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## Storm Warning: New Zealand's Treatment of "Climate Refugee" Claims as a Violation of International Law

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# STORM WARNING: NEW ZEALAND’S TREATMENT OF “CLIMATE REFUGEE” CLAIMS AS A VIOLATION OF INTERNATIONAL LAW

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I. INTRODUCTION

As some countries begin to acknowledge the increasingly strong effects of climate change, others have struggled with its slow onset of effects for decades. Coastal communities, especially island nations at or slightly above sea level, face not only threats of flooding and damaging storms, but also rising sea levels jeopardizing soil and water health.<sup>1</sup> As citizens of these coastal regions face increasing difficulty accessing food, water, and medical care, the United Nations’ (“U.N.”) scientific bodies predict there will be staggering numbers of displaced persons within the next few decades.<sup>2</sup> Island nations rising two meters above sea-level face total submersion by 2050, and will increasingly feel the serious effects from encroaching sea water as it contaminates their fresh water sources.<sup>3</sup> Although

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1. See Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENV’T L. REV. 349, 355–56 (2009) (“Although there has been much publicity about rising sea levels and potentially ‘sinking states,’ storms or water shortages also pose significant risks to small island states.”); see, e.g., Alan Taylor, *Category 5 Cyclone Pam Devastates Vanuatu*, THE ATLANTIC (Mar. 17, 2015), <https://www.theatlantic.com/photo/2015/03/cyclone-pam-devastates-vanuatu/388024/> (describing a storm in Vanuatu “that killed dozens, destroyed or damaged 90 percent of the buildings in the capital, and will force the nation to start anew.”).

2. See John Podesta, *The Climate Crisis, Migration, and Refugees*, BROOKINGS (July 25, 2019), <https://www.brookings.edu/research/the-climate-crisis-migration-and-refugees>.

3. See Chris Armstrong & Jack Corbett, *Climate Change, Sea Level Rise, and Maritime Baselines: Responding to the Plight of Low-Lying Atoll States*, 21 GLOB. ENV’T POLITICS 89, 92 (2021), <https://direct.mit.edu/glep/article/21/1/89->

refugee protections are already enshrined in international law, the specific distinction of “climate refugee” does not yet exist. Thus, fewer protections are afforded to those fleeing instability in their countries due to climate change.<sup>4</sup> However, alternative frameworks exist, such as the protection of the right to life and the freedom from cruel, inhuman, or degrading treatment or punishment under Articles 6 and 7 of the International Covenant on Civil and Political Rights (“ICCPR”), respectively.<sup>5</sup> New Zealand, having arbitrated numerous applications for refugee status from applicants claiming that returning home would place their lives in danger from effects of climate change, has consistently denied requests for refugee status and deported applicants back to their home countries where they face hardship from the effects of ongoing climate change.<sup>6</sup>

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107/95071 (“Communities in the low-lying atoll states of Kiribati, Maldives, Marshall Islands and Tuvalu will be the most dramatically affected as even tens of centimeters of sea level rise has the potential to increase incidences of flooding and reduce the availability of potable water, effectively rendering these islands uninhabitable.”).

4. See Tim McDonnell, *The Refugees the World Barely Pays Attention To*, NPR (June 20, 2018, 11:25 AM), <https://www.npr.org/sections/goatsandsoda/2018/06/20/621782275/the-refugees-that-the-world-barely-pays-attention-to> (explaining that “so-called ‘climate refugees,’ who currently lack any formal definition, recognition or protection under international law even as the scope of their predicament becomes more clear”).

5. International Covenant on Civil and Political Rights, Dec. 16, 1966, 99 U.N.T.S. 17 [hereinafter ICCPR]. See generally Evelyn Li Wang, *The Human Rights Responsibilities of States as a Result of Climate Change*, JURIST (July 27, 2021, 4:00 AM), <https://www.jurist.org/commentary/2021/07/evelyn-wang-human-rights-responsibility-climate-change/> (“It is . . . argued that under the current international human rights law regime, the [ICCPR], the International Covenant on Economic, Social Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC) are the relevant human rights treaties in responding to climate change not only because of the detailed lists of rights to be protected, but also because of their legally binding character.”).

6. See Kelly Buchanan, *New Zealand: “Climate Change Refugee” Case Overview*, THE L. LIBRARY OF CONG. (2015) (providing a list of cases with decisions and an overall presentation of the treatment in New Zealand domestic law of cases involving claims of protected person or refugee status due to climate change); see also Laura Walters, *NZ Plans For Inevitable Climate-Related Migration*, NEWSROOM (Apr. 30, 2019), <https://www.newsroom.co.nz/nz-planning-for-inevitable-climate-related-migration> (noting that since 2011, New Zealand has seen eleven cases for protected-person status due to climate change, and that all eleven claims failed).

This Comment argues that by denying the refugee claims of persons fleeing the effects of climate change in atoll nations and returning them to their countries, New Zealand violated Articles 6 and 7 of the ICCPR through deportations back to dangerous locations and legally deficient analyses of the imminent threat to life in these locations.

Part II of this Comment provides background on and relevant provisions of major treaties by which New Zealand is bound as well as details recent movement within the international community to implement further agreements specifically regarding mitigating the effects of climate change.<sup>7</sup> This section also includes several cases illustrating the legal analysis of climate displacement claims.<sup>8</sup> Part III analyzes how New Zealand violated Articles 6 and 7 of the ICCPR through its prohibition against refoulement.<sup>9</sup> It then further analyzes how New Zealand denied protected person status to applicants that were unwilling to return to countries experiencing environmental degradation due to climate change.<sup>10</sup> Part IV recommends that New Zealand amend its Immigration Act to better address the harms that environmental asylum-seekers face, that New Zealand reinstate a special visa pathway for migrants of this type, and that the international community strengthen maritime laws to preserve State sovereignty threatened by rising sea-levels.<sup>11</sup>

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7. See *infra* Part II.

8. See *infra* Part II.

9. See *infra* Part III.

10. See *infra* Part III; see also *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, U.N. HIGH COMM'R FOR REFUGEES ¶¶ 17–20 (Jan. 26, 2007), <https://www.unhcr.org/4d9486929.pdf> [hereinafter *Advisory Opinion*].

11. See *infra* Part IV.

## II. BACKGROUND

### A. EFFECTS OF SLOW-ONSET CLIMATE CHANGE ON PACIFIC ISLAND ATOLL NATIONS

The effects of climate change can be seen all over the world.<sup>12</sup> Some of the most dramatic examples are extreme weather events exacerbated by regional conditions, such as the deadly wildfires affecting the West Coast of the United States in 2018.<sup>13</sup> Longer-term effects like rising sea levels pose great risks to nations, especially island nations that sit less than ten feet above sea level.<sup>14</sup> The effects of rising sea levels are not limited to flooding or high storm surges, but also include the contamination of freshwater supplies and the salination of farmland.<sup>15</sup>

Pacific Island countries are varied in population numbers and economies.<sup>16</sup> However, commonalities include limited natural

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12. But see Riley E. Dunlap & Aaron M. McCright, *Climate Change Denial: Sources, Actors and Strategies*, in ROUTLEDGE HANDBOOK OF CLIMATE CHANGE AND SOCIETY 240, 240–259 (Constance Lever-Tracy ed., 2010) (explaining an international trend across States to deny climate change, promoted by a range of sources like fossil fuel companies, politicians, and scientists).

13. See *New Timeline of Deadliest California Wildfire Could Guide Lifesaving Research and Action*, NAT'L INST. OF STANDARDS AND TECH. (Feb. 8, 2021), <https://www.nist.gov/news-events/news/2021/02/new-timeline-deadliest-california-wildfire-could-guide-lifesaving-research> (noting that the 2018 Camp Fire stills holds the record for most destructive and deadliest wildfire in California history).

14. See Rachel Blue, *Turning the Tide: Atoll Nations during the Era of Climate Change Emergency*, 48 DENV. J. INT'L L. & POL'Y 67, 84 (2020) (noting that “ninety-nine percent of the Marshall Islands’ inhabitants and the entirety of Tuvalu’s and the Maldives’ populations live within six feet of sea level.”); see also David Gray, *Tide of Humanity, As Well As Rising Seas, Lap at Kiribati’s Future*, REUTERS (June 13, 2013, 12:44 AM), <https://www.reuters.com/article/us-kiribati-climate/tide-of-humanity-as-well-as-rising-seas-lap-at-kiribatis-future-idUSBRE95C04L20130613> (noting that Kiribati’s thirty-two atolls and one coral island sit on average of two meters or six-and-a-half-feet above sea level).

15. But see Xing-Yin Ni, *A Nation Going Under: Legal Protection for Climate Change Refugees*, 38 B.C. INT'L & COMP. L. REV. 329, 333 (2019) (noting that “[m]ost of the people of Kiribati . . . survive through subsistence farming of indigenous tree crops”).

16. *Pacific Islands Overview*, WORLD BANK (Oct. 6, 2020),

resources, geographic distance from major world markets, and vulnerability to climate change.<sup>17</sup> Studies into the economic profiles of several of these nations reveal reliance on fishing and tourism, among other industries.<sup>18</sup> For example, in 2015, ninety-one percent of Kiribati's GDP came from fishing license revenue.<sup>19</sup> Similarly, given that the Pacific Island nations are home to many indigenous cultures with deep histories, loss of land to climate change risks great loss to cultural heritage.<sup>20</sup> According to recent census results, Kiribati's population in 2018 was 96.2 percent indigenous I-Kiribati.<sup>21</sup> Similarly, the majority of Tuvalu's population is

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<https://www.worldbank.org/en/country/pacificislands/overview> (providing overview of Pacific Island countries' demographics and economies).

17. See *Pacific Islands Overview* (discussing the similar challenges experienced by Pacific Island countries); see, e.g., *Bolstering Tuvalu's Socioeconomic Resilience in a COVID-10 World*, INT'L ORG. FOR MIGRATION (Mar. 30, 2021), <https://www.iom.int/news/bolstering-tuvalu-socioeconomic-resilience-covid-19-world> (discussing the impact COVID-19 had on the tourism industry and risk of food insecurity because of slowed imports in Tuvalu).

18. See generally Francis X Hezel, SJ, *Pacific Island Nations: How Viable Are Their Economies?*, 7 PAC. ISLANDS POL'Y (2012) (highlighting in particular "one important cultural factor: the 'subsistence affluence' that the tropical Pacific offers those wishing to live off the land, thereby inhibiting motivation to develop at any cost" because basic necessities are naturally abundant which disincentivizes tradeoffs for economic growth).

19. See James Webb, *Kiribati Economic Survey: Oceans of Opportunity*, ASIA PAC. POL'Y STUD. 5, 5–26 (Feb. 2020) (discussing trends in Kiribati's economic development and expansion). See generally *Central Pacific Islands*, WORLD BANK (Apr. 2021), <https://pubdocs.worldbank.org/en/256961563917598074/mpo-cpi.pdf> (providing updated statistics for the economic status Kiribati and Tuvalu following the COVID-19 pandemic).

20. See *World Directory of Minorities and Indigenous Peoples – Kiribati*, MINORITY RTS. GROUP INT'L (Apr. 2018), <https://www.refworld.org/docid/4954ce2025.html> ("One example is the *maneaba*, a community meeting space that historically has been central to Kiribati leadership and consensus-based decision-making. As the system needs to be structured around closely connected communities to function effectively, the migration of many villagers to larger urban settlements has already put it under pressure. Many fear that migration out of Kiribati could see *maneaba* vanish entirely."). See generally *Australia and Oceania: Human Geography*, NAT'L GEOGRAPHIC <https://www.nationalgeographic.org/encyclopedia/oceania-human-geography/> (last visited June 27, 2021) (explaining how Polynesian culture is largely developed from its geography).

21. *World Directory of Minorities and Indigenous Peoples – Kiribati*, *supra* note 20.

Polynesian, which is an indigenous population in Oceania.<sup>22</sup> These cultures are at risk as islands sink and communities are separated through involuntary migration to whatever country will accept them.<sup>23</sup>

#### B. GOVERNMENT MITIGATION PLANS FOR CLIMATE CHANGE AFFECTING PACIFIC ISLAND ATOLL NATIONS

Pacific Island nations face a particular threat from climate change due to the topographic makeup of the islands and reliance on coastal and marine resources.<sup>24</sup> Strong spring tides, called “king tides” damage coastal infrastructure by washing away soil needed to grow staple crops like taro.<sup>25</sup> Citizens from two States in particular, Kiribati and Tuvalu, have submitted claims to New Zealand seeking refugee or protected person status under the ICCPR, and these two States will serve as representative examples of the issue of climate migration and governmental mitigation plans addressing climate change.<sup>26</sup>

Kiribati has submitted multiple adaptation plans that outline the government’s proposed actions and goals for the islands, including an updated plan for 2019 to 2028.<sup>27</sup> While these plans demonstrate

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22. *Australia and Oceania: Human Geography*, *supra* note 20.

23. See Kenneth R. Weiss, *Kiribati’s Dilemma: Before We Drown We May Die of Thirst*, SCIENTIFIC AMERICAN <https://www.scientificamerican.com/article/kiribati-s-dilemma-before-we-drown-we-may-die-of-thirst/> (Oct. 28, 2015) (discussing the problems of overcrowding in Kiribati’s capital city Tarawa and the migration that the country’s inhabitants may be forced to undertake).

24. See Maxine Burkett, *In Search of Refuge: Pacific Islands, Climate-Induced Migration, and the Legal Frontier*, 98 E.W. CTR. 4 (2011).

25. *Id.*

26. See generally Buchanan, *supra* note 6 (providing a list of case names from the year 2000 illustrating the analysis undertaken by the New Zealand Refugee Status Appeals Authority which precedes the current Immigration and Protection Tribunal).

27. *Kiribati Joint Implementation Plan for Climate Change and Disaster Risk Management (KJIP) 2019–2028*, GOV’T OF KIRIBATI 8, <https://www4.unfccc.int/sites/NAPC/Documents/Parties/Kiribati-Joint-Implementation-Plan-for-Climate-Change-and-Disaster-Risk-Management-2019-2028.pdf> (last visited Jan. 25, 2022) (“The social, economic and environmental ramifications of the observed and projected climatic changes and hazards are multiplied when overlaid with the high levels of vulnerability of people and their



the government's willingness to act, other sources indicate that the plans are still vulnerable to political discord. The Washington Post published an opinion piece by Anote Tong, the president of Kiribati from 2003 to 2016 in which he expresses his view that the current administration is ignoring the danger of climate change and "focusing on turning the island into the next Dubai or Singapore" by constructing luxury accommodations on uninhabited islands.<sup>28</sup> These plans are at odds with historical issues maintaining large infrastructure on the islands.<sup>29</sup>

Tuvalu also has comparable mitigation plans in place and benefits from international relief funding to help it build infrastructure to protect against rising sea levels.<sup>30</sup> However, opposition leader Enele Sopoaga alleges that the Pacific Resilience Facility, a financial framework to fund mitigation efforts in the Pacific Islands, places too much responsibility on affected nations without acknowledging how much other countries drive climate change and highlights disagreement within the government on the subject of mitigation.<sup>31</sup>

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environment.").

28. Anote Tong & Matthieu Rytz, *Opinion: Our Island is Disappearing but the President Refuses to Act*, WASH. POST (Oct. 24, 2018, 3:21 PM), <https://www.washingtonpost.com/news/theworldpost/wp/2018/10/24/kiribati> (quoting the current president, Taneti Maamau announcing the administration's official intention to "put aside the misleading and pessimistic scenario of a sinking, deserted nation").

29. See Webb, *supra* note 19, at 21 (noting that a lack of preventative maintenance and general upkeep has led to degradation of the capital and many buildings have become unserviceable well before their expected end-of-life).

30. See *Government of Tuvalu Launches New Coastal Protection Project to Bolster Resilience to Climate Change*, RELIEFWEB (July 11, 2017), <https://reliefweb.int/report/tuvalu/government-tuvalu-launches-new-coastal-protection-project-bolster-resilience-climate> (noting that the Green Climate Fund—established by the U.N. Framework Convention on Climate Change and mandated to fund projects to both limit greenhouse gas emissions and support mitigation efforts—provided a thirty six million dollar grant to the Tuvalu Coastal Adaptation Project).

31. *Tuvalu Regressing on Climate Change*, PACIFIKA ENVIRONNEWS (Sept. 30, 2020), <https://pasifika.news/2020/09/tuvalu-regressing-on-climate-change> ("We, in the Pacific have minimal greenhouse gas emissions and therefore contribute very little to climate change. Yet, we bear the greatest costs from the impacts of climate change. This is totally unfair and is a denial of our human rights to a safe and secure future."). See generally *The Pacific Resilience Facility*, PACIFIC ISLANDS F., <https://www.forumsec.org/prf/> (last visited Aug. 11, 2021) (describing the Facility

C. PROTECTIONS OFFERED TO “CLIMATE REFUGEES” UNDER  
CURRENT INTERNATIONAL LEGAL FRAMEWORKS

The 1951 Geneva Convention Relating to the Status of Refugees (“the Convention”) protects people from persecution and other harms, but the Convention’s definition of “refugee” is narrowly tailored to apply only to people in certain situations.<sup>32</sup> To be considered a refugee, the Convention states that a person must demonstrate the following: A well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a specific social group or political opinion, is outside the country of his nationality.<sup>33</sup> The problem for people fleeing the effects of climate change is that it is difficult to show persecution stemming from an environmental problem, thus they are not classified as refugees under this leading definition.<sup>34</sup> The United Nations High Commissioner for Refugees has not recognized “climate refugees,” instead naming them “environmental migrants.”<sup>35</sup> Because of this exclusion from the refugee protective framework, states like New Zealand, which incorporated the Convention’s definition into its domestic Immigration Act of 2009, have no legal requirement to classify people fleeing environmental harm as refugees.<sup>36</sup>

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as a financial framework designed to increase the independence and resilience of Pacific Island nations by self-funding climate change mitigation).

32. Geneva Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, art. 1(A)(2) [hereinafter 1951 Refugee Convention].

33. Harriet Farquhar, *Migration with Dignity: Towards a New Zealand Response to Climate Change Displacement in the Pacific*, 46 VICTORIA U. WELLINGTON L. REV. 29, 33 (2015) (summarizing Article 1(A)(2) of the 1951 Refugee Convention and adding that “while those who are displaced by climate change are not expressly precluded from gaining refugee status, an applicant would need to prove that an additional element constituting persecution on one of the Convention grounds was present”).

34. See *id.* (noting that persecution “requires an element of human agency” which the effects of climate change lack).

35. See Podesta, *supra* note 2 (noting that “the current system of international law is not equipped to protect climate migrants, as there are no legally binding agreements obliging countries to support climate migrants”).

36. See Jane McAdam, *The Emerging New Zealand Jurisprudence on Climate Change, Disasters, and Displacement*, 3 MIGRATION STUDIES 131, 131 (2015) [hereinafter *The Emerging New Zealand Jurisprudence*] (arguing that New Zealand has failed to accept refugees protect its based on the impacts of climate change despite the jurisprudence available on the subject); see also Immigration

The International Covenant on Economic, Social, and Cultural Rights (“ICESCR”) recognizes the rights of individuals to safe and healthy working conditions, preservation of the family unit, and the right to education, among other protections.<sup>37</sup> The ICCPR, among religious and political protections, protects by law an individual’s inherent right to life under Article 6.<sup>38</sup> Article 7 of the ICCPR mandates freedom from “torture or cruel, inhumane, or degrading treating or punishment.”<sup>39</sup> Under Article 2 of the ICCPR, its State Parties are required to protect the rights enumerated in the ICCPR of people presently within the State’s territory or subject to its jurisdiction.<sup>40</sup> Even in times of public emergency, any derogation from certain articles, including Articles 6 and 7, is prohibited.<sup>41</sup>

The United Nations Human Rights Committee is a body of experts whose function is to oversee the implementation of the ICCPR.<sup>42</sup> While non-binding, the Human Rights Committee released a General Comment addressing Article 6 of the ICCPR, which provides more detail about how State Parties should interpret the obligation as well

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Act 2009, s 131 (N.Z.) (providing elements for recognition and basis in international treaties of refugee or protected person status).

37. See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, art. 11(1) [hereinafter ICESCR] (“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”); see also Walters, *supra* note 6 (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”).

38. ICCPR, *supra* note 5, art. 6(1).

39. *Id.*, art. 7.

40. See *id.*, art. 2(1) (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”).

41. See *id.*, arts. 4(1)–(2) (stating that times of public emergency that “threaten the life of the nation and the existence of which is officially proclaimed” allow derogation from obligations as required by the emergency, but that no derogation is possible from “articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16, and 18.”).

42. *Monitoring Civil and Political Rights*, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx> (last visited June 23, 2021). See generally Evan Kiehl, *A Framework for the Future of Climate Refugees*, 34 GEO. IMMIGR. L.J. 819, 820–21 (explaining the structure of the Committee as comprised of eighteen nominated human rights experts who may accept complaints from individuals submitted via mail or email and noting that the Committee’s decision after reviewing the complaint is non-binding).

as a recommendation that States err towards a broad, rather than narrow, interpretation of the article.<sup>43</sup>

Another important principle is that of *non-refoulement*, which is recognized as customary international law.<sup>44</sup> Under the principle, a state may not remove or return an individual to a country where he faces a real threat of irreparable harm or human rights violations, such as the arbitrary deprivation of life or cruel treatment.<sup>45</sup>

#### D. NEW ZEALAND'S DOMESTIC IMMIGRATION AND REFUGEE LAW

New Zealand domestic law generally follows its international treaty obligations, although courts have found that these obligations may impose “extra-legal” restraints.<sup>46</sup> New Zealand's 2009 Immigration Act is the foremost mechanism outlining the legal structure and obligations concerning immigration to the country.<sup>47</sup>

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43. See Hum. Rts. Comm., *General Comment No. 36*, CCPR/C/GC/36 (Sept. 3, 2019) (providing definitions and factors to analyze when determining violations to an individual's right to life, as well as information about protected persons); see also *Barrios Family v. Venezuela*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 237, ¶ 124 (Nov. 24, 2011) (explaining the attribution of a violation of rights to a state).

44. *The Principle of Non-Refoulment Under International Human Rights Law*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf> (last visited Feb. 12, 2022).

45. See *Advisory Opinion*, *supra* note 10, ¶¶ 17–20 (defining a non-refoulement provision); see also Cordula Droegge, *Transfers of Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges*, 90 INT'L REV. RED CROSS 871, 671–673 (2008), <https://international-review.icrc.org/sites/default/files/irrc-871-droegge2.pdf> (discussing how different international agreements have incorporated non-refoulment provisions); *AC (Tuvalu)* [2014] NZIPT 800517-520 at [77] (“the Tribunal examined the development of the implied *non-refoulement* obligation under Article 7 of the ICCPR . . . [where] it must be established that there is some qualifying harm—the arbitrary deprivation of life or cruel treatment as defined under the Act—in the receiving state”).

46. See Timothy P. Fadgen & Guy Charlton, *Humanitarian Concerns and Deportation Orders Under the Immigration Act 2009: Are International Obligations Enough Protection for the Immigrant with Mental Illness*, 43 VICTORIA U. WELLINGTON L. REV. 423, 425 (2012) (noting that “courts will ‘strive to interpret legislation consistently with treaty obligations . . . whether or not the legislation was enacted with the purpose of implementing the relevant text’”).

47. Immigration Act 2009 (N.Z.) (outlining the specific procedures and

The 2009 Act also establishes the discretionary ability not just of the Minister of Immigration, but also of immigration officers, over claims and orders for deportation.<sup>48</sup> This humanitarian discretion defined by Section 207 allows officials to approve claims that do not exactly fall under treaty criteria but where it would be “unduly harsh” to remove a person from New Zealand.<sup>49</sup> This standard is much more subjective than the previous Immigration Act of 1987. The 1987 Act mandated the following factors for consideration: age, length of lawful residence in New Zealand, personal circumstances, work record, reasons for revocation of residence permit, interests of the family, and any other matter that the Tribunal considers relevant.<sup>50</sup>

Section 131 of the 2009 Act mirrors the ICCPR by mandating that a person may achieve protected status if “there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life.”<sup>51</sup> Although not published at the time of the following decisions, the Human Rights Committee stated that an arbitrary deprivation of life must be interpreted to include “elements of inappropriateness, injustice, lack of predictability and due process of law as well as elements of reasonableness, necessity, and proportionality.”<sup>52</sup> The Immigration and Protection Tribunal noted that while there is no standard

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requirements for immigration into New Zealand).

48. *Id.* at ss 61, 177(2) (providing immigration officers discretionary powers in instances of cancelling a deportation order).

49. Compare Buchanan, *supra* note 6 (providing a list of case names from the year 2000 illustrating the analysis undertaken by the New Zealand Refugee Status Appeals Authority which precedes the current Immigration and Protection Tribunal) with *AD (Tuvalu)* [2014] NZIPT 501370 at [18] (stating that discretion may be granted when there are “(a) exceptional circumstances of a humanitarian nature that would make it unduly harsh or unjust for the person to be removed from New Zealand; and (b) it would not in all circumstances be contrary to the public interest to allow the appellant to remain in New Zealand”).

50. Immigration Act 1987, s 22 (N.Z.); *cf.* Immigration Act 2009, s 207(1) (N.Z.) (“The Tribunal must allow an appeal . . . only when it is satisfied that . . . (a) there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported . . . and (b) it would not in all circumstances be contrary to the public interest to allow the appellant to remain in New Zealand.”).

51. *Id.*, s 131.

52. *General Comment No. 36*, *supra* note 46, ¶ 12.

definition of what constitutes an “arbitrary” deprivation of life, jurisprudence on the subject has led to the acceptance of the following three factors: “the interference must be one which is (a) not prescribed by law; (b) not proportional to the ends sought; and (c) not necessary in the particular circumstances of the case.”<sup>53</sup> The Tribunal went on to discuss the factor of the imminence of the risk in the analysis of an arbitrary deprivation of life.<sup>54</sup> Similarly, the Tribunal defined “imminence” as requiring “no more than sufficient evidence to establish substantial grounds for believing the appellant would be in danger.”<sup>55</sup> The concept of imminence of risk, however, is not present in Section 131, nor in the 2009 Act more generally.<sup>56</sup> It is only required for cases heard by the Human Rights Committee brought by individuals.<sup>57</sup> The Tribunal stated that the concept of imminence must be interpreted “in light of the express wording of [S]ection 131,” despite the fact that Section 131 does not reference time as a factor.<sup>58</sup> Finally, Section 131 does require that an immigration officer take into account “all considerations” when determining grounds for protected person status.<sup>59</sup>

Furthermore, the Tribunal, on an appeal under Section 194(1)(c) (the right of appeal concerning refugee or protection status), must analyze the appellant’s status under the Refugee Convention, the 1984 Convention Against Torture (“CAT”), and the ICCPR.<sup>60</sup>

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53. *AF (Kiribati)* [2013] NZIPT 800413 at [84].

54. *Id.* at [81]–[91].

55. *Id.* at [89]–[90] (citing *Aaldersberg v. Netherlands*, U.N. Doc. CCPR/C/87/D/1440/2005 (Aug. 14, 2006) in which two thousand Dutch nationals brought a case against the State that the policy jeopardized their lives but ultimately failed for a lack of real probability of harm).

56. A search of the 2009 Act for any words relating to imminence yields no results. *See generally* Immigration Act 2009 (N.Z.).

57. *AF (Kiribati)* at [89] (“The case law of the [Human Rights] Committee requires that, to be a victim for the purposes of bringing a complaint under the First Optional Protocol, the risk of violation of an ICCPR right must be ‘imminent’”).

58. *Id.* at [90].

59. Immigration Act 2009, s 131(3) (N.Z.).

60. *See AF (Kiribati)* at [36] (explaining that the Tribunal must perform a full assessment of these instruments in the listed order to determine whether the applicant can be recognized as a refugee or as a protected person); *see also* Immigration Act 2009, ss 129–31 (N.Z.) (providing grounds for recognition under refugee convention, CAT, and ICCPR, respectively).

Because of this discretionary ability, the Tribunal has more narrowly construed Article 6 than other jurisdictions lacking this humanitarian discretion.<sup>61</sup> This discretion is especially relevant in relation to New Zealand's goal of aligning its interpretation of domestic law to be consistent with its international treaty obligations.<sup>62</sup>

#### E. "CLIMATE REFUGEE" CASES

There are several reported cases concerning applications for refugee status in New Zealand that the Tribunal denied on the grounds that the applicants do not meet the enumerated requirements for refugee status under the 1951 Refugee Convention.<sup>63</sup> New Zealand has been hearing cases since 1995 about climate refugees, but to date has not ruled in favor of any applicants.<sup>64</sup>

The following two cases are used throughout this Comment as

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61. See *The Emerging New Zealand Jurisprudence*, *supra* note 38, at 138 (explaining the Tribunal's interpretation of certain concepts are restricted by domestic legislation which results in a narrower construction of Articles 6 and 7). See generally Timothy Philip Fadgen et al., *Narrowing the Scope of Judicial Review for Humanitarian Appeals of Deportation Orders in Canada, New Zealand and the United States*, 35 HAMLINE U.'S SCH. L.'S J. PUB. L. AND POL'Y 241, 258–264 (2014) (noting that “the decisional efficacy of humanitarian considerations on administrative and judicial decision-making, while informed by international law, generally remains wedded to domestic conceptions of what is ‘humanitarian’” and providing a historical perspective based on colonialist practices and views informing how humanitarian discretion is applied).

62. See *id.* at 258 (explaining that New Zealand's courts have held that international treaties impose obligations and restrictions on their decisions); see also Immigration Act 2009, s 207 (N.Z.) (stating that an appeal on humanitarian grounds must be allowed when “there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand” and it is not against public interest to for the appellant to remain in New Zealand).

63. See generally Buchanan, *supra* note 6 (providing a list of case names from the year 2000 illustrating the analysis undertaken by the New Zealand Refugee Status Appeals Authority which precedes the current Immigration and Protection Tribunal).

64. See *id.* (providing a list of New Zealand cases between 1995 and 2014); see also *The Emerging New Zealand Jurisprudence*, *supra* note 38, at 132 (discussing how New Zealand has not granted protection to refugees on the grounds of climate change, natural disasters, or environmental degradation since it started hearing cases on those ground in 1995).

examples of factors that the New Zealand Immigration and Protection Tribunal use to decide issues of climate migration: *AF (Kiribati)*<sup>65</sup> and *AC (Tuvalu)*.<sup>66</sup> In addition to providing the analytic framework used by the Tribunal, these cases illustrate the basis upon which the argument that the analysis is incomplete rests.

The first case, *AF (Kiribati)*, involves Kiribati native Ioane Teitiotia's denied application for refugee status following the expiration of his and his family's visas in 2010.<sup>67</sup> In subsequent appeals, Teitiotia claimed that social instability, environmental degradation, and threats to life because of the effects of rising sea levels created a substantial risk of harm should he and his family return to Kiribati.<sup>68</sup> In this appeal, the Tribunal looked particularly at the claim that the appellant would face an arbitrary deprivation of life should he and his family be deported.<sup>69</sup> According to the Tribunal, "arbitrary deprivation of life" is not statutorily defined in domestic law, but is understood as a protection against the deprivation of life "by state action or as a consequence of its omission."<sup>70</sup> The Tribunal examined the Kiribatian government's actions in response to climate change, including both mitigation and development plans as well as aid to citizens through water rationing and buying land in Fiji to grow crops.<sup>71</sup> The Tribunal then determined that the government had not failed to take steps to mitigate loss of life, and so there was no indication of risk that the

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65. *AF (Kiribati)*.

66. *AC (Tuvalu)* [2014] NZIPT 800517-520; *see also AD (Tuvalu)* [2014] NZIPT 501370 (analyzing the case under the grounds for granting a humanitarian discretion claim rather than as refugee and protected persons claim).

67. *See Buchanan, supra* note 6, at 2 (providing background on Teitiotia's initial claim).

68. *See AF (Kiribati)* at [6]–[9] (describing how the island experienced significant coastal erosion within the last decade and how the encroaching sea water salinized fresh-water wells and soil, making crops difficult to grow).

69. *See id.* at [80]–[89] (differentiating between risks to life generally and risks to life "by means of arbitrary deprivation" in which only the latter risks fall under Section 131 ("Recognition as protected person under Covenant on Civil and Political Rights") of the 2009 Immigration Act).

70. *Id.* at [84] (defining "arbitrary deprivation of life" according to communications with the Human Rights Committee and references to academic studies of international law from which the definition used by the Tribunal was acquired).

71. *Id.* at [30].



appellant would be arbitrarily deprived of his life.<sup>72</sup> The appellant unsuccessfully appealed his case several times before New Zealand courts.<sup>73</sup> Unfortunately, the appellant was then unable to file for a visa extension or to appeal to authorities on humanitarian grounds as the deadline to do so had passed.<sup>74</sup> The Tribunal also stated that Section 133 of the 2009 Act requires “each person and every family member” seeking protection to file an individual claim, but because the appellant’s wife and children did not do so, they could only seek protection under Section 207.<sup>75</sup> The text of Section 131, however, makes no reference to this requirement.<sup>76</sup>

The second case, *AC (Tuvalu)*, is that of a family from Tuvalu appealing the decisions of a refugee and protection officer for denying them refugee or protected person status.<sup>77</sup> This decision relied in large part on the decision in *AF (Kiribati)* when deciding whether to recognize the appellants as refugees or as protected persons.<sup>78</sup>

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72. See *id.* at [88] (noting that the government of Kiribati was active on the international stage regarding the risks of climate change and that it had multiple plans and programs in place to support its citizens).

73. See *Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment* [2013] NZHC 3125 (appealing to the High Court); see also *Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173 (appealing to the Court of Appeal); *Teitiota v. Chief Executive of the Ministry of Business, Innovation, and Employment* [2015] NZSC 107 (appealing to the Supreme Court).

74. See Kenneth R. Weiss, *The Making of a Climate Refugee: How an Unsuspecting Farmworker from Kiribati Became the Brand Ambassador of Climate Change—Despite Barely Knowing What It Was*, FOREIGN POL’Y (Jan. 28, 2015), <https://foreignpolicy.com/2015/01/28/the-making-of-a-climate-refugee-kiribati-tarawa-teitiota/> (explaining that by the time the appellant asked the attorney to take his case, the deadline to request a visa extension had passed).

75. 2014 NZCA 173, at [35].

76. *Id.*

77. *AC (Tuvalu)* [2014] NZIPT 800517-520 at [1]. See generally Immigration Act 2009, s 133(4)–(5) (N.Z.) (stating that “whether or not an immigration officer considers cancelling a deportation order . . . he or she is not obliged to give reasons for any decision . . . however, to the extent that an immigration officer does have regard to any international obligations, the officer is obliged to record . . . a description of the international obligations; and the facts about the person’s personal circumstances”).

78. See *AC (Tuvalu)* at [35], [45], [55], [66], [73], [83] (referencing the reasoning given by the Tribunal in *AF (Kiribati)* as a basis for denying refugee or

The analysis in this case is similar to that of *AF (Kiribati)* in that the Tribunal found that the appellants did not qualify as refugees, or as protected persons under Article 6 of the ICCPR because they could not point to evidence of a great risk of arbitrary deprivation of life.<sup>79</sup> As part of its analysis, the Tribunal noted that a majority of Tuvalu's population lives within coastal zones.<sup>80</sup> The Tribunal also highlighted the impact of external funding from various sources as evidence that the Tuvaluan government was taking steps to mitigate climate change, showing that the appellant could not establish a danger of arbitrary deprivation of life.<sup>81</sup> A difference, however, was that the Tribunal allowed the family to remain in New Zealand under the Tribunal's discretionary power due to evidence of family ties and cultural considerations.<sup>82</sup>

A third case, *Teitiota v. New Zealand* shows the Human Rights Committee's analysis of the issue of "climate refugees" in an appeal claiming that New Zealand was in violation of Article 6 of the ICCPR.<sup>83</sup> Although the Committee ultimately denied any violation of Article 6, dissenting opinions highlighted the fact that access to potable drinking water does not equate to access to safe drinking water because of the presence of microorganisms that the family, especially the children born in New Zealand, would not be

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protected person status, including a focus on the Tuvaluan government's provision of safe drinking water to its citizens).

79. *See id.* at [119] (specifically describing that despite the inherent vulnerability of children to natural disasters, there was insufficient evidence to find a real risk of arbitrary deprivation of life).

80. *Id.* at [7].

81. *See id.* at [102]–[103], [108] (citing assistance received from the Global Environment Fund, the European Development Fund, and Save the Children).

82. *See The Emerging New Zealand Jurisprudence*, *supra* note 38, at 137 (explaining that the appellant's children had never been to Tuvalu and because of an "extended family network" of permanent residents and citizens of New Zealand); *see also* Fadgen et al., *supra* note 64, at 266 (quoting case law stating that "the best interests of [a] child shall be a 'primary consideration'"); *Ye v. Minister of Immigration* [2008] NCZA 291 at [123]–[129] (CA) (discussing balance test between detriment to "overstayer" child and right of nation to protect its borders).

83. Hum. Rts. Comm., *Teitiota v. New Zealand*, U.N. Doc. CCPR/C/127/D/2728/2016, ¶¶ 1.1, 3 (Oct. 24, 2019) ("the author claims that by removing him to Kiribati, New Zealand violated his right to life under the Covenant").

accustomed to.<sup>84</sup> Following deportation, one of the appellant's children got a serious case of blood poisoning leading to boils covering his body.<sup>85</sup> In fact, among Pacific Island nations, Kiribati has the second-worst child mortality rate (behind Papua New Guinea) related directly to poverty and insufficient access to clean water or adequate sanitation, which could worsen with even more limited access to resources because of climate change.<sup>86</sup> Given these factors and the precarious situation in which the Pacific Island nations find themselves, it is important for the international community to conform to the treaties and frameworks that can offer some help to those most affected in the era of climate change.

### III. ANALYSIS

New Zealand is in violation of Articles 6 and 7 of the ICCPR, which guarantees the right to life and freedom from cruel or degrading treatment, because its decisions conflict with the object and purpose of the Convention. As a State Party to the ICCPR, New Zealand is obligated by international law to ensure an individual's right to life and freedom from cruel treatment.<sup>87</sup> New Zealand's domestic immigration law provides a mechanism for people to claim refugee or protected person status in line with the framework of the Refugee Convention and the ICCPR.<sup>88</sup> New Zealand is violating Articles 6 and 7, and the principle of *non-refoulement*, when they

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84. See *id.* at 13 (Committee member Vasilka Sancin, dissenting) (discussing the lack of a complete assessment by the Tribunal into the safety of the drinking water provided by the Kiribati government and there is sufficient evidence that the appellant's claim of insufficient access to safe water is substantiated); *Id.* at 15 (Committee member Duncan Laki Muhumuza, dissenting) (stating that the burden of proof to establish real risk of harm was too high for the appellant and that "whereas the risk to a person expelled or otherwise removed, must be personal—not deriving from general conditions, except in extreme cases—the threshold should not be too high or unreasonable").

85. *Id.* at 15.

86. See *Situation Analysis of Children in Kiribati*, UNICEF 26–28 (Dec. 2017), <https://www.unicef.org/pacificislands/media/1131/file/Situation-Analysis-of-Children-Kiribati.pdf> (discussing the child mortality rate in Kiribati).

87. ICCPR, *supra* note 5, preamble.

88. See generally *The Emerging New Zealand Jurisprudence*, *supra* note 38, at 133 (explaining that New Zealand's Immigration Act of 2009 contains provisions that fulfill obligations under international law).

return applicants for protected person status to their home countries where the applicants face threats to life because of the negative effects of climate change.<sup>89</sup>

Similarly, case law holds that interpretation of domestic law should be in line with international treaty obligations, such as the ICCPR.<sup>90</sup> Because the Human Rights Committee stated in 1982 that Article 6 must be broadly interpreted to remain consistent with its “inherent nature” and relation to other rights, New Zealand’s decisions in cases related to climate migration do not comply with its international obligations.<sup>91</sup>

#### A. FEASIBILITY OF GOVERNMENT PLANS TO MITIGATE CLIMATE CHANGE

State Parties to the ICCPR are bound by Article 6 to protect by law a person’s right to life, including the arbitrary deprivation of life.<sup>92</sup> While people fleeing States that are adversely affected by climate change such as extreme weather events, rising sea levels, and social instability, may not qualify under current refugee protection frameworks, they may still be entitled to protection through the ICCPR if fleeing to State Parties to the treaty.<sup>93</sup> Using the principle of *non-refoulement*, a State is obligated to refrain from deporting or otherwise forcibly removing an individual from its territory if there are substantial grounds upon which that person may face a “real risk of irreparable harm.”<sup>94</sup> In order to comply with its obligation, the New Zealand courts need to determine whether applicants for

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89. See *Advisory Opinion*, *supra* note 10, ¶ 19 (outlining the obligation to not deport a person where there are grounds for believing there is a real risk of irreparable harm).

90. See Fadgen et al., *supra* note 64, at 258 (explaining that New Zealand’s courts have held that international treaties impose obligations and restrictions on their decisions)

91. *AF (Kiribati)* [2013] NZIPT 800413 at [82]; see also Hum. Rts. Comm., *Teitiota v. New Zealand*, U.N. Doc. CCPR/C/127/D/2728/2016, ¶ 2.5 (Oct. 24, 2019) (acknowledging that the “Tribunal noted the right to life must be interpreted broadly, in keeping with the Committee’s general comment No. 6 (1982) on article 6”).

92. ICCPR, *supra* note 5, art. 6(1).

93. *Id.*, preamble.

94. *Advisory Opinion*, *supra* note 10, ¶ 19.

protected person status under the ICCPR face a real risk of harm should they be returned, including cruel treatment or the arbitrary deprivation of life.<sup>95</sup>

*i. Government action*

An important factor in the analysis of whether an arbitrary deprivation of life has occurred is the governmental actions of climate-affected States to protect its citizens and mitigate damage.<sup>96</sup> In the cases so far, New Zealand has argued that its decisions to deny protection to applicants was in part based on evidence that State governments were taking steps to mitigate the effects of climate change.<sup>97</sup> For example, in *AF (Kiribati)*, the Tribunal determined that because the appellant could not point to evidence that he was at risk of being arbitrarily deprived of life through an act or omission of the government of Kiribati, his claim would fail.<sup>98</sup> The Supreme Court of New Zealand agreed with the Tribunal's findings that because the government of Kiribati was taking steps to mitigate climate change, the appellant faced no harm of having his life arbitrarily deprived.<sup>99</sup> This determination is at odds, however, with a statement by the appellant's counsel that the government of Kiribati is "unwilling or unable" to mitigate the effects of climate change.<sup>100</sup>

In its analysis, the Tribunal relies on evidence of the construction of seawalls and the movement of public services such as primary schools and hospitals to central islands.<sup>101</sup> It does not, however, reference any research about the efficacy of these seawalls nor the

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95. See *id.* (outlining the obligation to not deport a person where there are grounds for believing there is a real risk of irreparable harm).

96. See *AC (Tuvalu)* [2014] NZIPT 800517-520 at [53] (explaining that Section 131 analysis should be focused on the ability and willingness of the government to mitigate against the harm); see also *AF (Kiribati)* at [88] (analyzing steps the government took to mitigate harm).

97. See generally *The Emerging New Zealand Jurisprudence*, *supra* note 38, at 134 (outlining the reasoning of the Tribunal in past New Zealand cases).

98. *AF (Kiribati)* at [86–88] (noting that a state has a positive obligation to take programmatic steps to provide basic necessities for its citizens).

99. *Teitiota v. Chief Executive of the Ministry of Business, Innovation, and Employment* [2015] NZSC 107, [12] (stating "We are not persuaded that there is any risk of a substantial miscarriage of justice").

100. *AF (Kiribati)* at [51].

101. *Id.* at [88].

ability of Kiribati's citizens to reach the public services due to road conditions and flooding.<sup>102</sup> Kiribati is one of the poorest and most remote Pacific Island nations, with a significant amount of its GDP coming from fishing income.<sup>103</sup> Looking at government development projects, a large amount of capital has been placed into the tourism industry including two large aircrafts for the purpose of increasing the number of visitors to the islands.<sup>104</sup> However, looking at the geographic location of Kiribati compared with other popular island destinations, as well as the history of low performance of a large hotel,<sup>105</sup> the costs to the government will be significant, as well as a risk by investing so much capital into a venture based on tourism.<sup>106</sup> Kiribati is also facing issues with significant gaps in maintaining current infrastructure, and poor planning has led to the selection of designs within the "build-neglect-rebuild" cycle instead of investments towards longer-term resilience.<sup>107</sup> By focusing on the mitigation and adaptation plans instead of more general trends in government spending and project-planning, the Tribunal failed to consider the realistic conditions of the country. Figuring in the ongoing COVID-19 pandemic as an example of the risks of relying on one type of economy, the Tribunal should have further analyzed the appellant's statements that the government of Kiribati was unable or unwilling to mitigate climate change.<sup>108</sup>

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102. *AF (Kiribati)* at [13].

103. *See Webb, supra* note 19, at 6 (explaining that ninety one percent of GDP stemmed from Kiribati's fishing license revenue in 2015); *see also Central Pacific Islands, supra* note 19 (providing data on Kiribati's economy).

104. *See Webb, supra* note 19, at 24 (discussing the tourist market, and how Kiribati is one of the least traveled to countries in the world (which requires a large investment to make change)).

105. *Id.*

106. *Id.* (discussing the tourism market, and tourism-based gambles that the Kiribati government has made before).

107. *See id.* at 21–23 (addressing known gaps in Kiribati government planning, asset management, and project selection that may make this type of investment risk).

108. *See generally* Katherine Shen, *The Economic Costs of the Pandemic for the Pacific Islands*, CTR. FOR STRATEGIC AND INT'L STUDIES (Sept. 9, 2020), <https://www.csis.org/blogs/new-perspectives-asia/economic-costs-pandemic-pacific-islands> (explaining that the COVID-19 pandemic has led to an economic crisis that could push the number of people living in extreme poverty up to forty percent).

*ii. Imminence of the risk*

In *AF (Kiribati)*, the Tribunal relied in part on a discussion of imminence as a factor in whether an individual is at risk of an arbitrary deprivation of life.<sup>109</sup> The Tribunal's analysis of imminence was flawed, however, because the significance the Tribunal accorded to it is not supported by domestic law nor by the text of Articles 6(1) or 7 of the ICCPR.<sup>110</sup> Instead, the Tribunal conflated its obligations with those of the Human Rights Committee established by the ICCPR and the First Optional Protocol despite the fact that the Committee's decisions are non-binding on parties outside of the claim.<sup>111</sup>

Even if imminence were a required factor for analysis, the Tribunal's treatment of the circumstances as required by Section 131 of the 2009 was incomplete. In *AF (Kiribati)*, the Tribunal pointed specifically to the plans and past actions of the Kiribatian government buying land in Fiji to grow crops and to build seawalls as evidence that the State has fulfilled its obligation to protect its citizens.<sup>112</sup> However, this narrow consideration of the political and economic environment is an incomplete risk assessment because it does not take into account the trends in Kiribati's history in maintaining its infrastructure, a relevant consideration required under Section 131(3).<sup>113</sup>

Tuvalu has one of the smallest populations of any of the Pacific Islands, with the Tribunal in *AC (Tuvalu)* noting that the entire population on each of the islands lives within a coastal zone.<sup>114</sup> The Tribunal also acknowledged that given expected growth rates in population and increasingly strong weather events, Tuvalu is expected to be one of the countries most severely affected by climate

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109. *AF (Kiribati)* [2013] NZIPT 800413 at [89]–[91].

110. There is no specific mention of the imminence of a risk contained in articles 6 or 7 of the ICCPR. See ICCPR, *supra* note 5, arts. 6(1), 7.

111. UN Human Rights Treaty Bodies, INT'L JUSTICE RES. CTR., <https://ijrcenter.org/un-treaty-bodies/> (last visited Oct. 17, 2021) (noting that while Committee decisions are not binding, "they do represent a reasoned interpretation" of the treaty").

112. *AF (Kiribati)* at [30], [88].

113. Immigration Act 2009, s 131(3) (N.Z.).

114. *AC (Tuvalu)* [2014] NZIPT 800517-520 at [7].

change.<sup>115</sup> As far as risk assessment, the Tribunal relied on the government's plan of action to mitigate climate change as evidence that should the appellants be returned, they would not face either arbitrary deprivation of life nor cruel, inhuman, or degrading treatment protected under Section 131 of the 2009 Act.<sup>116</sup> Within this analysis of arbitrary deprivation of life is a distinction that the Tribunal made regarding governmental action (or lack thereof). In *AF (Kiribati)*, the Tribunal determined that there was no evidence that the government failed to take "adequate steps" to prevent harm from befalling the appellant,<sup>117</sup> whereas subsequently in *AC (Tuvalu)*, the Tribunal instead relied on the government taking "steps within its power" to prevent harm to the appellant.<sup>118</sup> The difference is important because it highlights a subtle yet inconsistent determination of a government's responsibility towards its citizens facing harm from climate change, especially because the Tribunal acknowledged that States cannot be held responsible for mitigating the underlying causes of climate change.<sup>119</sup> It is significant to note that the Tribunal's assessment of the Kiribatian government taking "adequate steps" to prevent harm falls under its analysis of the Refugee Convention's grounds for persecution, not in its analysis of ICCPR violations.<sup>120</sup> When considering government action under the ICCPR as it relates to an arbitrary deprivation of life, the Tribunal simply stated that the combination of the Kiribatian government's knowledge of the danger and its taking of "many steps at the regulatory and programme level" was enough to preclude an arbitrary deprivation of life.<sup>121</sup> This lack of consistency in language highlights the vulnerabilities of an increasingly subjective analytical baseline.

The other important consideration is the Tribunal's analysis of the

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115. *Id.* at [14].

116. *Id.* at [61]–[62].

117. *AF (Kiribati)* at [75].

118. *AC (Tuvalu)* at [102].

119. *Id.* at [75] (describing this obligation, if imposed on States, as "an impossible burden").

120. *AF (Kiribati)* at [75] ("Nor has it been suggested that the Government of Kiribati has in some way failed to take adequate steps to protect him from such harm as it is able to for any applicable Convention ground").

121. *Id.* at [88].



risk of cruel, inhuman, or degrading treatment should the appellants in these two cases be deported.<sup>122</sup> Not only is the prevention of this treatment an obligation under Article 7 of the ICCPR, but it is also reflected in Section 131 of the 2009 Immigration Act.<sup>123</sup> Again, the Tribunal relied on evidence of government action to support its denials.<sup>124</sup> In *AC (Tuvalu)*, the Tribunal reiterated that the State was failing in any way to protect its citizens from climate change.<sup>125</sup> However, this ties back to its finding in *AF (Kiribati)* about imminence in which it found that a State action or inaction creating a stronger-than-conjecture possibility of harm could meet the threshold to establish a danger of arbitrary deprivation of life.<sup>126</sup> Looking to the administrations of Kiribati and Tuvalu, both at the time of these cases as well as several years later, there is evidence of a disparity between administrations about the severity of climate change.<sup>127</sup> While the Tribunal did look to a previous Dutch case involving government policy on the lawfulness of nuclear weapons, its dismissal of that policy as evidence of imminent harm is different from government policy denying or downplaying climate change.<sup>128</sup> In this case, evidence that Kiribati and Tuvalu are vulnerable to the shifting views of climate change by their leaders should have met the threshold for substantial grounds of danger of arbitrary deprivation

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122. *See id.* at [79]–[96].

123. *Id.* at [79], [83] (noting that Section 131 protects only against arbitrary deprivation of life, but that “what constitutes arbitrary deprivation of life has not been statutorily defined”); Immigration Act 2009, s 131 (N.Z.) (providing elements for recognition and basis in international treaties of refugee or protected person status).

124. *Id.* at [88] (“the Kiribati Government is acutely aware of the problems poses and is taking many steps . . . in relation to these risks”).

125. *AC (Tuvalu)* [2014] NZIPT 800517-520 at [114].

126. *AF (Kiribati)* at [89]–[91] (noting that the Tribunal draws on the appellant’s wife’s stated fear of her children drowning in a tidal event but not considering the counsel’s statement that the government of Kiribati is unwilling or unable to adequately respond to climate change).

127. *See* Tong & Rytz, *supra* note 29 (“Let Kiribati be a lesson: Its fate will be the world’s fate if we continue burying our heads in the sand”); *see also Tuvalu Regressing on Climate Change*, *supra* note 33 (“The fact that the Prime Minister has endorsed the Pacific Resilience Facility shows that outside interests are even influencing our own national statements and . . . national security”).

128. *AF (Kiribati)* at [89]–[90] (citing *Aaldersberg v. Netherlands*, U.N. Doc. CCPR/C/87/D/1440/2005 (Aug. 14, 2006)).

of life under Article 6(1) or cruel or degrading treatment under Article 7.<sup>129</sup>

## B. SECTION 207 FRAMEWORK AND THE ICCPR

The two standards that the Tribunal assessed to determine grounds to remain are the risk of arbitrary deprivation of life under the ICCPR, and an “unjust or unduly harsh” outcome under Section 207.<sup>130</sup> The issue is that the Tribunal’s inconsistent application of a minimum standard to determine the risk of arbitrary deprivation of life is further complicated by its ability to use humanitarian discretion as a catch-all for situations not meeting ICCPR standards.<sup>131</sup> The Tribunal pointed to a government’s positive obligations to protect the right to life of its citizens.<sup>132</sup> The Tribunal’s conflation of language in its analysis combined a government’s “taking steps” to fulfill its positive obligations under Article 6(1) of ICCPR with the objective result of those steps, but does so inconsistently.<sup>133</sup> For instance, the Tribunal determined that the governments of each country “took steps within its power” to mitigate harm; however, no consideration was made for the level of concrete action taken by the government.<sup>134</sup> This inconsistency of

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129. *Id.* at [91]–[92] (“The Tribunal accepts that, given the greater predictability of the climate system, the risk to the appellant and his family from sea level rise and other natural disasters may, in a broad sense be regarded as more ‘imminent’” yet does not quite reach a threshold to constitute a real risk of arbitrary deprivation of life).

130. Immigration Act 2009, s 207(1)(a) (N.Z.)

131. See *The Emerging New Zealand Jurisprudence*, *supra* note 38, at 132, 138.

132. *AF (Kiribati)* at [86]–[87] (noting that a government’s positive obligations include taking “concrete steps to protect life” and that failure to do so could potentially constitute an omission by the government that creates a risk of arbitrary deprivation of life).

133. Compare *AF (Kiribati)* at [75], [87]–[88] (noting the difference in language between the Kiribatian government taking steps “where it is able” and taking “adequate steps to protect” its citizens under the Refugee Convention), with *AC (Tuvalu)* [2014] NZIPT 800517-520 at [3], [108] (demonstrating the Tribunal’s shift away from adequacy of government response to simply taking steps within its power with no consideration for effectiveness).

134. The Tribunal fails to elucidate a clear minimum threshold for concrete interventions to minimize risk of arbitrary deprivation of life, only stating that the evidence of government action is enough in the Tribunal’s view to preclude a violation of Article 6(1) of the ICCPR. *AF (Kiribati)* at [75], [87]–[88].

standards for government behavior increases the subjectivity of the factors the Tribunals consider, and combined with the relaxed analysis of Articles 6(1) and 7 criteria leads to an increased risk of a violation of individual rights. Following the deportation of the Teitiota family, blood poisoning affecting one of the children is evidence of the Kiribatian government's inadequate actions to protect its most vulnerable citizens.<sup>135</sup> To remain consistent with the individualized nature of these claims and requirements under domestic law, the Tribunal should have more completely examined government action in relation to the specific claimant.

### C. DISCRETION FOR HUMANITARIAN AND CONSIDERATE CIRCUMSTANCES

New Zealand's domestic law, exemplified in its 2009 Immigration Act, closely follows international law regarding the determination of refugee or protected person status.<sup>136</sup> The sections of the Act concerning refugee or protected person status directly reference the meanings given in both the Refugee Convention and the ICCPR.<sup>137</sup> Additionally, Section 207, while providing the basis upon which an appeal to humanitarian discretion may be granted, does not give much by way of specific definitions or tests.<sup>138</sup> A Section 207 analysis, therefore, becomes a balancing test between exceptional circumstances making it "unduly harsh" or unjust to deport the appellant and whether the appellant's personal circumstances or behavior endanger New Zealand's public interests.<sup>139</sup> Looking to case

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135. Hum. Rts. Comm., *Teitiota v. New Zealand*, U.N. Doc. CCPR/C/127/D/2728/2016, annex 2 (Oct. 24, 2019) (highlighting a dissenting opinion noting that even if the Kiribatian government can take steps to provide drinking water potable for native-born citizens, that may still cause harm to others not used to the microbiome of the area).

136. Immigration Act 2009, ss 129, 131 (N.Z.) (concerning recognition as a refugee and as a protected person under the ICCPR).

137. *Id.*

138. *Id.*, s 207. *But see* Fadgen & Charlton, *supra* note 49, at 432 (noting that the previous iteration of the Immigration Act from 1987 included a five-prong test to determine grounds for granting humanitarian discretion which was replaced in the 2009 Act with the "unjust or unduly harsh" standard).

139. *See* Fadgen & Charlton, *supra* note 49, at 431–32 (providing the mandated factors the Tribunal was required to consider as part of the 1987 Act as follows: age of the appellant, length of lawful stay in New Zealand, appellant's personal

law on the matter, what constitutes an exceptional circumstance does not necessarily have to be a rare or uncommon occurrence, but something outside of the circumstances of visa overstayers in general.<sup>140</sup>

The rights of children are figured into the balancing act by looking at the detriment to a deported child.<sup>141</sup> This factor is illustrated in the Tribunal's analysis in *AC (Tuvalu)*, where the Tribunal acknowledges the particular vulnerability of children to water shortages and the lack of available medical treatment such as vaccination programs.<sup>142</sup> However, the Tribunal did not find that the level of harm faced by the appellant's children was severe enough to merit the granting of refugee or protected person status.<sup>143</sup> Instead, the Tribunal granted permanent residence on the basis of exceptional circumstances of a humanitarian nature.<sup>144</sup> This is a different outcome from the Kiribatian family wherein the appellant's children had been born in New Zealand (although were not eligible for citizenship) but were still deported as the Tribunal did not find adequate reason to grant refugee or protected person status.<sup>145</sup>

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circumstances, appellant's work record, nature of the offense triggering deportation, nature of any other convicted offenses, interests of the appellant's family, and other relevant matters the Tribunal would like to consider).

140. Fadgen et al., *supra* note 64, at 266–67 (quoting *Ye v. Minister of Immigration* [2009] 2 NZLR 596 at [34] (SC)). *But see* Farquhar, *supra* note 35, at 37 (defining “exceptional circumstances” as being a “unique” case, illustrating the confusion that the language in Section 207 of the 2009 Act creates when the delineated factors for humanitarian appeals are removed).

141. *AC (Tuvalu)* [2014] NZIPT 800517-520 at [116]–[18].

142. *Id.* (also noting that the Committee's “deep concern” about the effects of natural disasters exacerbated by climate change on the rights of a child is different from a definitive opinion that there were real risks of children being arbitrarily deprived of life).

143. *Id.* at [119] (“The government of Tuvalu is sensitized to the specific vulnerabilities of children” and as such, the appellant's children are not in danger of arbitrary deprivation of life).

144. *AD (Tuvalu)* [2014] NZIPT 501370 at [24], [31]–[33] (citing the family's deep family network in New Zealand; “Culturally, as the only son, the husband is the one who is required to look after his mother” and “although not New Zealand citizens, both children were born in New Zealand and have never been to Tuvalu. Life in New Zealand as part of an extended family network is the only life they have known”).

145. *AF (Kiribati)* [2013] NZIPT 800413 at [91]–[92] (noting that the appellant's wife's fear that her children would drown in climate-driven tidal surges

When comparing the outcomes of these two cases, it is important to note that Teitiota was not able to file an appeal on humanitarian grounds as he missed the deadline to do so.<sup>146</sup> However, under the Immigration Act, officers are granted the ability to cancel deportation orders based on personal circumstances and applicable international obligations.<sup>147</sup> Because of this ability outside of a formal appeal on humanitarian grounds, the Kiribatian appellant's personal circumstances justifying a stay of deportation will be compared to those in *AD (Tuvalu)* which followed *AF (Kiribati)*. In *AD (Tuvalu)*, the Tribunal noted that environmental degradation and climate change could constitute exceptional circumstances meeting the discretion threshold, but only if the situation is such that deporting the individual would be unjust in that particular case (as opposed to acknowledging the general humanitarian concerns that climate change poses globally).<sup>148</sup> Despite the fact that the appellant's children in *AF (Kiribati)* were born and raised in New Zealand and were deported to a country with a vastly different standard of living, in addition to serious threats from climate change, the Tribunal still ruled against the appellant and his family.<sup>149</sup>

Similarly, in *Teitiota v. New Zealand*, dissenting opinions highlighted the facts that access to potable drinking water, upon which the Tribunal in *AF (Kiribati)* relied, does not equate to safe drinking water because of the presence of microorganisms the family, especially the children born in New Zealand, would not be accustomed to.<sup>150</sup> Additionally, after the deportation, one of the

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"remains firmly in the realm of conjecture or surmise").

146. See Weiss, *supra* note 77 ("After the [forty-two-day] grace period, there was no legal room for a humanitarian appeal").

147. See Immigration Act 2009, s 177(2) (N.Z.).

148. See *AD (Tuvalu)* [2014] NZIPT 800517-520 at [32]. But see discussion *infra* Part III (noting that "exceptional circumstances" need only fall between the harm of repatriation generally at one end and harm reaching a level of refugee or protected person status; sending children to a country to which they have no real connection and without limited access to pediatric healthcare could be seen as meeting exceptional circumstances more specific than general negative effects from climate change on a population).

149. See *AF (Kiribati)* at [94]–[95] (explaining that the conditions on the island combined with stated government action did not rise to a severe enough level to warrant a stay of deportation).

150. See Hum. Rts. Comm., *Teitiota v. New Zealand*, U.N. Doc.

appellant's children got a serious case of blood poisoning leading to boils covering his body.<sup>151</sup> While this outcome was unknown at the time of the Tribunal's decision, it serves as evidence that returning the appellant and his family to Kiribati did lead to health problems upon their return to the country.<sup>152</sup>

Relating this humanitarian discretion to New Zealand's obligations under international law to protect an individual's right to life is the justification for domestic tribunals to more narrowly construe the analysis of Article 6(1) because they can cite the discretionary ability.<sup>153</sup> Given the short amount of time to file an appeal on humanitarian grounds coupled with the subjective nature of the criteria for the grounds, a successful appeal is difficult not only to win but to make in the first place.<sup>154</sup>

#### D. INDIGENOUS PEOPLE AND CHILDREN

In its General Comment on Article 6(1), the Human Rights Committee stated that State Parties to the ICCPR must take special care towards vulnerable people facing harm from a specific threat.<sup>155</sup>

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CCPR/C/127/D/2728/2016, annex 1 (Oct. 24, 2019) (dissenting opinion of Committee member Vasilka Sancin specifically discussing the lack of a complete assessment by the Tribunal into the safety of the drinking water provided by the Kiribatian government and there is sufficient evidence that the appellant's claim of insufficient access to safe water is substantiated).

151. *But see id.* at 15 (dissenting opinion of Committee member Duncan Laki Muhumuza stating that the burden of proof to establish real risk of harm was too high for the appellant and that "whereas the risk to a person expelled or otherwise removed, must be personal—not deriving from general conditions, except in extreme cases—the threshold should not be too high or unreasonable").

152. *See AF (Kiribati)* at [19] (noting reported health problems in children caused by contamination of freshwater sources by salt water). Although the Tribunal cannot be held responsible for specific outcomes after the fact, the information is useful for future analyses into any unjust or unduly harsh consequences of deportation.

153. *See generally The Emerging New Zealand Jurisprudence*, *supra* note 38, at 138 (explaining the Tribunal's interpretation of certain concepts are restricted by domestic legislation which results in a narrower construction of Articles 6 and 7).

154. *See Fadgen et al.*, *supra* note 64, at 294–95 (noting that New Zealand government has narrowed the factors to be reviewed and increased the amount of subjectivity when reviewing these factors).

155. *See General Comment No. 36*, *supra* note 46, ¶ 23 ("the duty to protect the right to life requires States parties to take special measures of protection towards persons in vulnerable situations whose lives have been placed at risk because of

The Committee specifically lists ethnic minorities and indigenous peoples as belonging to “persons in vulnerable situations.”<sup>156</sup> In *AF (Kiribati)*, the Tribunal reasoned that the threats faced by the appellant from the effects of climate change and environmental degradation were not felt by him and his family alone, but instead were conditions that the population as a whole felt.<sup>157</sup> In 2018, the majority of Kiribati’s population was indigenous I-Kiribati.<sup>158</sup> Similarly, the majority of Tuvalu’s population is Polynesian.<sup>159</sup> Because the populations of both Kiribati and Tuvalu are indigenous populations, they are entitled to the additional protection recommended by the Committee when facing the specific threat of climate change.<sup>160</sup> The Committee cited a case explaining that the deprivation of life of an individual can be attributed to a state when that state is “fully aware” of the dangers to the individual.<sup>161</sup> Ioane Teitiota, the appellant in *AF (Kiribati)* and subsequent appeals in higher New Zealand courts, had previously made the State aware of

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specific threats or pre-existing patterns of violence”).

156. *See id.* (noting that other groups include children, displaced persons, alleged witches, and transgender persons among others).

157. *See AF (Kiribati)* at [75] (noting specifically that because environmental events had no political or civil dimensions in addition to affecting the community as a whole, status for the appellant as a refugee under the Refugee Convention would fail).

158. *See World Directory of Minorities and Indigenous Peoples – Kiribati*, *supra* note 20 (providing information on indigenous populations in Kiribati).

159. *See Australia and Oceania: Human Geography*, *supra* note 20 (discussing human geography in the Pacific).

160. *Cf. Burkett*, *supra* note 24, at 4 (“Negative impacts on traditional knowledge and cultural sites are already occurring and may accelerate, as, for example, place-based practices, such as taro cultivation and the craft of salt making, are hampered in coastal areas.”).

161. *See Barrios Family v. Venezuela*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 237, ¶¶ 123–124 (Nov. 24, 2011) (“In accordance with the Court’s case law, the treaty obligations of guarantee imposed on States by the [American Convention on Human Rights] do not imply its unlimited responsibility for any act or protection of an individual, because the States’ obligation to adopt measures of prevention and of protection of individuals in their relations with each other are conditioned by their awareness of a situation of real and immediate danger”). *See generally General Comment No. 36*, *supra* note 46, ¶ 23 (“The duty to protect the right to life requires States parties to take special measures of protection towards persons in situation of vulnerability whose lives have been placed at particular risk because of specific threats . . .”).

the danger he was in.<sup>162</sup> Due to the real risk of harm from the Kiribati government's political transition, economic status, and evidence of environmental degradation combined with the State's knowledge of these factors in the appellant's case, New Zealand's deportation of an I-Kiribati family is a violation of the principle of non-refoulement and therefore a violation of Articles 6 and 7.

In *AC (Tuvalu)*, the Tribunal did not find that the appellant's claims of the dangers posed by climate change were substantial or imminent enough to support the granting of either refugee or protected person status, although they did grant permanent residence to the family on an appeal to humanitarian discretion.<sup>163</sup> However, no reference to indigenous rights or protections is made in the original appeal beyond a brief mention of the concept of land ownership among "indigenous Pacific people."<sup>164</sup> There is similarly no reference to protections for indigenous peoples in *AF (Kiribati)*, which is especially significant given that the appellant was unable to bring another appeal on humanitarian grounds.<sup>165</sup> Given that General Comment 36, which includes a provision for increased protection of indigenous peoples, was written after the Tribunal's decision in *AF (Kiribati)*, it cannot be said that the Tribunal expressly violated the ICCPR's protected person obligations.<sup>166</sup> However, because of New Zealand's commitment to interpret its domestic law as consistently as possible with its international obligations, the New Zealand courts should have applied a broader analysis of Article 6(1).<sup>167</sup> By giving

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162. See Ni, *supra* note 15, at 336–343 (describing the legal cases that Ioane Teitiota brought before multiple courts in New Zealand seeking status as a protected person).

163. See *AC (Tuvalu)* [2014] NZIPT 800517-520 at [31] (noting that the family's large network and appellant's responsibility for looking after his mother who had difficulty with mobility would create unduly harsh circumstances for the appellant and his family should they be deported from New Zealand).

164. See *id.* at [11]–[12].

165. See *AF (Kiribati)* [2013] NZIPT 800413 at [94] ("New Zealand's protected person jurisdiction is a creature of statute. It is derived from the ICCPR and the Tribunal is bound by the wording of section 131 [of the 2009 Immigration Act]").

166. See *generally* General Comment No. 36, *supra* note 46 (noting that this document was published in 2019).

167. See Fadgen & Charlton, *supra* note 49, at 425 (noting that "courts will 'strive to interpret legislation consistently with treaty obligations . . . whether or not the legislation was enacted with the purpose of implementing the relevant



deference to Tuvaluan culture in *AD (Tuvalu)* through granting permanent residence to preserve the family unit, the Tribunal demonstrated acknowledgment of and respect for indigenous communities.<sup>168</sup> Although specific reference to special protections for indigenous peoples was not made until the 2019 General Comment, the Draft General Comment published in 2015 does discuss increased protection of minorities and certain other individuals and populations.<sup>169</sup> This draft demonstrates a precedent for this shift in protection, which the Tribunal should have taken into account.<sup>170</sup>

The Tribunal in both *AF (Kiribati)* and *AC (Tuvalu)* also considered the health and safety of the appellants' children should they be returned to Kiribati and Tuvalu.<sup>171</sup> In an appeal of the Tribunal's decision in *AF (Kiribati)*, the court found that the lack of individual refugee status claims for each of the children precluded the court's consideration of an error of law, instead explaining that their claims would be covered by humanitarian discretion under Section 207 of the 2009 Immigration Act.<sup>172</sup> The text of Section 133, however, does not explicitly require individual claims.<sup>173</sup> Instead, the only reference to family is found in Section 133(4) requiring that a claimant inform an officer if he knows of immediate family also seeking protection.<sup>174</sup> The reliance on Section 207 as the sole basis

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text”).

168. See *The Emerging New Zealand Jurisprudence*, *supra* note 38, at 137 (explaining that the Tribunal recognized the cultural obligation of an only son taking responsibility for the care of a parent).

169. See *General Comment No. 36*, *supra* note 46, ¶ 15(1) (including “detainees, minorities, women, children, older persons, migrants, and persons with disabilities” among those for whom special protections should be afforded).

170. See generally Hum. Rts. Comm., *Draft General Comment No. 36: Article 6, Right to Life: International Covenant on Civil and Political Rights*, CCPR/C/GC/R.36/Rev.2.

171. *AF (Kiribati)* [2013] NZIPT 800413 at [91]; *AC (Tuvalu)* [2014] NZIPT 800517-520 at [113]–[119].

172. See *Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173, [35] (“Sympathetic though one might be to the position of the applicant’s family, there is no identifiable error of law” in reference to the fact that only the appellant, Ioane Teitiota, had filed a claim, but that his children and wife who were also eligible to file for protected person status failed to do so).

173. Immigration Act 2009, s 133(4) (N.Z.).

174. See *id.* (“If a claimant is aware that any member of his or her immediate

for protection of the appellant's family resulted in a more subjective analysis of risk of harm than that contained in Section 131 for no reason supported by New Zealand's domestic law.<sup>175</sup>

Additionally, as discussed above, the ability to submit an appeal on humanitarian grounds is subject to a short time-window while also serving as a catch-all protection for domestic immigration courts is inconsistent with the right to life and freedom from cruel treatment.<sup>176</sup> The Tribunal in *AC (Tuvalu)* did consider the rights of the appellant's children more than in *AF (Kiribati)*, but relied again primarily on evidence of government action without considering the real-world effects.<sup>177</sup> For example, the appellant noted the general lack of medical facilities and medication on the island, which in combination with the observation that children born in New Zealand are not used to certain microorganisms that may be present in rationed water could become sick increases the likelihood that returning a child under these conditions constitutes cruel treatment.<sup>178</sup>

More generally at issue with the Tribunal's reliance on humanitarian discretion is the matter of consistency with international obligations.<sup>179</sup> Prior to the replacement of the 1987 Immigration Act with the 2009 Act, the Supreme Court of New Zealand ruled that consistency between domestic law and

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family who is in New Zealand is seeking recognition as a refugee or a protected person, the claimant must, as soon as possible after making a claim, inform a refugee or protection officer").

175. See *The Emerging New Zealand Jurisprudence*, *supra* note 38, at 132 (noting that humanitarian discretion does not need to be based on either international or domestic legal obligations).

176. See *infra* Section IV(E).

177. *AC (Tuvalu)* [2014] NZIPT 800517-520 at [117–19] (acknowledging the inherent vulnerability of young children but citing government action to provide rationed water in cases of emergency).

178. Hum. Rts. Comm., *Teitiota v. New Zealand*, U.N. Doc. CCPR/C/127/D/2728/2016, annex 1 (Oct. 24, 2019) (Committee member Vasilka Sancin, dissenting) (specifying that "the Special Rapporteur on the human right to safe drinking water . . . on her mission to Kiribati in July 2012 . . . warned that the National Development Strategy 2003–2007 . . . contained policies and goals of direct relevance to water, but that the priorities set for the first three years . . . had yet to be implemented"); see also *AC (Tuvalu)* at [32] ("The government does not have the medical facilities and the medicines are generally not available to keep children healthy").

179. Fadgen & Charlton, *supra* note 49, at 425.

international obligations would create “certain substantive and procedural requirements” within the 1987 Act.<sup>180</sup> Similarly, the removal of specific factors from the 1987 Act, such as consideration for the interests of the appellant’s family, further restricts protections for children.<sup>181</sup> Because Section 131 requires individual applications for protected person status, failure to do so necessarily relies on the more subjective language of Section 207.<sup>182</sup> This extra step, in combination with the broader balancing test under Section 207, creates an additional barrier for the protection of children, which is seemingly at odds with the high level of importance international law places on children’s rights.<sup>183</sup> While the Tribunal does make reference to the potential danger to the appellant’s family members in *AF (Kiribati)*, the Tribunal’s analysis is firmly centered on the appellant’s individual situation.<sup>184</sup>

Because the balance required for an “unjust or unduly harsh” outcome falls between hardship from “mere repatriation” and circumstances qualifying refugee or protected person status,<sup>185</sup> the interests of a child born and raised in a different country with a

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180. *Id.* at 433 (citing *Zaoui v. Attorney-General (No 2)* [2005] 1 NZLR 577 (SC)) (highlighting the extent to which the domestic courts interpret international obligations when analyzing legislation in relation to protected rights and also noting that this “presumption of consistency” may have been more readily applied in the 1987 Act with its enumerated factors for consideration than the subsequent 2009 Act’s broader balancing test).

181. *See* Immigration Act 1987, s 22(f) (N.Z.) (mandating that the Tribunal shall examine “the interests of the appellant’s family” in its determination of an appeal for humanitarian discretion).

182. *Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173, [35] (noting that the Tribunal specifically asked why separate appeals had not been filed for the appellant’s wife and children, the text of the decision does not specify what those answers were, such as failure to meet the deadline to appeal, lack of knowledge about the requirement, or some other reason).

183. *See* Fadgen & Charlton, *supra* note 49, n 49 (“Arts[.] 17, 23, and 24 of the International Covenant on Civil and Political Rights [ICCPR] place the rights and interests of a child as rights and interests of the highest order”).

184. *See AF (Kiribati)* [2013] NZIPT 800413 at [89] (“[The appellant] cannot establish that there is a sufficient degree of risk to his life, or that of his family, at the present time.”)

185. *Id.* at [88] (describing how the structure of the 1987 Act created an analytical framework with a minimum standard for judicial review absent from the 2009 Act.)

different standard of living and access to medical care should meet the threshold for Section 207.<sup>186</sup> The combination of risks that the children in these cases face and New Zealand's inconsistent application of domestic legal framework, New Zealand's reliance on Section 207 and deportation of the appellants violated Articles 6 and 7 of the ICCPR.

#### IV. RECOMMENDATIONS

Climate change, resulting in rising sea-levels and severe weather events, is a real danger for low-lying Pacific Island nations rising only a few meters above sea level.<sup>187</sup> Major effects of climate change include severe storm surges, salination of wells and farmland making it difficult to grow crops, and the destruction of infrastructure like roads.<sup>188</sup> New Zealand courts reviewing asylum applications from Pacific Island citizens citing imminent danger to life from the effects of climate change have been consistently denied, in violation of Articles 6 and 7 of the ICCPR of which New Zealand is a party.<sup>189</sup> To mitigate this situation, Part A recommends that New Zealand amend its current Immigration Act to reflect the enumerated factors limiting the Tribunal's discretionary previously seen in the 1987 Immigration Act.<sup>190</sup> Part B recommends that the international community work to strengthen maritime law by ensuring that State sovereignty is not threatened by rising sea levels as it is in the current Convention on the Law of the Sea.<sup>191</sup> Lastly, Part C recommends that New Zealand reinstate plans to create a special visa pathway for those displaced by

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186. Hum. Rts. Comm., *Teitiotia v. New Zealand*, U.N. Doc. CCPR/C/127/D/2728/2016, at 15 (noting in the dissenting opinion that “[w]ater can be designated as potable, while containing microorganisms dangerous for health, particularly for children (all three of [Ioane Teitiotia]’s dependent children were born in New Zealand and were thus never exposed to water conditions in Kiribati”).

187. *See supra* Section III(A).

188. *Id.*

189. *See generally* Buchanan, *supra* note 6 (providing a list of case names from the year 2000 illustrating the analysis undertaken by the New Zealand Refugee Status Appeals Authority which precedes the current Immigration and Protection Tribunal); *See supra* Section III.

190. *See infra* Section IV(A).

191. *See infra* Section IV(B).

climate change.<sup>192</sup>

A. REINSTATING AN ENUMERATED LIST OF FACTORS LIKE NEW ZEALAND'S 1987 IMMIGRATION ACT

The discretionary ability written into New Zealand's domestic law allows the Tribunal to more narrowly apply the elements of Articles 6 and 7 of the ICCPR.<sup>193</sup> While this discretionary ability can arguably be used to broaden the Tribunal's ability to consider cases for refugee or protected person status that do not meet the criteria of Articles 6 and 7, other countries with similar policies demonstrate that this may not be a realistic outcome.<sup>194</sup> Looking at the successful humanitarian discretion claim in *AD (Tuvalu)*, the Tribunal granted residence permits to the appellants due to concerns of family separation, not concerns of arbitrary deprivation of life or cruel treatment under the ICCPR.<sup>195</sup> Additionally, Australia's Ministerial discretion, which is both non-reviewable and non-delegable, has prompted a number of inquiries by the Senate Legal and Constitutional References Committee for lack of transparency and accountability in the decisions.<sup>196</sup> Returning to the use of humanitarian discretion within New Zealand's domestic system, the removal of the 1987 Immigration Act's enumerated factors for mandated consideration demonstrates an unhelpful movement away from transparency and accountability by obscuring the factors involved in the decision.<sup>197</sup> Given the rapidly evolving nature of climate migration and claims that do not fit into established

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192. See *infra* Section IV(C).

193. *The Emerging New Zealand Jurisprudence*, *supra* note 38, at 138.

194. See Susan Kneebone, *The Australian Story: Asylum Seekers Outside the Law*, in REFUGEES, ASYLUM SEEKERS AND THE RULE OF LAW: COMPARATIVE PERSPECTIVES 171, 208 (Susan Kneebone, ed., 2009) ("The overall success rate on [ministerial discretion] in 'humanitarian' (mainly refugee) cases has typically been as low as 5.1% . . . thus the exercise of the s 417 discretion does not operate as a true 'safety-net'.").

195. *AC (Tuvalu)* [2014] NZIPT 800517-520 at [24], [31–33].

196. See Kneebone, *supra* note 198, at 209 (citing two failed cases brought by asylum seekers that prompted an inquiry into the use of the Minister's discretion because of the "informal nature of the process").

197. Immigration Act 1987, s 22 (N.Z.); *cf.* Immigration Act 2009, s 207(1) (N.Z.) (noting the differences in enumerated standards between the 1987 Act and the current version).

frameworks, the efficient use of humanitarian discretion could be an alternative solution to amending frameworks like the Refugee Convention or the ICCPR.<sup>198</sup> In combination with the recommendations below, New Zealand should use an enumerated list of factors raising the specificity of its domestic immigration law. This specificity would increase New Zealand's compliance with its international obligations and treatment of climate displaced persons by analyzing all individual circumstances consistent with a standard guide, thus making the process more transparent and effective for future cases.

## B. MARITIME BOUNDARIES AND STATE SOVEREIGNTY

Rising sea levels present a unique legal consideration for the international community to address. A state's sovereignty over maritime territory (known as exclusive economic zones, or EEZs) is established by measuring from low water marks, and establishes that "rocks which cannot sustain human habitation or economic life of their own" shall not have EEZs.<sup>199</sup> Although previous conventions on maritime law have assumed that these baselines would remain unchanged, the issue of rising sea levels puts these EEZs at risk as low water marks from which the baselines are calculated shift.<sup>200</sup>

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198. See Kerry Carrington, *Ministerial Discretion in Migration Matters: Contemporary Policy Issues in Historical Context*, 3 CURRENT ISSUES BRIEF 16 (2003) ("New Ministerial Guidelines issued in 1999 which now explicitly reflect Australia's humanitarian obligations . . . direct case officers to assess every negative decision of the relevant tribunal against criteria set out in those guidelines in deciding whether or not to recommend a case to the Minister for consideration . . . significantly enhancing the chance of many more cases of a humanitarian nature being recommended.").

199. Armstrong & Corbett, *supra* note 3, at 2 (noting examples of enormous cost and inefficiency in countries like Japan trying to build seawalls to maintain their EEZs (the Okinotorishima rocks in Japan)).

200. *Id.* (noting that due to their geographic features, certain countries like Kiribati and Tuvalu have some of the largest EEZs in the world because the chains of islands separated by water increase the amount of maritime territory with a proportionally smaller amount of land); see also Tim McDonald, *Pacific Islands Want a Bigger Share of Fishing Income*, BBC (Nov. 24, 2015), <https://www.bbc.com/news/business-34897585> ("Kiribati's land area is only 810 sq km, roughly equal to the city of New York or about half the size of Greater London, but its exclusive economic zone bigger than India (about 3.5 million sq km)").

The Study Group of the International Law Commission has submitted a report detailing the problem and urging the development of legislation to create fixed baselines instead of ones that shift with the traditional boundaries.<sup>201</sup> This action would include updating the United Nations Convention on the Law of the Sea to specifically state how baselines should be calculated given rising sea levels.<sup>202</sup> The report specifies that only fifteen countries have officially requested that the International Law Commission (“ILC”) address this issue.<sup>203</sup> New Zealand was not one of these countries and has only referred to the importance of the issue through its national delegation to the Sixth Committee of the General Assembly of the ICC.<sup>204</sup> Because Pacific Island nations such as Kiribati and Tuvalu generate a significant portion of their GDP from marine resources such as fishing licenses, legislation that protects their maritime boundaries in the face of climate change would contribute to their economic stability.<sup>205</sup>

The other prong to this recommendation is the importance of preserving State sovereignty at risk by the loss of EEZs. The stated desire of Pacific Island citizens is to maintain their homes and

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201. See Int'l Law Comm'n, *Sea-Level Rise in Relation to International Law*, U.N. Doc. A/CN.4/740, ¶ 91 (2020) (discussing the possibility of using official maritime charts to delineate boundaries instead of low-water lines to determine State territory, and that the movement towards fixed baselines was already consistent with international law) [hereinafter *Sea-Level Rise in Relation to International Law*].

202. See *Convention on the Law of the Sea*, Dec. 10, 1982, 1833 U.N.T.S. 397, arts. 3–5 (providing current guidance on the establishment of the territorial sea, including calculation of baselines).

203. *Sea-Level Rise in Relation to International Law*, *supra* note 206, ¶ 8.

204. *Sea-Level Rise in Relation to International Law*, *supra* note 206, at [8], [93] (“In its 2019 statement, New Zealand stated that it ‘was committed to working with partners to ensure that, in the face of changing coastlines, the maritime zones of coastal States were protected’ and in a 2018 statement said that ‘coastal States’ baselines and maritime boundaries should not have to change because of human-induced sea level rise.’”).

205. Webb, *supra* note 19, at 6; Press Release, Int'l Monetary Fund, *IMF Executive Board Concludes 2021 Article IV Consultation with Tuvalu* (Aug. 4, 2021), <https://www.imf.org/-/media/Files/Publications/CR/2021/English/1TUVEA2021001.ashx> (noting percentage of revenue from fishing per year in Tuvalu).

culture rather than to abandon the islands.<sup>206</sup> Thus, ensuring that the islands can sustain themselves at a basic level (not including financing climate change mitigation plans) is extremely important.<sup>207</sup> New Zealand should support an amendment to the Convention on the Law of the Sea or an alternative legislative framework addressing sea-level rise on maritime territory.

C. NEW ZEALAND SHOULD REINSTATE ITS PLAN TO CREATE A  
FRAMEWORK TO ADMIT CLIMATE REFUGEES FROM OTHER PACIFIC  
ISLAND NATIONS

In 2017, New Zealand announced that it would be implementing a framework to recognize refugees fleeing the effects of climate change as a valid pathway under the domestic application of the Refugee Convention.<sup>208</sup> This plan, however, was discontinued in 2018 following concerns from other Pacific Island national leaders that the visa pathway would cause harm by prioritizing a way off the islands instead of helping to mitigate climate change.<sup>209</sup> This view is consistent with the Kiribati government's official plans to build up the tourism industry as a source of income as well as evidence of tension between the current and previous administration.<sup>210</sup> While

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206. See Ni, *supra* note 15, at 335 (describing how global discourse on “climate refugees” evokes a sense of helplessness in the citizens of Kiribati.); see also Walters, *supra* note 6 (“It has become apparent Pacific peoples have no appetite for anything that remotely resembles refugee status, which conjures up images of homeless, stateless people forced to give up their land, and eventually culture”).

207. *Id.*

208. Jane Steffens, *Climate Change Refugees in the Time of Sinking Islands*, 52 VAND. J. TRANSNAT'L L. 727, 748 (2019) (discussing a plan that would admit one hundred individuals on a special visa category for climate-induced harm).

209. See Burkett, *supra* note 24, at 4 (“By highlighting the apparently inevitable loss of their entire homelands, Tuvalu and the Maldives have challenged international climate change discourse that is dominated by wealthier, higher-polluting countries.”); see also Jane McAdam, *Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement*, 114 AM. J. INT'L L. 4, 711 (2020) (“Since 2017, more people have been displaced within their own countries by sudden-onset disasters than by conflict—sixty-one percent compared to thirty-nine percent”); Robert Huish & Sharon McLennan, *Cuban Compassion*, ECOLOGIST (July 15, 2019), <https://theecologist.org/2019/jul/15/cuban-compassion> (discussing a program that encourages Kiribatian medical professionals to remain in the country).

210. See Tong & Rytz, *supra* note 29 (stating that “luxury infrastructures will



respecting the sovereignty of other nations, New Zealand should be realistic about the risks posed to citizens of low-lying atoll nations given the dire warnings of climate scientists.<sup>211</sup> Similarly, Article 12 of the ICCPR states that individuals have a right to freely leave any country.<sup>212</sup> It would be prudent for New Zealand to resume its migration scheme so that applicants with valid claims have a more direct path to safety. It should then be the responsibility of the sending State governments to incentivize its citizens to remain by prioritizing spending in areas of social services and infrastructure. According to the economic survey of Kiribati, a rapid increase in revenue and financial stability from fishing licenses from the last decade is in jeopardy of depletion from risky government investment, infrastructure maintenance, and rapid expenditure.<sup>213</sup> Because of these factors, New Zealand should continue to implement the framework and update its legislation to reflect the current state of affairs.

Additionally, should New Zealand reinstate this visa pathway, it should take care to avoid using the word “refugee,” which is disfavored by the I-Kiribati because of its connotation with the idea of victimhood.<sup>214</sup> However, there should still be some differentiation between the concept of voluntary migration and forced displacement from climate change to establish a legal precedent for other countries

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eventually flood. Instead of actively dismantling climate policies set in place by a previous government, the current administration should focus on building realistic climate mitigation plans”).

211. See Blue, *supra* note 14, at 67 (stating that “[a]s a result of rising seas and the ensuing loss of territory, 2.2 million people could be displaced from small island States, including all people residing among atoll nations, by century’s end”).

212. ICCPR, *supra* note 5, art. 12(2).

213. Webb, *supra* note 19, at 24–25 (noting that there are many obstacles present to the effective growth or establishment of a tourism sector); see also Burkett, *supra* note 24, at 4 (noting that the tourism sector has been negatively affected in certain island nations); Ashley Westerman, *The Pandemic Wiped Out Tourism on Pacific Island Nations. Can They Stay Afloat?*, THE WORLD (Jan. 28, 2021, 1:30 PM), <https://theworld.org/stories/2021-01-28/pandemic-wiped-out-tourism-pacific-island-nations-can-they-stay-afloat> (discussing COVID-19’s economic impact on the tourism sector in various countries in the Pacific).

214. Ni, *supra* note 15, at 335 (describing how I-Kiribati people have criticized the use of the term “refugee” as the imagery associated with the term is at odds with “Pacific pride”).

to follow, even if non-binding outside of New Zealand.<sup>215</sup>

## V. CONCLUSION

New Zealand is in violation of Articles 6 and 7 of the ICCPR by denying and returning applicants for refugee and protected person status to their home countries facing credible threats from climate change due to rising sea levels.<sup>216</sup> While the Tribunal does discuss Articles 6 and 7, the analysis regarding whether an arbitrary deprivation of life would occur should the applicants be returned to their home countries is incomplete, resulting in harm and degradation of quality of life for the applicants whose petitions were denied.<sup>217</sup> Similarly, the dismissal of the possibility of cruel, inhuman, or degrading treatment evidenced by government action plans did not adequately consider the imminence of the threat and vulnerability of the nation to shifting policies regarding climate change.<sup>218</sup> Additionally, increased protections for indigenous peoples and children were not adequately analyzed.<sup>219</sup> Finally, the Tribunal and higher courts made numerous references to the applicability of humanitarian discretion as a means of obtaining permanent residence, although trends in domestic law towards subjectivity in granting these claims indicate that the Tribunal's reliance on this mechanism as a justification for a narrower reading of Articles 6 and 7 is misplaced.<sup>220</sup>

New Zealand should first amend its domestic legal framework to

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215. See Leilani Rania Ganser, *The Climate Crisis Isn't Just Taking Pacific Islanders' Homes, It's Taking Our Identities: As Indigenous Pacific Islanders, Climate Adaptation Plans Cannot Override Our Fight for Sovereignty and Self-Determination*, VICE (Dec. 4, 2019, 5:00 AM), <https://www.vice.com/en/article/43kje3/climate-change-isnt-just-taking-indigenous-pacific-islanders-homes-its-taking-our-identities> (stating that “this makes managed retreat a question of Indigenous sovereignty or, put another way, makes Indigenous sovereignty a form of climate action. It underscores the necessity of listening to the Indigenous population of a region affected by the climate crisis and gives context to the global challenges Indigenous climate defenders face.”).

216. See *supra* Section III.

217. See *supra* Section III(B), (C).

218. *Id.*

219. See *supra* Section III(D).

220. See *supra* Section III(B), (C).

become more consistent with its international obligations under the ICCPR. Relying on humanitarian discretion with a subjective appraisal and no requirements for officers to explain their reasoning on deportation decisions does not provide adequate protections for people from atoll nations facing climate change.<sup>221</sup> New Zealand should also focus resources on creating better pathways for applicants facing threats from climate change in a manner both consistent with the ICCPR and the wishes of the sending States. Similarly, the international community should take specific steps to amend or create agreements regarding maritime resource rights given threats from rising sea levels so that State governments are more secure in their mitigation plans to address climate change.

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221. *Id.*