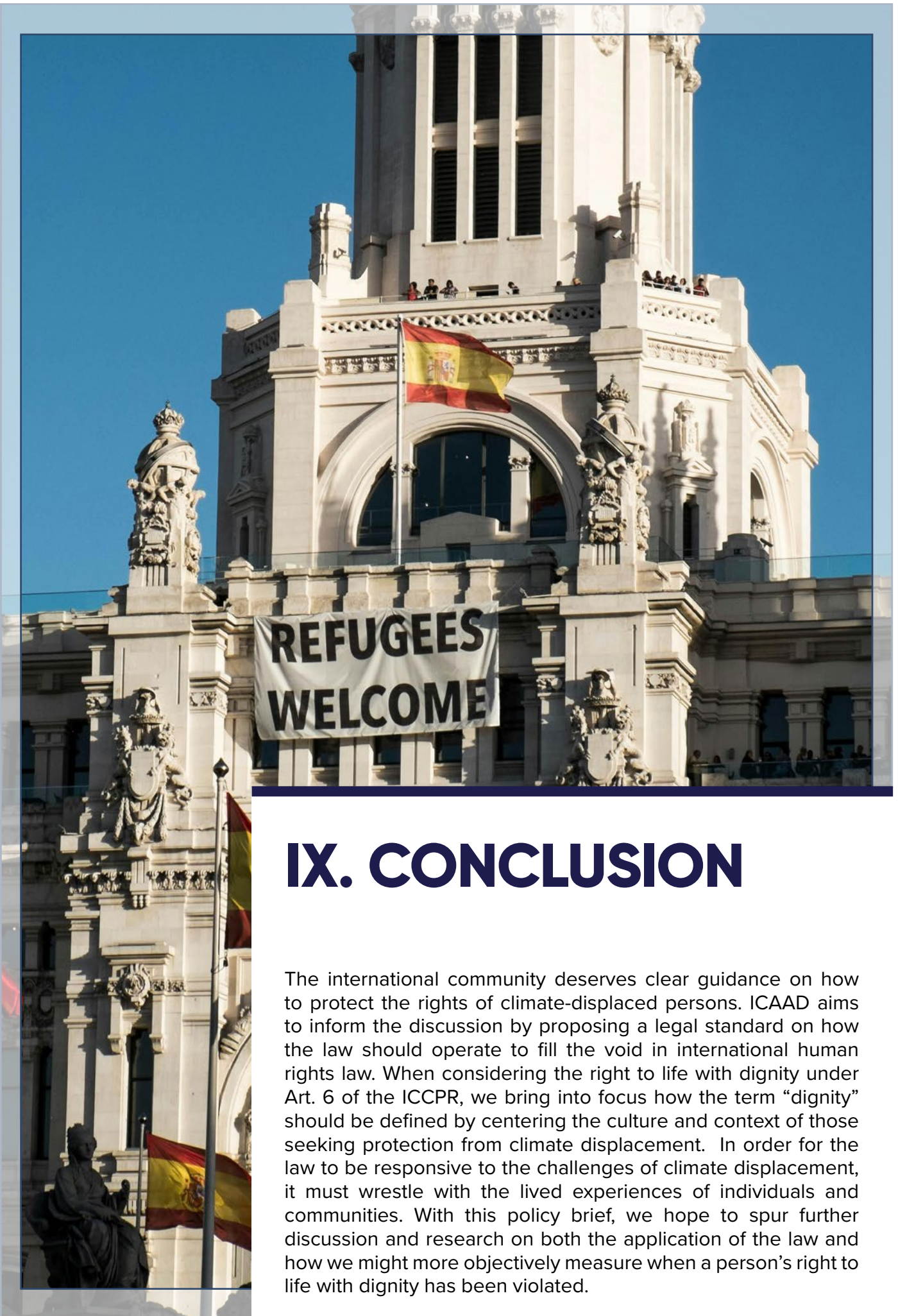


protections for people displaced by the climate crisis. Existing provisions applied from other sources of law, like refugee law, fail to capture the widespread impacts of climate change. This misalignment also represented how the Committee continues to place the burden of proof on climate frontline communities to identify 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.

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.¹¹⁷ 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."¹¹⁸

¹¹⁷ 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"), at 22 https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220923_CCPRC135D36242019_decision.docx.

¹¹⁸ 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"), at 23 https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220923_CCPRC135D36242019_decision.docx.



IX. CONCLUSION

The international community deserves clear guidance on how to protect the rights of climate-displaced persons. ICAAD aims to inform the discussion by proposing a legal standard on how the law should operate to fill the void in international human rights law. When considering the right to life with dignity under Art. 6 of the ICCPR, we bring into focus how the term “dignity” should be defined by centering the culture and context of those seeking protection from climate displacement. In order for the law to be responsive to the challenges of climate displacement, it must wrestle with the lived experiences of individuals and communities. With this policy brief, we hope to spur further discussion and research on both the application of the law and how we might more objectively measure when a person’s right to life with dignity has been violated.

APPENDIX

Asylum Case Law in the Pacific Island Region Around Climate-Displaced Persons

AUSTRALIAN CASES INVOLVING PICs REFUGEE APPLICANTS

Kiribati

The following case is an Australian case that involves citizens from Kiribati:

0907346 [2009] RRTA 1168 (10 December 2009)

The case of 0907346 [2009] RRTA 1168 concerned a Kiribati citizen's application for review by the Migration Review Tribunal of the Australian Government's Department of Immigration and Citizenship decision to reject his protection visa application under section 65 of the Migration Act 1958 (Cth) was rejected by the Australian Government's Department of Immigration and Citizenship, to have the decision to reject his application for a protection visa reviewed by the Migration Review Tribunal.

The applicant filed for a protection visa under section 65 of the *Migration Act 1958* (Cth) and pleaded that life in Kiribati was getting tougher, particularly in his village which is badly affected by the sea level rise that contaminates the freshwater lenses when there is a washover event. This impacts communities who rely on farming and fisheries for their livelihood.

Under section 65 of the *Migration Act 1958* (Cth), a visa may be granted if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied, including criteria outlined under section 36(2):

“(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is

a refugee; or

(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; ...”

The Tribunal referred to the definition of “refugee” contained in Article 1A(2) of the Refugee Convention and to previous High Court cases which dealt with the definition of “refugee.”

The Tribunal stated that there were four elements to the definition, as qualified by section 91R and 91S of the *Migration Act 1958* (Cth), namely:

- (a) the applicant must be outside his or her country;
- (b) the applicant must fear persecution, which must involve:
 - (i) “serious harm” to the applicant (including, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist);
 - (ii) “systematic and discriminatory conduct”;
 - (iii) the persecution which the

applicant fears must be for one or more of the reasons set out in the definition of “refugee” in Article 1A(2) of the Refugee Convention (being race, religion, nationality, membership of a particular social group or political opinion); and

- (c) the applicant’s fear must be well-founded; and
- (d) finally, the applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable or unwilling because of his or her fear, to return to his or her country of former habitual residence.

In its decision, the Tribunal acknowledged that the impacts of climate change faced by Kiribati nationals were severe and deserving of significant Government consideration and attention. However, the Tribunal held that such matters are not matters against which the Refugee Convention, as it applies in Australia, is able to provide protection.

The Tribunal held that the applicant is not a person owed protection obligations by Australia (nor is he a member of the same family unit as such a person), as he does not hold a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion should he return to Kiribati now or in the foreseeable future. As the applicant did not satisfy the criteria for a protection visa prescribed by section 36 of the *Migration Act 1958* (Cth), the decision to refuse the applicant a protection visa was upheld.

Tonga

The following case is Australian cases that involve citizens from Tonga:

1004726 [2010] RRTA 845 (30 September 2010).

The case of 1004726 [2010] RRTA 845, involved a review by the Refugee Review Tribunal of a decision by the Minister for Immigration and Citizenship to refuse to grant a Protection (Class

XA) visa to an applicant from Tonga.

The applicant had stated in his application that he feared for his life in Tonga given that Tonga is vulnerable to natural disasters and climate change and that it is predicted that Tonga will sink in the future due to high sea levels

The Refugee Review Tribunal did not ultimately find in favour of the application, as “essential and significant reason for the harm the applicant fears is not related to any of the Convention grounds.”

Tuvalu

The following cases are Australian cases that involve citizens from Tuvalu:

(e) N00/34089 [2000] RRTA 1052 (17 November 2000)

In N00/34089 [2000] RRTA 1052, the applicant sought refugee status on a number of grounds including on the basis that the Tuvalu islands were slowly sinking.

The Refugee Review Tribunal rejected the application, stating “The fact of the islands sinking is unfortunate, and as advised by the applicant is a matter being discussed between his government and those of neighboring countries. It is not a matter however which has any bearing on the Convention definition.”

(f) N99/30231 [2000] RRTA 17 (10 January 2000)

In N99/30231 [2000] RRTA 17, the applicant claimed refugee status due to the fear of harm as a result of rising sea levels in Tuvalu.

The Refugee Review Tribunal rejected the application for a protection visa stating:

“It may be that this will happen, however if it does, it would be an act of nature and as such, would not and could not bring the applicant within the Convention. The Convention is not directed towards the victims of natural disasters. The purpose and focus of the Convention is the protection of people who have a well

founded fear of persecution for one of five reasons named in the Convention. There is no evidence or suggestion that the harm the applicant fears is in any way consciously directed by any individual or group, against the applicant or anyone else, or that it is motivated by any of the Convention reasons.”

NEW ZEALAND CASES INVOLVING PICs REFUGEE APPLICANTS

Kiribati

The following case is a New Zealand case that involves citizens from Kiribati:

***Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107 (20 July 2015)**

Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment [2015] NZSC 107 (20 July 2015) is a decision of the Supreme Court of New Zealand that upheld an earlier decision of the Court of Appeal¹¹⁹ and the High Court¹²⁰ to refuse the appellant, Mr Ioane Teitiota, a citizen of Kiribati, leave to appeal against a decision of the New Zealand Immigration and Protection Tribunal¹²¹ to refuse him refugee status and/or protected person status in New Zealand under sections 129 and 131 of the *Immigration Act 2009* (NZ).

Mr Teitiota and his wife were citizens of Kiribati that were living illegally in New Zealand, having remained in the country after the expiry of their work visas. They had 3 children, all born in New Zealand but none of whom were entitled to New Zealand citizenship as a result of being born in New Zealand.

After being arrested, Mr Teitiota applied for refugee status and/or protected person status in New Zealand under sections 129 and 131 of the *Immigration Act 2009* (NZ), on the basis that his homeland, Kiribati, was suffering the effects of climate change and that, as a result of the rising sea level and associated environmental degradation, he and other Kiribati residents will

be forced to leave Kiribati.

After Mr Teitiota’s application for refugee status and protected person status under sections 129 and 131 of the *Immigration Act 2009* (NZ) was declined by the Refugee and Protection Officer, Mr Teitiota appealed the decision to the Immigration and Protection Tribunal. However, his appeal was dismissed by the tribunal on the basis that he was not the subject of persecution on environmental grounds, as he was neither:

- (a) a “refugee,” as defined in Article 1(A)(2) of the Refugee Convention; or
- (b) a “protected person” within the meaning of the International Covenant on Civil and Political Rights.

Mr Teitiota sought leave from the High Court to appeal the decision of the Immigration and Protection Tribunal to reject him refugee status and/or protected person status under sections 129 and 131 of the *Immigration Act 2009* (NZ), identifying the following six possible questions of law:

1. *“The word “refugee” extends to people who are refugees from climate change and its effects and that by referring to such people as “sociological refugees” the Tribunal had erred.*
2. *The Tribunal erred in finding that because all people in Kiribati suffer from the same results of “global warming” this disqualifies the applicant from claiming refugee status.*
3. *Greenhouse gases are responsible for rising sea levels and changes of weather patterns (inherent in climate change) and, as such, constitute an indirect but worldwide “human agency.”*
4. *The Tribunal had failed to consider Articles 2, 3(a) and 24(1) of the ICCPR as they might relate to the three children of the applicant and had further failed to consider Articles 24(1) and 2(a)-(c) of the United Nations Convention on the Rights of the Child (UNCROC).*
5. *The Tribunal erred in law in not considering the situation of the applicant’s children separately, particularly as*

¹¹⁹ *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173.

¹²⁰ *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2013] NZHC 3125, [2014] NZAR 162 (Priestley J).

¹²¹ *AF (Kiribati)* [2013] NZIPT 800413.

regards the effect on them of water and food deprivation as New Zealand born children who, if returned to Kiribati where they had never lived, would suffer serious harm.

6. *The factual finding of the Tribunal that the applicant's food and water supply were adequate was a "misdirection" because of the evidence of the effects severe overcrowding and future climate change would have on the applicant and his children."*

Mr Teitiota's application for leave to appeal was rejected by the High Court on the basis that none of the above questions raised an arguable question of law of general or public importance.¹²²

Mr Teitiota then sought leave from the Court of Appeal to appeal to the High Court against the decision of the Immigration and Protection Tribunal. However, the Court of Appeal also rejected Mr Teitiota's application for leave to appeal the decision on the basis that none of the six questions was sufficient to justify the grant of leave.¹²³

Mr Teitiota finally sought leave from the Supreme Court to appeal against the Court of Appeal's decision on the basis of the same six questions, with the following four key issues that the proposed appeal raised were:

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

The Supreme Court dismissed the application and, agreeing with the decisions of the High Court and the Court of Appeal held that:

"the questions identified raise no arguable question of law of general or public importance. In relation to the Refugee Convention, while Kiribati undoubtedly faces challenges, Mr Teitiota does not, if returned, face "serious harm" and there is no evidence that the Government of Kiribati is failing to take steps to protect its citizens from the effects of environmental degradation to the extent that it can. Nor do we consider the provisions of the ICCPR relied on have any application on these facts..."

The Supreme Court further stated, in support of the comments by the Tribunal and the High Court, that its decision should not be taken as a ruling that environmental degradation resulting from climate change should never create a pathway into the Refugee Convention or protected person jurisdiction.

Tuvalu

The following case is a New Zealand case that involves citizens from Tuvalu:

AD (Tuvalu) [2014] NZIPT 501370-371

In the case of *AD (Tuvalu) [2014] NZIPT 501370-371* the applicants were a family of four from Tuvalu. The family sought refugee status and/or protected person status in New Zealand on the basis that there were substantial grounds for believing that their lives would be endangered and/or they would be at risk of cruel, inhuman or degrading treatment if returned to Tuvalu. They based their claim on the fact that the effects of climate change—a lack of fresh drinking water and sea-level rise in particular— would have adverse impacts on them, especially the children.

On the morning of the hearing the refugee claim was abandoned and the family accepted that there was no basis upon which any of them could be recognised as refugees. Whatever harm they faced in Tuvalu due to the anticipated adverse effects of climate change, it did not arise by reason of their race, religion, nationality,

¹²² *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment [2013] NZHC 3125, [2014] NZAR 162 (Priestley J) [Teitiota (HC)].*

¹²³ *Teitiota v Chief Executive of the Ministry of Business Innovation and Employment [2014] NZCA 173, [2014] NZAR 688 (Stevens, Wild and Miller JJ) [Teitiota (CA)].*

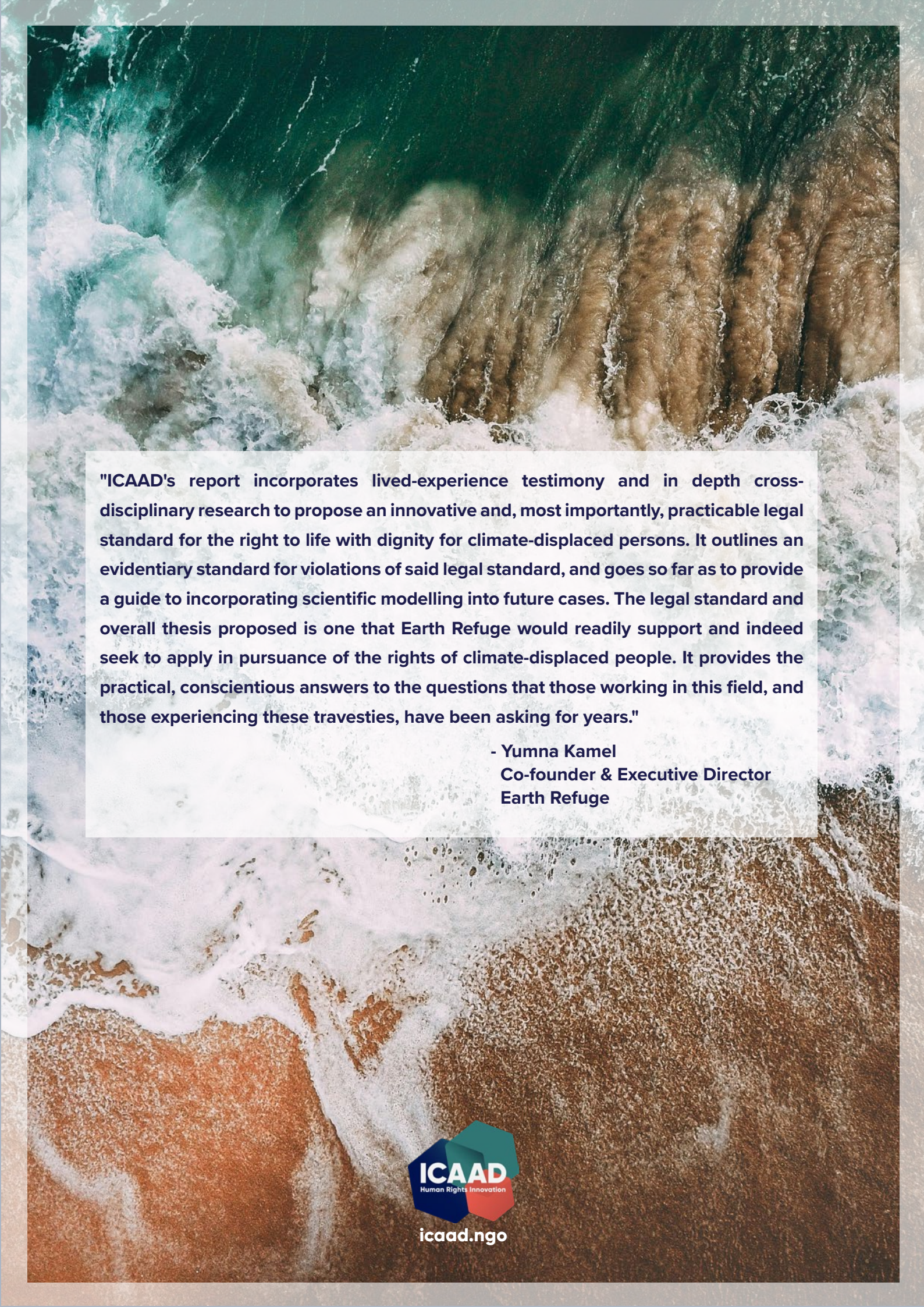
membership of any particular social group or political opinion.

The Immigration and Protection Tribunal refused their application for protected person status. There was no evidence before the Tribunal to establish that, if returned to Tuvalu, the family's lives would be so precarious as a result of any act or omission by the state that they are in danger of being arbitrarily deprived of their lives. The Tribunal accepted that challenges do exist, particularly in relation to food and water security in Tuvalu, and acknowledged that, by reason of their young age, the children were inherently more vulnerable to the adverse impacts of natural disasters and climate change than their adult parents, but found that it had not been established that Tuvalu, as a state, has failed or is failing to take steps to protect the lives of its citizens from known environmental hazards such that any of the appellants would be in danger of being arbitrarily deprived of their lives or of being subjected to cruel, inhuman or degrading treatment.

The family were subsequently allowed to stay in New Zealand on humanitarian grounds, as they had close family connections there.

However in a recent case, the Supreme Court of New Zealand interpreted the environmental dangers narrowly due to fear that establishing a common law precedent would compel the government to develop a policy framework accepting persons displaced by the effects of climate change, a move that appears politically untenable.¹²⁴

¹²⁴ Morgan Godfery, *The First and Last Climate Change Refugee*, Overland (August 10, 2015), <https://overland.org.au/2015/08/the-first-and-last-climate-change-refugee/>.



"ICAAD's report incorporates lived-experience testimony and in depth cross-disciplinary research to propose an innovative and, most importantly, practicable legal standard for the right to life with dignity for climate-displaced persons. It outlines an evidentiary standard for violations of said legal standard, and goes so far as to provide a guide to incorporating scientific modelling into future cases. The legal standard and overall thesis proposed is one that Earth Refuge would readily support and indeed seek to apply in pursuance of the rights of climate-displaced people. It provides the practical, conscientious answers to the questions that those working in this field, and those experiencing these travesties, have been asking for years."

**- Yumna Kamel
Co-founder & Executive Director
Earth Refuge**



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