

# A PATH TO CLIMATE ASYLUM UNDER U.S. LAW

By Natalie Smith\*

*Clarifying the extent to which existing legal regimes afford protection to climate migrants must be part of an effective and coordinated response to climate change. This Note argues that climate refugees, a group which it narrowly defines as those who meet the requirements of the 1951 Refugee Convention because they have experienced climate change–induced harm amounting to persecution, should qualify for asylum under U.S. immigration law. To establish an initial asylum claim, climate refugees must demonstrate persecution on account of one of the Refugee Convention’s five protected grounds. Either membership in a particular social group or nationality could be an appropriate basis. In the context of climate change, the accumulation of slow- and rapid-onset harm inflicted by high-emitting actors in the Global North, against which climate refugees’ governments are unable or unwilling to protect them, should constitute persecution. Actual or constructive knowledge of the relationship between high-emitting activities, climate change, and damage to climate-vulnerable populations should establish a nexus between persecution and the protected ground. Successfully meeting these criteria establishes a well-founded fear of future persecution, which the U.S. government may rebut. To overcome such a refutation, climate refugees should argue for humanitarian asylum based on their fear of experiencing “other serious harm” if repatriated, which provides an opportunity to introduce the full range of evidence of climate change–related harm. While most climate migrants will not meet the criteria for climate asylum, those who qualify should benefit from this established form of protection.*

INTRODUCTION .....	1780
I. ASYLUM IN THE CONTEXT OF CLIMATE MIGRATION.....	1784
A. A Brief Note on Terminology.....	1784
B. Growing Recognition of Climate Asylum.....	1785
1. Reconciling Asylum and Climate Change–Induced Displacement .....	1785
2. Evolving Bases for Climate Refugee Protection Under International Law .....	1789
3. U.S. Asylum Law and Climate Migration.....	1791
II. ESTABLISHING AN INITIAL CLIMATE ASYLUM CLAIM.....	1794
A. Protected Grounds.....	1794
1. Membership in a Particular Social Group.....	1795
a. Doctrinal Framework .....	1795

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\* J.D. Candidate 2025, Columbia Law School. Thanks to Professor Camille Pannu for her support and to the staff of the *Columbia Law Review* for their diligent editorial work.

b. Application to Climate Asylum.....	1797
2. Nationality.....	1799
B. Persecution.....	1800
1. Nature of Persecution.....	1800
2. Persecutory Actor.....	1805
C. Nexus.....	1807
III. CLAIMING HUMANITARIAN ASYLUM.....	1808
A. Humanitarian Asylum in the Climate Change Context.....	1809
1. Introduction to Humanitarian Asylum.....	1809
2. “Other Serious Harm”.....	1812
3. Federal Appellate Precedent.....	1815
4. Justifying Climate Change as a Basis for Humanitarian Asylum.....	1816
B. Statutory Challenges: Evaluating the Strengths of Potential Government Rebuttals.....	1817
1. Reasonable Internal Relocation.....	1818
2. Changed Country Conditions.....	1818
CONCLUSION.....	1819

## INTRODUCTION

The immense scale of predicted climate migration demands an effective and coordinated international response.<sup>1</sup> One component of this effort must be clarifying the application of existing international legal regimes to this novel context—perhaps most saliently, the extent to which

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1. See Juergen Voegelé, Foreword to Viviane Clement, Kanta Kumari Rigaud, Alex de Sherbinin, Bryan Jones, Susana Adamo, Jacob Schewe, Nian Sadiq & Elham Shabahat, World Bank, *Groundswell Part 2: Acting on Internal Climate Migration*, at xvii (2021), <http://hdl.handle.net/10986/36248> (on file with the *Columbia Law Review*) (predicting that climate change will internally displace 143 million people in sub-Saharan Africa, South Asia, and Latin America alone by 2050); UN, *The Sustainable Development Goals Report 2020*, at 37 (2020), <https://unstats.un.org/sdgs/report/2020/The-Sustainable-Development-Goals-Report-2020.pdf> [<https://perma.cc/H33L-DPDM>] (claiming that, if water stress remains “unmitigated,” water scarcity could displace 700 million people by 2030); Paula Beltran & Metodij Hadzi-Vaskov, *How Climate Shocks Are Linked to Cross-Border Migration in Latin America and the Caribbean*, IMF (Dec. 8, 2023), <https://www.imf.org/en/News/Articles/2023/12/08/cf-how-climate-shocks-are-linked-to-cross-border-migration-in-latin-america-and-the-caribbean> [<https://perma.cc/YN76-8R7U>] (demonstrating that acute climate change events have an appreciable impact on migration from Latin American countries); Cesia Chavarría, Alejandro Cartagena, Alberto Cabezas & Pablo Escrivano, *In Central America, Disasters and Climate Change Are Defining Migration Trends*, Int’l Org. Migration, <https://environmentalmigration.iom.int/blogs/central-america-disasters-and-climate-change-are-defining-migration-trends> [<https://perma.cc/B4MN-39L4>] (last visited Aug. 5, 2024) (discussing increased migration from Central to North America due to climate change–induced natural disasters).

the protections of international refugee law can encompass climate migrants.<sup>2</sup>

As for any other category of displacement, the standard governing refugee status in the context of climate migration emerges from the 1951 Convention Relating to the Status of Refugees (“Refugee Convention”) and its 1967 Protocol.<sup>3</sup> The Refugee Convention defines a refugee as an individual who has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,” is outside their country of origin, and, due to such fear, is “unwilling to avail [them]self of [its] protection.”<sup>4</sup> To be legally considered refugees and eligible for asylum, climate migrants thus face three central challenges: they must have (1) experienced harm amounting to persecution (2) on account of (3) one of these five protected grounds.<sup>5</sup> Though persecution has no precise definition in this context, “a threat to life or freedom” based on one of the protected grounds “is always persecution.”<sup>6</sup> The second requirement, termed the “nexus,” demands that such persecution be inflicted because of one of the protected characteristics.<sup>7</sup>

There is widespread recognition that some climate migrants will meet the Refugee Convention’s standard but little agreement as to the precise

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2. See Jane McAdam, *Climate Change, Forced Migration, and International Law* 39–51 (2012) [hereinafter *McAdam, Climate Change*] (discussing the application of existing international legal regimes to climate migrant protection).

3. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter *Refugee Convention*]; see also Protocol Relating to the Status of Refugees, Dec. 16, 1966, 606 U.N.T.S. 267 [hereinafter *Refugee Protocol*]. The Refugee Convention originally applied only to events that occurred before January 1, 1951, and allowed each signatory to decide whether it had an obligation to refugees from outside of Europe. See *Refugee Convention*, supra, art. 1, ¶ B.1(1), 189 U.N.T.S. at 154. The Protocol removed these temporal and geographic restrictions, recognizing “that new refugee situations have arisen since the convention was adopted” and “it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention.” See *Refugee Protocol*, supra, at 268.

4. *Refugee Convention*, supra note 3, art. 1, ¶ A(2), 189 U.N.T.S. at 152.

5. See *id.* (establishing these three elements of the “refugee” definition under international law).

6. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 51, HCR/1P/4/ENG./REV.4 (2019) [hereinafter *UNHCR Handbook*]; see also *Matter of Laipenieks*, 18 I. & N. Dec. 433, 457 (B.I.A. 1983) (adopting identical language). As a crime against humanity under international criminal law, persecution is more precisely defined as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.” *Rome Statute of the International Criminal Court* art. 7, ¶ 2(g), July 17, 1998, 2187 U.N.T.S. 90, 94.

7. See *UNHCR Handbook*, supra note 6, ¶¶ 66–67 (examining the requirement that persecution be experienced on account of one of the protected grounds).

context it governs.<sup>8</sup> Some types of climate change–related<sup>9</sup> asylum claims correspond more naturally to conventional understandings of the protection that the Refugee Convention offers. For instance, President Joe Biden’s Administration has recognized that a government’s discriminatory withholding of climate change relief from particular groups might amount to persecution.<sup>10</sup> Similarly, the U.N. High Commissioner for Refugees (UNHCR) accepts that the Refugee Convention extends to situations in which climate change increases the risk of persecution or violence.<sup>11</sup> For example, refugees who fled from northern Cameroon to neighboring Chad in 2021 after conflict erupted due to climate change–induced water scarcity would fall within the ambit of the Refugee Convention.<sup>12</sup> However, these limited categories exclude what might be termed “climate asylum”: qualification for asylum on the basis that climate change–based harm, for which a set of international high-emitting actors are responsible, amounts to persecution, against which climate migrants’ own governments are unable or unwilling to protect them.

In the absence of an international agreement reconciling climate migration and refugee status, examining domestic legislation

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8. See *infra* section I.B.

9. This Note adopts the following definition for climate change: “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.” UN Framework Convention on Climate Change, art. 1, ¶ 2, May 9, 1992, 1771 U.N.T.S. 107, 168.

10. See The White House, Report on the Impact of Climate Change on Migration 17 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/10/Report-on-the-Impact-of-Climate-Change-on-Migration.pdf> [<https://perma.cc/6UQ7-UVVT>] [hereinafter *Climate Migration Report*] (“For example, if a government withholds or denies relief from the impacts of climate change to specific individuals who share a protected characteristic in a manner and to a degree amounting to persecution, such individuals may be eligible for refugee status.”); see also Christel Cournil, *The Inadequacy of International Refugee Law in Response to Environmental Migration*, in *Research Handbook on Climate Change, Migration and the Law* 85, 102 (Benoît Mayer & François Crépeau eds., 2017) (“[A]nother example could include governments that persecute through the denial of assistance to specific groups of people affected by an environmental disaster.”).

11. See Kristy Siegfried, *Climate Change and Displacement: The Myths and the Facts*, UNHCR U.K. (Nov. 15, 2023), <https://www.unhcr.org/uk/news/stories/climate-change-and-displacement-myths-and-facts> [<https://perma.cc/UZ6C-RLTF>] (recognizing that the Refugee Convention may afford protection when “an individual’s risk of facing persecution or violence is increased by climate change”).

12. *Id.* In this region, temperatures increased 1.5 times more quickly than the global average, impacting an estimated 80% of farmland. The surface area of Lake Chad, the body of water supporting the region, decreased by up to 95% over the past sixty years due to rain scarcity. The violent conflict between pastoralists and a group of fishermen and farmers displaced eleven thousand people to Chad between August and September 2021. To support their livelihoods, the latter resorted to trapping rainwater in trenches, in which the pastoralists’ cattle were frequently trapped. Aristophane Ngargoune, *Climate Change Fuels Clashes in Cameroon that Force Thousands to Flee*, UNHCR (Sept. 9, 2021), <https://www.unhcr.org/news/stories/climate-change-fuels-clashes-cameroon-force-thousands-flee> [<https://perma.cc/XE7X-SJMD>].

implementing the Refugee Convention better facilitates actual consideration of the potential success of a climate asylum claim. In the United States, the Immigration and Nationality Act (INA) incorporates and expands upon the language of the Refugee Convention.<sup>13</sup> As amended by the Refugee Act of 1980, it establishes a burden-shifting framework for an asylum claim, introducing additional elements: (1) the applicant must establish past persecution, which creates a presumption of a well-founded fear of future persecution; (2) the government may rebut this presumption by proving either that country conditions have changed or that the applicant could reasonably relocate within their country of origin; and (3) the applicant, by prevailing on a claim of humanitarian asylum, may overcome the rebuttal.<sup>14</sup> Prior scholarship has explored strategies for establishing past persecution under the INA but has largely neglected to evaluate this framework as a whole.<sup>15</sup> In particular, it has failed to consider the role of humanitarian asylum, the discretionary grant of protected status in the absence of a future fear of persecution, in combating challenges raised by the U.S. government.<sup>16</sup>

Considering this burden-shifting framework collectively, this Note argues that U.S. asylum law is capable of providing—and, applied justly

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13. The INA distinguishes between asylum and refugee status, awarding the former to applicants within the territorial United States and the latter to those abroad. See 8 U.S.C. § 1101(a)(42) (2018) (defining “refugee”); *id.* § 1158 (establishing provisions for asylum); see also *id.* § 1157 (articulating criteria for admitting refugees).

14. See Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.) (amending the INA to bring the United States into compliance with the Refugee Convention and its Protocol). Federal appellate courts have characterized this as a burden-shifting framework. See, e.g., *Mejia-Lopez v. Barr*, 944 F.3d 764, 768–69 (8th Cir. 2019) (explaining that establishing past persecution as part of an asylum claim provides a “rebuttable presumption of a well-founded fear of [future] persecution”). But it may, in practice, function more as a balancing test for cases in which the government alleges reasonable internal relocation and the applicant seeks humanitarian asylum based on “other serious harm.” See *infra* section III.B.1.

15. For scholars that have examined only the initial asylum claim, see, e.g., Jessica B. Cooper, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 N.Y.U. Env’t L.J. 480, 486–87 (1998) (arguing that “environmental refugees” meet the criteria of the Refugee Convention based on “government-induced environmental degradation”); Shea Flanagan, “Give Me Your Tired, Your Poor, Your Huddled Masses”: The Case to Reform U.S. Asylum Law to Protect Climate Change Refugees, 13 DePaul J. for Soc. Just. 1, 22–32 (2019) (proposing either the addition of a sixth “environmental” protected ground or recognition on the basis of a particular social group); Barbara McIsaac, *Domestic Evolution: Amending the United States Refugee Definition of the INA to Include Environmentally Displaced Refugees*, 9 U. Mia. Race & Soc. Just. L. Rev. 45, 69–72 (2019) (recommending an amendment to the INA to encompass environmental refugees); see also Julia Toscano, *Climate Change Displacement and Forced Migration: An International Crisis*, 6 Ariz. J. Env’t L. & Pol’y 457, 476–78 (2015) (rejecting the possibility that the Refugee Convention might afford protection to environmentally displaced people and recommending the development of a new international agreement).

16. See *infra* section III.B (exploring potential government rebuttals, such as the argument that an applicant’s own government has taken substantial steps to mitigate and adapt to the impacts of climate change).

toward humanitarian ends, must provide—protection for climate refugees. It first introduces international discourse surrounding climate asylum and its relationship to the United States’ burgeoning response to climate migration. It then examines the initial and humanitarian asylum claims in turn, countering potential rebuttals and outlining a successful claim.

## I. ASYLUM IN THE CONTEXT OF CLIMATE MIGRATION

To frame the protection the INA might afford to climate refugees, this Part explores the current discourse surrounding climate asylum. It first briefly acknowledges disputes of terminology and explains this Note’s use of the terms “climate asylum” and “climate refugee.” Turning to broad challenges in applying refugee law in the context of climate change, it then examines growing international recognition of climate change as a basis for asylum claims. Finally, it discusses the United States’ response to climate migration and argues that climate asylum must be an integral component of maximizing the protections afforded to migrants by existing U.S. immigration law.

### A. *A Brief Note on Terminology*

This Note consciously employs the terms “climate asylum” and “climate refugee,” the latter of which has been the subject of contentious discourse. Both the UNHCR and the International Organization on Migration (IOM) have explicitly disavowed the term “climate refugee,” objecting to its broad use in popular media and advocacy to describe all “those uprooted because of disasters, climate change and environmental degradation,” many of whom could not qualify for protection under the Refugee Convention.<sup>17</sup> They emphasize that the use of “refugee” is inapposite because most climate migrants experience internal rather than international displacement.<sup>18</sup> Consequently, the Refugee Convention, which establishes physical presence “outside the country of [an individual’s] nationality” as a criterion for asylum, would be inapplicable.<sup>19</sup>

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17. Environmental Migration, IOM Env’t Migration Portal, <https://environmentalmigration.iom.int/environmental-migration> [<https://perma.cc/55YW-SP62>] [hereinafter IOM Environmental Migration] (last visited Aug. 2, 2024) (observing that “people moving for environmental reasons, do not fall squarely within any one particular category provided by the existing international legal framework” and consequently rejecting the universal application of any one legal framework); see also Siegfried, *supra* note 11 (describing the UNHCR’s rejection of synonymy between climate displacement and protection under the Refugee Convention).

18. See Climate Change Displacement, UNHCR, <https://www.unhcr.org/what-we-do/build-better-futures/environment-disasters-and-climate-change/climate-change-and-displacement> [<https://perma.cc/96AQ-3ANR>] (last visited Aug. 2, 2024); IOM Environmental Migration, *supra* note 17.

19. Refugee Convention, *supra* note 3, art. 1, ¶ A(2), 189 U.N.T.S. at 152. See generally UN Off. for the Coordination of Humanitarian Affs., *Guiding Principles on Internal*

As a “more accurate” alternative, the UNHCR has adopted the phrase “persons displaced in the context of disasters and climate change.”<sup>20</sup>

Though recognizing the significance of the term “climate refugee” in broader discourse is valuable, this Note does not directly engage with that dispute. Instead, it restricts the term “climate refugee” to its narrowest legal sense, describing only those who meet the criteria for asylum under the Refugee Convention because they have experienced climate change–induced harm amounting to persecution on account of a protected ground. This term was chosen for parity with the phrase “climate asylum,” which, perhaps because its legal character is more clearly understood, has not engendered the same confusion. When it refers more broadly to “climate migration,” this Note adopts the definition proposed by the IOM, which encompasses both internal and international displacement based on either acute or progressive harm.<sup>21</sup>

In utilizing “climate refugees,” then, this Note makes no claim of equivalency with the broader concept of “climate migrants.” Only for the former does it assert a claim to protection under the Refugee Convention.

#### B. *Growing Recognition of Climate Asylum*

This section discusses the increasing demand for an effective response to climate migration, subsequently exploring whether an international trend recognizing the Refugee Convention as the appropriate basis for affording legal protection to climate migrants has emerged.

1. *Reconciling Asylum and Climate Change–Induced Displacement.* — While there have been calls for expansion of the Refugee Convention and Protocol,<sup>22</sup> the prevailing consensus among both scholars and

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Displacement (2001), <https://www.unhcr.org/media/guiding-principles-internal-displacement> [<https://perma.cc/63X9-5TVH>] (providing international standards for internal displacement).

20. Climate Change and Disaster Displacement, UNHCR Ir., <https://www.unhcr.org/ie/what-we-do/how-we-work/environment-disasters-and-climate-change/climate-change-and-disaster> [<https://perma.cc/2VFQ-298H>] (last visited Aug. 21, 2024); see also UNHCR, Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters 2 (2020), <https://www.refworld.org/policy/legalguidance/unhcr/2020/en/123356> (on file with the *Columbia Law Review*) [hereinafter UNHCR, Legal Considerations] (discussing the applicability of existing international instruments to climate migration without reference to “climate refugees,” instead employing variants of the alternative referenced in the text).

21. The IOM defines climate migration as the movement of “a person or groups of persons who, predominantly for reasons of sudden or progressive change in the environment due to climate change, are obliged to leave their habitual place of residence, or choose to do so, either temporarily or permanently, within a State or across an international border.” IOM, Glossary on Migration 31 (Alice Sironi, Céline Bauloz & Milen Emmanuel eds., 2019), [https://environmentalmigration.iom.int/sites/g/files/tmzbd11411/files/iml\\_34\\_glossary.pdf](https://environmentalmigration.iom.int/sites/g/files/tmzbd11411/files/iml_34_glossary.pdf) [<https://perma.cc/H4JM-9XYG>].

22. See, e.g., Tyler Bergeron, No Refuge for ‘Climate Refugees’ in International Law, Environmental, Natural Resources, & Energy Law, Lewis & Clark L. Sch.: Env’t, Nat. Res. & Energy L. Blog (Jan. 20, 2023), <https://www.lclark.edu/live/blogs/200-no-refuge-for->

international actors is that any attempt to modify these instruments to accommodate climate migrants will weaken its robust protection for those who qualify as refugees.<sup>23</sup> Nonetheless, there is also broad recognition that a narrow subset of migrants displaced by climate change will qualify for protection under the Refugee Convention.<sup>24</sup>

The complex and often progressive nature of harm caused by climate change, however, makes it difficult to clearly determine who falls within the Convention's scope—particularly with respect to the nature of the required persecution.<sup>25</sup> To be effectively applied to the context of climate asylum, persecution must be reframed as the product of a complex network of sociopolitical, economic, and environmental factors.<sup>26</sup> Although climate change may, in limited contexts, be the sole underlying cause of displacement, it is more likely to interplay with resource scarcity

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climate-refugees-in-international [<https://perma.cc/8X8D-FDXE>] (arguing for the development of a novel climate refugee treaty on the basis that international law currently affords no protection to those displaced by climate change); Christiano d'Orsi, Environmental Disasters and Climate Change Force People to Cross Borders, but They're Not Recognized as Refugees—They Should Be, *The Conversation* (Sept. 26, 2023), <https://theconversation.com/environmental-disasters-and-climate-change-force-people-to-cross-borders-but-theyre-not-recognised-as-refugees-they-should-be-212979> [<https://perma.cc/HA3V-2F8V>] (proposing that “international laws and conventions be amended to explicitly include people forced by weather shocks to move across borders”); Morgiane Noel, Here's How International Law Can Protect People Fleeing Environmental Disaster, *World Econ. F.* (Mar. 16, 2023), <https://www.weforum.org/agenda/2023/03/as-people-flee-environmental-disasters-how-can-international-law-help-them/> (on file with the *Columbia Law Review*) (arguing that the “the scope of the [R]efugee [C]onvention . . . must be widened” to encompass climate migrants).

23. For scholars, see, e.g., McAdam, *Climate Change*, supra note 2, at 39; Elizabeth Keyes, Environmental Refugees? Rethinking What's in a Name, 44 *N.C. J. Int'l L.* 461, 478–79 (2019); Sanjula Weerasinghe, In Harm's Way: International Protection in the Context of Nexus Dynamics Between Conflict or Violence and Disaster or Climate Change 11 (UNHCR Div. of Int'l Prot., Legal and Protection Policy Research Series No. 39, 2018), <https://www.unhcr.org/5c1ba88d4.pdf> (on file with the *Columbia Law Review*). For international actors, see, e.g., Claudia Savage, UN Chief Warns Refugee Rights Would 'Go Backwards' Amid Populist Rhetoric, *The Independent* (Oct. 4, 2023), <https://www.independent.co.uk/news/uk/belfast-suella-braverman-lake-chad-washington-dc-icc-b2423906.html> [<https://perma.cc/4SFZ-48G3>]; see also infra section I.B.2 (summarizing the positions of relevant international actors).

24. See supra notes 8–12 and accompanying text.

25. For a more detailed discussion of how persecution might be defined in a domestic legal system to accommodate climate refugees, see infra section II.B.

26. See Matthew Scott, Finding Agency in Adversity: Applying the Refugee Convention in the Context of Disasters and Climate Change, 35 *Refugee Surv. Q.* 26, 56 (2016) (recognizing that refugee status determination in the context of climate change “builds on an understanding of disasters as being deeply social phenomena that have a differential impact on individuals and groups”); cf. Roxana A. Mastor, Michael H. Dworkin, Mackenzie L. Landa & Emily Duff, Energy Justice and Climate-Refugees, 41 *Energy L.J.* 337, 339 (2020) (finding a persecution-based framework for protection to be insufficient but nonetheless recognizing that “[t]he reality is that the reasons people flee their houses and countries go beyond fear of prosecution [sic]—they include major disasters, imminent impacts of climate change, wars and conflicts brought on by resource scarcity”).



and conflict.<sup>27</sup> For instance, flooding due to increased rainfall in Nigeria and the shrinking of Lake Chad in Northern Cameroon have both led to conflict between farmers and herdsmen over usable land, the latter producing refugees to Chad.<sup>28</sup> Both examples of environmental degradation are attributable to the impacts of climate change on the Lake Chad Basin.<sup>29</sup>

Thus, climate change may serve as a “threat multiplier” that “exacerbat[es] resource scarcity and existing vulnerabilities,” particularly in states without sufficient resources to respond effectively to its impacts.<sup>30</sup> Alarmingly, fifteen of the twenty-five most climate-vulnerable countries are also fragile and conflict-affected states.<sup>31</sup> Communities vulnerable to climate change–based harm are thus also likely to experience other significant human rights abuses, including severe food and water scarcity

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27. See Mastor et al., *supra* note 26, at 344 (discussing the indirect ways in which climate change can drive displacement); see also Michael T. Klare, *Climate Change, Water Scarcity, and the Potential for Interstate Conflict in South Asia*, 13 *J. Strategic Sec.* 109, 119 (2020) (discussing water scarcity due to climate change as a precipitator of interstate as well as intrastate conflict and a national security risk); 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.* 708, 712 (2020) [hereinafter McAdam, *Protecting People Displaced*] (“[T]he drivers of displacement are typically multi-causal, which means that disasters, conflict, and persecution are often intertwined.” (citing Weerasinghe, *supra* note 23, at 10)); Kerstin Unfried, Krisztina Kis-Katos & Tilman Poser, *Water Scarcity and Social Conflict*, *J. Env't Econ. & Mgmt.*, Feb. 2022, no. 102633, at 1, 15 (conducting an empirical analysis of water scarcity in Africa and Latin America to conclude that climate change–induced water scarcity significantly increases the likelihood of local conflict); Paola Vesco, Shouro Dasgupta, Enrica De Cian & Carlo Carraro, *Natural Resources and Conflict: A Meta-Analysis of the Empirical Literature*, *Ecological Econ.*, Mar. 2020, no. 106633, at 1, 12 (concluding through a literature review that climate change, by increasing scarcity of vital resources, promotes conflict).

28. See Abugu Nkechinyere Anthonia, Yero Ahmed Bello, Odele Muiyiwa Oliatan & Irene Amahagbor Macaulay, *Reviewing the Links Between Climate Change and Resource Conflict*, 27 *Glob. J. Pure & Applied Sci.* 243, 245 (2021) (examining the role of climate change in provoking resource conflict in Nigeria); Amali Tower, *Shrinking Options: Climate Change, Displacement and Security in the Lake Chad Basin*, in *Loss and Damage Case Studies From the Frontline: A Resource to Support Practice and Policy* 24, 24–30 (Ritu Bharadwaj & Clare Shakya, *Int'l Inst. for Env't & Damage eds.*, 2021), <https://www.iied.org/sites/default/files/pdfs/2021-10/20551iied.pdf> [<https://perma.cc/8ULS-ZW8E>] (discussing both case studies).

29. Tower, *supra* note 28, at 24–30.

30. Toscano, *supra* note 15, at 463; see also Hadil Al-Mowafak, *Yemen Pol'y Ctr.*, *Rising Temperatures, Falling Resources: Climate Change Impacts on Yemen's Agrarian and Coastal Communities* 3 (2023), [https://ceobs.org/wp-content/uploads/2023/10/Rising\\_Temperatures\\_Falling\\_Resources\\_Bosch\\_Eng.pdf](https://ceobs.org/wp-content/uploads/2023/10/Rising_Temperatures_Falling_Resources_Bosch_Eng.pdf) [<https://perma.cc/3FQG-VN8T>] (discussing climate change as a threat multiplier in the Yemeni context).

31. *Fragility, Conflict & Violence*, World Bank Grp., <https://www.worldbank.org/en/topic/fragilityconflictviolence/overview> [<https://perma.cc/FK3J-PA55>] (last updated May 24, 2024) (defining climate-vulnerable countries according to the Notre Dame Global Adaptation Initiative index).

and increased rates of both acute and chronic health problems, which implicate the rights to life and to health.<sup>32</sup>

Climate migration also challenges the fundamental assumption that repatriation is possible, a concept integral to “conventional” asylum adjudications.<sup>33</sup> Such cases generally evaluate whether an applicant could reasonably be expected to return to their country of origin.<sup>34</sup> If climate change has rendered an individual’s home state uninhabitable, repatriation is no longer a recourse.<sup>35</sup> In cases of severe environmental degradation falling short of actual uninhabitability, repatriation could violate states’ *non-refoulement* responsibility with respect to, at minimum, the right to life.<sup>36</sup> This critical difference from traditional political asylum acts as a practical incentive to adjudicate climate asylum cases and establish additional safeguards for those who fail to meet the Refugee Convention’s standards.<sup>37</sup>

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32. Scott, *supra* note 26, at 27, 56 (relating climate vulnerability to increased rates of human rights abuses and further recognizing the “deeply social nature of disasters, within which existing patterns of discrimination and marginalisation are exacerbated”). For further discussion, see *infra* sections II.B.1 and III.A.2, which explore severe human rights violations as a basis for persecution and humanitarian asylum, respectively.

33. See UN Hum. Rts. Comm., Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2728/2016, ¶ 9.11, UN Doc. CCPR/C/127/D/2728/2016 (Sept. 23, 2020) [hereinafter *Teitiota* Opinion] (finding that climate change may trigger states’ non-refoulement obligations and noting that, in countries at risk of becoming fully submerged, “the conditions of life . . . may become incompatible with the right to life with dignity before the risk is realized”).

34. See generally Am. Immigr. Council & Nat’l Immigrant Just. Ctr., *The Difference Between Asylum and Withholding of Removal* (2020), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_difference\\_between\\_asylum\\_and\\_withholding\\_of\\_removal.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_difference_between_asylum_and_withholding_of_removal.pdf) [<https://perma.cc/NC7H-AJNB>] (describing asylum and withholding of removal as forms of protection against repatriation). Withholding of removal is a lesser form of protection awarded to applicants ineligible for asylum but who possess a “reasonable fear” of experiencing persecution if returned. *Id.* at 1–2.

35. Mastor et al., *supra* note 26, at 344–45.

36. See *Teitiota* Opinion, *supra* note 33, ¶ 9.3 (establishing a “real risk of irreparable harm” standard for non-refoulement with respect to human rights violations in the context of environmental degradation); see also McAdam, *Protecting People Displaced*, *supra* note 27, at 712–19 (noting that human rights law provides greater scope for protection than refugee law with respect to non-refoulement); Shaindl Keshen & Steven Lazickas, *Non-Refoulement: A Human Rights Perspective on Environmental Migration From Small Island Developing States*, *J. Int’l Affs.*, Spring/Summer 2022, at 21, 23–27, 30 (examining the positive obligation imposed by the *Teitiota* opinion with respect to non-refoulement for environmental migrants). Note, however, that the United States has not recognized a non-refoulement obligation under the International Covenant on Civil and Political Rights. See *infra* note 52 and accompanying text.

37. See Benoit Mayer, *The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework*, 22 *Colo. J. Int’l Env’t L. & Pol’y* 357, 381 (2011) (arguing that the similar human rights violations experienced by climate and political refugees give climate refugees a moral entitlement to the same right to non-refoulement). Subsidiary protection, a lesser form of protection than refugee status, has begun to serve as one such avenue. See Monika Mayrhofer & Margit Ammer, *Climate Mobility to Europe: The Case of Disaster Displacement in Austrian Asylum Procedures*,

2. *Evolving Bases for Climate Refugee Protection Under International Law.* — These considerations demonstrate that application of the Refugee Convention to the context of climate asylum must confront a set of novel challenges. Nonetheless, recent years have brought international recognition that climate refugees may fall within the ambit of an unaltered Refugee Convention. The Human Rights Committee’s 2020 *Teitiota* opinion, which reviewed the case of a man from Kiribati who claimed his life would be jeopardized if he was forced to return, most fully considered this issue.<sup>38</sup> Its review focused on human rights violations under the International Covenant on Civil and Political Rights (ICCPR).<sup>39</sup> Because Mr. Ioane Teitiota had initially sought and been denied asylum in New Zealand, however, the Committee also commented upon Teitiota’s claim that, if returned to Kiribati, he faced an imminent risk of arbitrary deprivation of life due to climate change–induced sea level rise.<sup>40</sup> It concluded that the ICCPR requires State parties to “allow all asylum seekers claiming a real risk of a violation of their right to life in the State of origin access to refugee or other individualized or group status determination procedures that could offer them protection against *refoulement*.”<sup>41</sup>

Moreover, in reviewing for “arbitrariness, error[,] or injustice” committed by the New Zealand courts, the Committee observed that both the immigration tribunal and the Supreme Court had “allowed for the possibility that the effects of climate change or other natural disasters could provide a basis for protection.”<sup>42</sup> In conjunction, these remarks suggest that parties to the ICCPR have an obligation to consider climate change–induced harm as part of the asylum adjudication process. Ostensibly on this basis, the Office of the High Commissioner for Human Rights (OHCHR) welcomed the ruling as a step toward future successful climate asylum claims.<sup>43</sup>

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Frontiers in Climate, Dec. 8, 2022, at 1, 11–17 (examining recent trend in Austrian courts to extend subsidiary protection in cases of natural disasters when asylum claims are brought).

38. See *Teitiota* Opinion, supra note 33.

39. See id. ¶¶ 8.1–9.10; see also International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 172 [hereinafter ICCPR].

40. See *Teitiota* Opinion, supra note 33, ¶¶ 8.4–9.14.

41. See id. ¶ 9.3 (citing UN Hum. Rts. Comm., General Comment No. 36 on Article 6 of the Covenant on the Right to Life, ¶ 31, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019)). Note how the Human Rights Committee’s reasoning integrates refugee and human rights law by predicating refugee non-*refoulement* on the risk of violating the right to life. For further discussion of the interplay between international refugee and human rights law, see Valéria Horváth, The Right to Seek Asylum of ‘Climate Refugees’, 9 *Acta Humana* 119, 124–26 (2021).

42. See *Teitiota* Opinion, supra note 33, ¶ 9.6.

43. Press Release, OHCHR, Historic UN Human Rights Case Opens Door to Climate Change Asylum Claims (Jan. 21, 2020), <https://www.ohchr.org/en/press-releases/2020/01/historic-un-human-rights-case-opens-door-climate-change-asylum-claims> [https://perma.cc/PH2S-E3J2] (referencing Committee expert Yuval Shany’s statement

In sharp contrast to the exclusion of climate asylum from recent international instruments on refugee protection,<sup>44</sup> the U.N. Special Rapporteur tasked with examining the impact of climate change on human rights released an April 2023 report suggesting that the Refugee Convention should be the basis for addressing climate migration.<sup>45</sup> He urged the creation of an optional Protocol to the Refugee Convention “to address displacement and legal protection for people all over the world affected by the climate crisis.”<sup>46</sup> The Convention would be a “logical” framework, he asserted, because it would “come[] close to affording the type of protections that are needed” and would effectively normalize existing informal UNHCR policies.<sup>47</sup> His selection of the Refugee Convention as a basis for protection, as opposed to the ICCPR, in which the Human Rights Committee’s *Teitiota* opinion rooted its consideration of non-refoulement, centralizes a refugee rights framework as a basis for addressing the crisis posed by climate migration.<sup>48</sup>

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that “this ruling sets forth new standards that could facilitate the success of future climate change-related asylum claims”).

44. The New York Declaration for Refugees and Migrants (a 2016 UN General Assembly Resolution committing to the development of the instrument that would become the Global Compact on Refugees) made no specific commitment to refugees with respect to climate change, only to migrants more broadly. G.A. Res. 71/1, ¶ 50 (Sep. 19, 2016). The Global Compact on Refugees more directly dismissed the idea of climate refugees, observing that “climate, environmental degradation and natural disasters” are “not in themselves causes of refugee movements” but merely “increasingly interact with the[ir] drivers.” See UN, Global Compact on Refugees ¶ 8 (2018), <https://www.unhcr.org/sites/default/files/legacy-pdf/5c658aed4.pdf> (on file with the *Columbia Law Review*). Its outright rejection of climate change as a basis for refugee status conflicts with the Human Rights Committee’s recognition of climate harm as a factor in asylum evaluations, as well as the UNHCR’s caution against taking a “narrow view . . . of the effects of climate change and disasters.” Compare *id.*, with *Teitiota* Opinion, *supra* note 33, ¶ 9.6, and UNHCR, Legal Considerations, *supra* note 20, ¶ 5.

45. See Ian Fry, Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, Providing Legal Options to Protect the Human Rights of Persons Displaced Across International Borders Due to Climate Change, A/HRC/53/34 (Apr. 18, 2023) [hereinafter Climate Rapporteur Report].

46. Press Release, OHCHR, UN Expert Calls for Full Legal Protection for People Displaced by Climate Change (June 27, 2023), <https://www.ohchr.org/en/press-releases/2023/06/un-expert-calls-full-legal-protection-people-displaced-climate-change> (on file with the *Columbia Law Review*).

47. Climate Rapporteur Report, *supra* note 45, ¶¶ 68, 71(a). Within the body of the report, the Special Rapporteur identified language from regional instruments that might accommodate climate refugees, including the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (“events seriously disturbing public order”) and the Cartagena Declaration on Refugees (“generalized violence, foreign aggression, internal conflicts, massive violations of human rights ‘or other circumstances that have seriously disturbed the public order’”). See *id.* ¶¶ 33, 48 (quoting Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena Declaration on Refugees, art. III, ¶ 3, Nov. 22, 1984).

48. Compare Climate Rapporteur Report, *supra* note 45, ¶¶ 64–68 (discussing a protocol under the Refugee Convention as the most appropriate solution), with *Teitiota*

The Special Rapporteur's proposal accords with the position that has since been advanced by UN Assistant Secretary General Gillian Triggs.<sup>49</sup> Asserting that amending the Refugee Convention would risk undermining the protection it affords, she stated that there was a "good case to be made" for creating an optional protocol or a new treaty on climate refugees.<sup>50</sup> While it is too soon to conclude that "a new era in refugee protection" has dawned, such comments suggest an institutional shift within the UN to root legal protections for climate migration in refugee law.<sup>51</sup>

3. *U.S. Asylum Law and Climate Migration.* — Because the United States has rejected the Human Rights Committee's determination that the ICCPR imposes a non-refoulement obligation,<sup>52</sup> arguments for human rights-based protection of climate refugees emerging from the Committee's *Teitiota* opinion are unpersuasive in the domestic context. The United States does, however, recognize a non-refoulement responsibility under the Refugee Convention.<sup>53</sup> This disparity magnifies the importance of recognizing protection for climate refugees to the greatest extent possible under the INA.

The United States' official response to climate migration is still in its nascency. The first explicit executive action to deal with climate migration was Executive Order 14,013 (Order), signed by President Biden in February 2021, which ordered various executive actors to prepare a report examining "climate change and its impact on migration, including forced migration, internal displacement, and planned relocation."<sup>54</sup> While the Order broadly urges the utilization of "all available authorities for humanitarian protection,"<sup>55</sup> its emphasis on the United States Refugee Assistance Program (USRAP)<sup>56</sup> suggests that the Biden Administration

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Opinion, *supra* note 33, ¶ 9.11 (focusing non-refoulement with respect to human rights violations).

49. Savage, *supra* note 23.

50. *Id.* (internal quotation marks omitted) (quoting Assistant Secretary General Gillian Triggs).

51. See Ryan Plano, UNHCR Official: "Good Case to Be Made" for Climate Refugees Protocol, *Climate Refugees* (Nov. 2, 2023), <https://www.climate-refugees.org/spotlight/2023/11/2/unhcr-climate-refugees> [<https://perma.cc/XG2S-UTRG>] (expressing hope that Triggs' comments are indicative of a "new era in refugee protection").

52. *Climate Migration Report*, *supra* note 10, at 19.

53. *Id.*

54. Exec. Order No. 14,013, 86 Fed. Reg. 8839, 8844 (Feb. 4, 2021) [hereinafter *Executive Order on Climate Migration*].

55. *Id.* at 8839.

56. See *id.* (explaining that the U.S. government demonstrates the "core values of our Nation" through its administration of USRAP, listing several robust proposals for bolstering the reach of the humanitarian program). Under the INA, USRAP is a referral system that facilitates resettlement in the United States for vulnerable migrants who meet the refugee definition. For a more detailed description and current processing priorities, see *The United States Refugee Admissions Program (USRAP) Consultation and Worldwide Processing Priorities*, USCIS, <https://www.uscis.gov/humanitarian/refugees-and->

envisioned refugee resettlement as the most useful tool for responding to climate migration.<sup>57</sup> The greater weight afforded to USRAP is also consistent with the administration's increasing reliance on refugee resettlement to respond to irregular migration.<sup>58</sup>

The Report on the Impact of Climate Migration (Report) released in response to the executive order, however, emphasized USRAP's limitations in this context.<sup>59</sup> In particular, it observes that USRAP is heavily dependent on the UNHCR, which "does not explicitly incorporate climate considerations into referral criteria."<sup>60</sup> Emphasizing that USRAP applicants must still meet the criteria for refugee status, it notes with concern the absence of "well-established alternative pathways to complement refugee resettlement" affording permanent protection to "individuals facing serious threats to their life because of climate change"<sup>61</sup> and rejects mechanisms for temporary resettlement as insufficient.<sup>62</sup> Development of a private sponsorship program for refugees, another directive of the Order, is ongoing and will expand USRAP's capacity, but it alone will not adequately address these limitations.<sup>63</sup> Consequently, in addition to developing a novel and more comprehensive legal framework for all climate migrants, the Biden Administration stresses the importance of "strengthen[ing] the application of existing protection frameworks" and "adjust[ing] U.S. protection mechanisms to better accommodate people fleeing the impacts of climate change."<sup>64</sup>

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asylum/usrap [<https://perma.cc/VZ2B-HAFC>] (last visited Aug. 2, 2024). From the perspective of efficiency, one benefit of USRAP is that it permits the designation of groups of "special humanitarian concern to the United States" as eligible to apply for refugee status, though individual review to determine refugee status is nonetheless required. See *id.*

57. For instance, in establishing "the policy of [President Biden's] administration," the Order declared that "USRAP and other humanitarian programs shall be administered in a manner that furthers our values as a Nation and is consistent with our domestic law, international obligations, and the humanitarian purposes expressed by the Congress in enacting the Refugee Act of 1980." See Executive Order on Climate Migration, *supra* note 54, at 8839.

58. For example, in July 2023, the Biden Administration reached an agreement with Mexico to "accept refugee resettlement referrals from qualified individuals from Cuba, Haiti, Nicaragua, and Venezuela who are already in Mexico." Press Release, Statement From National Security Advisor Jake Sullivan on Legal Pathways Initiative With Mexico, White House (July 28, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/28/statement-from-national-security-advisor-jake-sullivan-on-legal-pathways-initiative-with-mexico/> [<https://perma.cc/BG2Z-KZ64>]. This represented a significant evolution in U.S. immigration policy.

59. See Climate Migration Report, *supra* note 10, at 21.

60. See *id.*

61. See *id.*

62. See *id.* (rejecting parole awarded on a case-by-case basis as a temporary measure "not designed to be a long-term solution").

63. See 30-Day Notice of Proposed Information Collection: Welcome Corps Application, 88 Fed. Reg. 66547, 66547 (Sept. 27, 2023).

64. Climate Migration Report, *supra* note 10, at 6.

Though neither the Report nor the initial Order specifically discusses the use of asylum law to fulfill this mandate, the Report examines how refugee status might do so.<sup>65</sup> Because the INA utilizes the Refugee Convention's standard for both asylum and refugee status, recommendations for the application of one in the context of climate migration are also relevant to the other.<sup>66</sup> The Report calls for the United States to "maximize [the] application, as appropriate," of "existing legal instruments" to those climate migrants eligible for protection.<sup>67</sup> With respect to the Refugee Convention, it recognizes that "people fleeing in the context of the adverse effects of climate change and disasters may, in limited instances, have valid claims for refugee status."<sup>68</sup> For instance, government refusal of "relief from the impacts of climate change to specific individuals who share a protected characteristic" may constitute persecution depending on manner and degree.<sup>69</sup> Similarly, climate change may influence the reasonableness of internal relocation, a consideration relevant to asylum adjudication under the INA.<sup>70</sup>

While the Report provides only broad guidance for evaluating claims for asylum or refugee status in the context of climate change-induced harm, its clear conclusion, consistent with the purpose of the original Order, is that existing legal frameworks must be maximized to achieve humanitarian ends.<sup>71</sup> The Biden Administration's ongoing commitment to acting on the recommendations of the Report further supports the proposition that asylum law ought to be interpreted in the light most favorable to climate refugees.<sup>72</sup>

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65. See *id.* at 17.

66. See *supra* note 13 (discussing definitions for asylum and refugee status under the INA).

67. See Climate Migration Report, *supra* note 10, at 17, 19 ("This new legal pathway should be additive to and in no way infringe upon or detract from existing protection pathways to the United States, including asylum and refugee resettlement.").

68. *Id.* at 17.

69. *Id.*; see also *infra* section II.B (discussing cases in which persecution might occur based on unequal government allocation of resources for climate change adaptation or mitigation).

70. Climate Migration Report, *supra* note 10, at 17; see also *infra* section III.B.1 (examining internal relocation in the context of climate change).

71. Climate Migration Report, *supra* note 10, at 17 ("The use of existing legal instruments to protect individuals displaced across borders by the impacts of climate change is limited in scope, and the United States should endeavor to maximize their application, as appropriate, to such individuals.").

72. In addition to the private sponsorship program it is developing, see 30-Day Notice of Proposed Information Collection, *supra* note 63, the State Department has adopted a new approach to addressing climate change-induced displacement based on the findings of the Report. "Protection" is one of its four principal objectives, requiring the United States to "[s]trengthen and expand protection of refugees, conflict victims, internally displaced persons (IDPs), stateless persons, and migrants in situations of vulnerability affected by climate change." Press Release, U.S. Dep't of State, The Department of State's Bureau of Population, Refugees and Migration Announces New Approach to Address the Impacts of

To that end, this Note rests not on a broad argument for the United States' responsibility to climate migrants as a class but rather on a narrower claim: that if American asylum law is to be justly applied, climate refugees already fall within its ambit of protection. Undoubtedly, the persuasive weight of this assertion depends on a compelling demonstration that some subset of climate migrants meets the criteria of the Refugee Convention as enshrined in American law and can therefore legally be considered "climate refugees." It is to this subject that the discussion now turns.

## II. ESTABLISHING AN INITIAL CLIMATE ASYLUM CLAIM

Though prior scholarship has explored both how a particular social group for climate refugees might be characterized and how environmental or climate-based harm might amount to persecution, it has neglected to consider the full range of practical legal challenges facing a climate asylum claim.<sup>73</sup> This Part outlines a preliminary climate asylum claim under the INA, analyzing its most challenging elements: the protected ground, persecution, and their nexus.<sup>74</sup> Part III subsequently applies humanitarian asylum to the climate refugee context and evaluates potential rebuttals of the presumption of a future fear of persecution. As noted earlier, this proposed framework for climate asylum focuses specifically on cases in which the impacts of climate change themselves amount to persecution, against which the government of an applicant's country of origin is unable or unwilling to afford protection.<sup>75</sup>

### A. *Protected Grounds*

One foundational challenge for a climate asylum claim is demonstrating that climate refugees fall within any of the five protected

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Climate Change on Migration and Displacement (June 21, 2023), <https://www.state.gov/the-department-of-states-bureau-of-population-refugees-and-migration-announces-new-approach-to-address-the-impacts-of-climate-change-on-migration-and-displacement/> [https://perma.cc/ZFR6-DCSU]. Moreover, in July 2023, USCIS amended its training for asylum and refugee officers to include information on the intersection between climate change and asylum/refugee status; those materials are not publicly available at the time of publication. See Fact Sheet: Marking the Two-Year Anniversary of the Report on the Impact of Climate Change on Migration, White House (Dec. 1, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/12/01/fact-sheet-marking-the-two-year-anniversary-of-the-report-on-the-impact-of-climate-change-on-migration/> [https://perma.cc/J2KY-3YY3].

73. See examples of such scholarship summarized *supra* note 15.

74. See 8 C.F.R. § 208.13(b)(1) (2024) (defining elements of an asylum claim); see also *supra* text accompanying notes 5–7.

75. As discussed in section I.B.1, *supra*, climate change may exacerbate existing socioeconomic and cultural inequities, which may in turn give rise to more traditional asylum claims based on other protected grounds, such as race or political opinion. Because, however, such cases do not directly depend either on climate change–induced harm amounting to persecution or on discriminatory government responses to climate change, they do not fall within the scope of climate asylum as defined by this Note.



grounds.<sup>76</sup> This section argues that one of two bases may be appropriate depending on the extent to which climate change–based harm threatens climate refugees’ country of origin: (1) membership in a particular social group in which a subgroup experiences the alleged harm and (2) nationality in cases of broader threat to a state’s population. While a number of scholars have recognized the possibility of membership in a particular social group,<sup>77</sup> the nationality basis remains comparatively unexplored.

1. *Membership in a Particular Social Group.* — Although membership in a particular social group has not yet successfully afforded protection to climate refugees, wholesale dismissal as a basis for climate asylum is premature.<sup>78</sup> A particular social group comprising climate refugees is definable without jeopardizing other components of an asylum claim, such as the nexus requirement.

a. *Doctrinal Framework.* — The Board of Immigration Appeals (BIA) has recognized that the flexibility of the particular social group protected ground permits it to serve as a “catch-all” for applicants with legitimate claims who could not qualify on one of the other bases.<sup>79</sup> In *Matter of Acosta*, the BIA originally required membership in a particular social group to be based, like the other four grounds, on a “common, immutable characteristic.”<sup>80</sup> That trait could either be innate (something which members of the group could not change, such as race, nationality, or some forms of past experience) or fundamental (something that members should not be required to change, such as the state of being uncircumcised in the context of female genital mutilation).<sup>81</sup> Generally, the BIA has

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76. The INA, like the Refugee Convention, affords protection to those who can demonstrate persecution on the basis of race, religion, nationality, membership in a particular social group, or political opinion. See 8 C.F.R. § 208.13(b)(1).

77. For examples of scholars who have examined membership in a particular social group for climate refugees, see, e.g., Flanagan, *supra* note 15, at 26 (suggesting that the definition of “particular social group” in U.S. asylum law should be amended to encompass climate change refugees); Amra Ismail, *A Penchant for Protection: Climate Change Refugees Under the 1951 Refugee Convention*, 28 Sri Lanka J. Int’l L. 63, 83 (2020) (arguing that climate refugees constitute a particular social group based on their collective attempt to exercise the right to a healthy environment).

78. See Natasha Spreadborough, *Oceans Apart: A New Proposal for Climate-Driven Refugees*, 30 Mich. St. Int’l L. Rev. 531, 533 (2022) (asserting that the particular social group basis is a “near-impossible” requirement for climate refugees); see also Toscano, *supra* note 15, at 477–78 (observing that courts have thus far failed to afford protection to those “searching for better living conditions or those forced to flee as a result of a natural disaster” even if their country of origin could not ameliorate the harm).

79. See *Matter of Kasinga*, 21 I. & N. Dec. 357, 375 (B.I.A. 1996).

80. 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

81. *Id.* at 233–34; see also Nat’l Immigr. Just. Ctr., *Particular Social Group Practice Advisory: Applying for Asylum Based on Membership in a Particular Social Group 2* (2021), <https://immigrantjustice.org/for-attorneys/legal-resources/file/practice-advisory-applying-asylum-based-membership-particular> (on file with the *Columbia Law Review*) (discussing what may constitute a “common, immutable characteristic”); USCIS, RAIO

rejected voluntary association, cohesiveness, or homogeneity requirements with respect to membership in a particular social group.<sup>82</sup>

In a series of cases in 2014, the BIA further narrowed eligibility for asylum on this basis by introducing two additional requirements: particularity and social distinction.<sup>83</sup> For a group to be “defined with particularity,” it must be “discrete and have definable boundaries” that “provide a clear benchmark for determining who falls within the group.”<sup>84</sup> “Social distinction” entails not “literal or ‘ocular’ visibility” but rather that an applicant’s society of origin be able to perceive the group.<sup>85</sup> This requires a fact-intensive, country- and case-specific analysis.<sup>86</sup>

Notably, this standard means that a particular social group must be perceived as “distinct” not by its persecutors but by its members’ society of origin, even though the association linking members of a persecuted group may exist only in their persecutor’s mind.<sup>87</sup> The social distinction criterion receives legitimate criticism on this basis.<sup>88</sup> However, this definition proves useful in the climate asylum context because it means that a cognizable particular social group may be recognized even when, as here, persecutor and persecuted never directly interact.

Proposed particular social group formulations must also avoid circularity; that is, they cannot be defined solely by the shared harm that their members experience.<sup>89</sup> This means that neither the social distinction nor the particularity criterion can be satisfied by identifying a group that has endured a specific or particularly acute form of harm. Climate asylum, then, demands a unifying characteristic independent from the experience of climate change-based injury.

The increased stringency of the BIA’s three-part particular social group test has generated substantial domestic and international

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Directorate—Officer Training: RAIO Combined Training Program: Nexus—Particular Social Group 12 (2021), [https://www.uscis.gov/sites/default/files/document/foia/Nexus\\_-\\_Particular\\_Social\\_Group\\_PSG\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Nexus_-_Particular_Social_Group_PSG_LP_RAIO.pdf) [<https://perma.cc/38PW-A2KP>] [hereinafter USCIS, Particular Social Group] (same).

82. *Matter of C-A-*, 23 I. & N. Dec. 951, 956–57 (B.I.A. 2006).

83. See, e.g., *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 232 (B.I.A. 2014) (clarifying the particularity and social distinction requirements); *Matter of W-G-R-*, 26 I. & N. Dec. 208, 210 (B.I.A. 2014) (same).

84. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 237–39 (citing *Matter of A-M-E & J-G-U-*, 24 I. & N. Dec. 69, 76 (B.I.A. 2007)).

85. *Matter of W-G-R-*, 26 I. & N. Dec. at 208.

86. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 242; see also *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014) (recognizing that the social distinction criterion requires an “evidence-based” and “society-specific” inquiry).

87. Nat’l Immigr. Just. Ctr., *supra* note 81, at 7.

88. *Id.* at 7 n.4 (critiquing this position on grounds of unreasonableness and observing that this position conflicts with federal appellate precedent).

89. USCIS, Particular Social Group, *supra* note 81, at 19 (warning that particular social groups cannot be solely or primarily defined by the harm experienced by their members, though it may be a contributing factor).

criticism.<sup>90</sup> Even federal appellate courts have not applied it uniformly. Although most courts of appeals have historically afforded *Chevron* deference to the BIA's framework, the U.S. Court of Appeals for the Seventh Circuit continues to apply only the *Matter of Acosta* immutability test and to cite to its own precedent.<sup>91</sup> It has never engaged directly with the question of deference to the BIA's particularity and social distinction requirements, though it noted that an applicant's "arguments that the Board's interpretation [of the particular social group test] is unreasonable have some force."<sup>92</sup> A particular social group claim advanced in the Seventh Circuit would thus depend only on immutability, avoiding the difficulty of formulating a particularly defined and socially distinct group on a basis other than shared harm. It remains to be seen whether, in the wake of the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, other federal appellate courts will continue to utilize the BIA's more exacting standard.<sup>93</sup>

b. *Application to Climate Asylum.* — Avoiding circularity is particularly difficult in the context of climate migration because the most natural formulation of a common characteristic centers around harm.<sup>94</sup> Particular social groups commonly proposed in scholarship often unconsciously fall into this trap, adopting a formulation analogous to "individuals impacted by environmental degradation."<sup>95</sup> But such a group, defined solely by the

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90. Immigrant rights advocates criticized the BIA's failure to publish a case recognizing a particular social group for six years after it introduced the tripartite test. Nat'l Immigr. Just. Ctr., *supra* note 81, at 6–7. The UNHCR, which approved the *Matter of Acosta* immutability standard, has repeatedly condemned the BIA's heightened standards as being inconsistent with the purpose of the Refugee Convention and the UNHCR's guidance. See, e.g., Brief of the United Nations High Comm'r for Refugees as Amicus Curiae in Support of the Petitioner at 3, *Valdiviezo-Galdamez v. Holder*, 663 F.3d 582 (3d Cir. 2011) (No. 08-4564), 2009 WL 8754827; see also Grace Carney, Note, Re-Defining Particular Social Group in the United States: Looking to International Guidance in the Wake of the *Matter of A-B-Vacatur*, 45 Fordham Int'l L.J. 575, 592, 601 (2022) (contrasting U.S. standards with UNHCR-endorsed standards over time).

91. Carney, *supra* note 90, at 590; see also Flanagan, *supra* note 15, at 28.

92. *W.G.A. v. Sessions*, 900 F.3d 957, 964 n.4 (7th Cir. 2018).

93. See 144 S. Ct. 2244, 2273 (2024) (overruling *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), holding that courts need not defer to an agency's interpretation of an ambiguous statutory provision).

94. Keyes, *supra* note 23, at 473 (observing that groups impacted by climate change may form "a strong social identity" around that shared experience, but that "a group defined by that affinity is defined by the very harm the group fears").

95. See, e.g., Cooper, *supra* note 15, at 522 (proposing "persons who lack the political power to protect their own environment"); Flanagan, *supra* note 15, at 29–30 (suggesting "citizens of [a given country] who lack the political power to protect their environment from climate change–related disaster" or "people who believe that no population should have to bear the consequences of climate change and be denied the human right to a safe living environment" (alteration in original) (internal quotation marks omitted) (quoting *Cece v. Holder*, 733 F.3d 662, 670 (7th Cir. 2013))); Toscano, *supra* note 15, at 477 (advancing "a group of people who have a common fear of being displaced by the effects of climate change").

alleged harm, would not survive judicial scrutiny.<sup>96</sup> Even human rights-oriented proposals, such as a particular social group based on a “common attempt made by its members to exercise the right to a healthy environment,” might not survive review on this basis.<sup>97</sup> The nexus requirement, demanding a causal link between the protected ground and the harm suffered, also limits the range of legally practicable particular social groups.<sup>98</sup>

In response to these challenges, the most promising formulation involves a group with a shared heritage that justifies their connection to a climate-vulnerable place of residence.<sup>99</sup> Indigenous groups are perhaps the most salient example. Such communities frequently share language, culture, heritage, and location of residence, which may be a “legally protected land or historically occupied area,” factors which support the classification of indigenous identity as an immutable characteristic.<sup>100</sup> Moreover, the governments of their countries of origin have often already recognized them as specific subpopulations, assisting with the particularity and social distinction arguments.<sup>101</sup> Particular social groups based on this model would satisfy the BIA’s framework without referencing harm, thus avoiding circularity of definition.

Another set of formulations could be based on climate-vulnerable occupations. For instance, climate change-induced shrinking of Lake Chad has imperiled the livelihoods of farmers, fishermen, and pastoralists in northern Cameroon.<sup>102</sup> While occupation is not an innate characteristic, it is arguably a fundamental one.<sup>103</sup> Because climate-vulnerable occupations such as farming or herding are land-dependent, they may also coincide with property ownership, which both federal appellate courts and the BIA have recognized as a basis for membership in a particular social group.<sup>104</sup> Groups based on climate-vulnerable

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96. See *supra* note 89 and accompanying text.

97. See Ismail, *supra* note 77, at 83 (proposing the formulation in question).

98. See *infra* section II.C.

99. See, e.g., Christopher M. Kozoll, Note, Poisoning the Well: Persecution, the Environment, and Refugee Status, 15 *Colo. J. Int’l Env’t. L. & Pol’y* 271, 290 (2004) (“[T]he best chance of making a successful argument for asylum in the case of environmental refugees will lie with a claimant whose cultural ties place them in a close relationship to the environment, and preferably to a particular area.”).

100. Joseph Cauich-Tamay, *Indigenous Groups Who Have Been Environmentally Displaced Should Be Considered Environmental Asylees Under a Particular Social Group*, 24 *Rutgers Race & L. Rev.* 257, 279 (2023).

101. *Id.*

102. Tower, *supra* note 28, at 24–30.

103. Contrast this case study with *Matter of Acosta*, 19 I. & N. Dec. 211, 234 (B.I.A. 1985) (finding that taxi drivers threatened by guerillas did not constitute a particular social group because they could avoid harm by switching occupations). Yet climate change-based harm is more pervasive and cannot necessarily be avoided by abandoning one’s profession.

104. See, e.g., *N.L.A. v. Holder*, 744 F.3d 425, 439 (7th Cir. 2014) (“[T]here can be no rational reason for the Board to reject . . . ‘land owners’ when the Board in *Acosta* specifically

occupations are also likely to satisfy particularity and social distinction requirements, as they comprise discrete social subgroups.

These nonexhaustive examples illustrate the considerations underlying the formation of a particular social group for climate refugees.

2. *Nationality*. — Compared to membership in a particular social group, nationality is a matter of straightforward definition, including, but not limited to, citizenship and ethnicity.<sup>105</sup> Where climate change–based harm is widespread, basing a climate asylum claim in nationality rather than membership in a particular social group avoids the challenges posed by the social distinction and particularity requirements. Even under the *Matter of Acosta* immutability standard alone, nationality is a more appropriate basis, as the most obvious “common, immutable characteristic” shared by members of a particular social group would be nationality itself.

A climate asylum case predicated upon nationality would be, admittedly, an atypical formulation of such a claim. Generally, nationality claims involve a particular ethnic, linguistic, or cultural group experiencing persecution within a heterogeneous society.<sup>106</sup> In contrast, a climate asylum claim would argue that individuals of a particular citizenship or ethnicity have experienced *externally* inflicted harm on the basis of that nationality. Consistent with a literal reading of both the Refugee Convention and the INA, this reframing repurposes the nationality basis to respond to a novel context of a set of international perpetrators.<sup>107</sup>

Small island nations threatened with vanishing or uninhabitability provide the clearest example of this application. Within these states, climate change has already threatened housing, infrastructure, health, food and water security, economic stability, and culture.<sup>108</sup> As global

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used land owning as an example of a social group and this Circuit has [recognized that] . . . educated land owning cattle farmers targeted by the FARC qualifies as a social group.”); *Matter of Acosta*, 19 I. & N. Dec. at 233 (“The shared characteristic might be . . . a shared past experience such as former military leadership or land ownership.”).

105. See *Shoaf v. Immigr. & Naturalization Serv.*, 228 F.3d 1070, 1074 n.2 (9th Cir. 2000) (recognizing that race and nationality claims may overlap, including with the use of “ethnicity”); UNHCR Handbook, *supra* note 6, ¶ 74 (observing that nationality also encompasses “membership of an ethnic or linguistic group”).

106. For an overview of typical nationality claims, see USCIS, RAIO Directorate—Officer Training: RAIO Combined Training Program: Nexus and the Protected Grounds 26–27 (2023), [https://www.uscis.gov/sites/default/files/document/lesson-plans/Nexus\\_minus\\_PSG\\_RAIO\\_Lesson\\_Plan.pdf](https://www.uscis.gov/sites/default/files/document/lesson-plans/Nexus_minus_PSG_RAIO_Lesson_Plan.pdf) [<https://perma.cc/RZ67-GNNF>] [hereinafter USCIS, Nexus].

107. See Refugee Convention, *supra* note 3, art. 1, ¶ A(2), 189 U.N.T.S. at 152 (recognizing only “nationality” as a basis for refugee status without further elaboration); 8 U.S.C. § 1158 (2018) (same).

108. Michelle Mycoo et al., 2022: Small Islands, *in* *Climate Change 2022: Impacts, Adaptation and Vulnerability*, Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change 2043, 2045 (Hans-Otto Pörtner

temperatures continue to rise, island access to fresh water will decrease dangerously, exacerbated by flooding from ocean waves and typhoons.<sup>109</sup> Moreover, coral bleaching, caused by ocean acidification, will undermine traditional practices related to both culture and livelihood.<sup>110</sup> Environmental degradation demonstrably increases climate vulnerability and will threaten the habitability of small island nations, even at current global temperature levels.<sup>111</sup>

Such evidence demonstrates that climate change broadly threatens the populations of small island states based on their nationality. In such circumstances, nationality will likely form a more effective basis for a climate asylum claim than membership in a particular social group, as it avoids the definitional limitations of the latter formulation.<sup>112</sup> Yet a nationality-based claim poses a greater strategic risk than an argument grounded in membership in a particular social group. A simpler standard to satisfy, it is also more vulnerable to total foreclosure by an unfavorable ruling—a practical consideration with which any climate asylum claim must contend.

#### B. *Persecution*

This section explores the nature of persecutory acts and actors in the context of climate change. It demonstrates that the most effective characterization of persecution is as an aggregate of substantial sudden- and slow-onset nonphysical harms inflicted by a set of international high-emitting actors, against whom the governments of climate refugees' countries of origin are unwilling or unable to protect them.

1. *Nature of Persecution.* — In light of the nuanced manner in which climate change may cause harm, demonstrating injury amounting to persecution requires collective consideration of sudden- and slow-onset climate events.<sup>113</sup> Doing otherwise would fail to adequately recognize the full scale and complexity of the harm that climate refugees experience.<sup>114</sup>

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et al. eds., 2022), [https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC\\_AR6\\_WGII\\_Chapter15.pdf](https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_Chapter15.pdf) [<https://perma.cc/JQN6-D7C8>].

109. Id. at 2045–46.

110. Id. at 2046.

111. Id.

112. See supra notes 90–92 and accompanying text.

113. See McAdam, *Protecting People Displaced*, supra note 27, at 711 (recognizing that climate refugees may be forced to migrate by either sudden- or slow-onset climate events, or by a combination of the two); see also Scott, supra note 26, at 52–53 (arguing that “[g]iven the complexity of each disaster situation, conventional distinctions between sudden onset and slower onset disasters should be avoided” and focus instead placed “on the current circumstances and foreseeable developments, albeit placed in historical and social context”).

114. Challenges in defining the nature of the persecutory actor are discussed in section II.B.2 *infra*. But see Scott, supra note 26, at 32 (arguing that recognizing the role of human agency in natural disasters—“existing patterns of discrimination and marginalisation

Because the BIA considers whether harm in the aggregate amounts to persecution, such an approach is viable in immigration courts.<sup>115</sup>

The standard paradigm for persecution, the knowing imposition of harm on an identified victim, applies poorly to the context of climate change–induced harm.<sup>116</sup> Instead, persecution is better based on nonphysical categorical harms identified in BIA precedent, including economic harm, mental harm, and the deprivation of fundamental human rights.

In *Matter of T-Z*, the BIA defined nonphysical harm amounting to persecution as the “deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.”<sup>117</sup> A climate asylum claim is unlikely to be able to overcome the intent requirement implicit in “deliberate imposition”; even if high-emitting actors know they are contributing to climate change, it is another matter altogether to successfully demonstrate that they, as a group, meant to inflict “severe economic disadvantage” on a specific population.<sup>118</sup> However, the latter “deprivation” basis is more favorable. The presence of “the” before “deprivation” indicates that “deliberate” does not modify “deprivation of . . . essentials of life.” The absence of such a qualifier suggests that “deprivation of . . . essentials of life” could be a collateral consequence of the persecutor’s actions—as, for instance, when

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generating unsafe conditions where individuals are exposed and vulnerable to natural hazard events”—is integral to the applicability of international refugee law).

115. See, e.g., *Matter of T-Z*, 24 I. & N. Dec. 163, 174–75 (B.I.A. 2007) (citing *Li v. U.S. Att’y Gen.*, 400 F.3d 157, 169 (3d Cir. 2005)) (finding that economic harms in the aggregate could rise to the level of persecution); *Matter of O-Z & I-Z*, 22 I. & N. Dec. 23, 26 (B.I.A. 1998) (holding that repeated instances of discrimination and harassment amounted to persecution).

116. *Cournil*, supra note 10, at 95–96 (observing that the Refugee Convention and Protocol apply to instances of individualized rather than generalized violence (e.g., persecution but not general civil unrest) and that establishing the relevant “personal” threat compelling migration in cases of environmental degradation is challenging).

117. *Matter of T-Z*, 24 I. & N. Dec. at 171 (alteration in original) (citing H.R. Rep. No. 95-1452, at 5 (1978), as reprinted in 1978 U.S.C.A.N. 4700, 4704). Enumerated factors related to economic harm include the applicant’s and their household’s earnings, the applicant’s net worth, other employment available to the applicant, loss of housing, loss of health benefits, loss of school tuition and educational opportunities, loss of food rations, confiscation of property, including household furniture and appliances, and any other relevant factor. *Id.* at 173–75; see also USCIS Refugee, Asylum & Int’l Operations Directorate (RAIO), Definition of Persecution and Eligibility Based on Past Persecution 21–22 (2015), [https://www.uscis.gov/sites/default/files/document/foia/Persecution\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Persecution_LP_RAIO.pdf) [<https://perma.cc/9D3U-7BMV>] [hereinafter USCIS, Persecution] (discussing economic harm as a form of persecution).

118. The use of “imposition” also suggests that “severe economic disadvantage” is inflicted by an entity with significant power over the persecuted individuals, consistent with the BIA’s focus on government-imposed persecution in *Matter of T-Z*. See 24 I. & N. Dec. at 173–75. The argument that high-emitting actors, whether other countries or private corporations, have the authority to “impos[e]” harm on climate refugees is at best tenuous.

a state's industrial sector produces substantial emissions in pursuit of economic success.<sup>119</sup>

Although the impacts of climate change can cause loss of “essentials of life” in a broad range of ways, both BIA and federal appellate precedent emphasize the role of state action in creating such deprivation.<sup>120</sup> For economic harm due to climate change to be sufficient, deprivation of fundamental necessities by a non-state actor must also constitute persecution. As section II.B.2 discusses, a demonstration that the state was unwilling or unable to prevent persecutory acts can provide the necessary government nexus.<sup>121</sup>

Though focusing on economic harm, *Matter of T-Z* stands for the broader proposition that “forms of nonphysical harm . . . may amount to persecution.”<sup>122</sup> Psychological harm, including past trauma, and mental harm, including forcibly witnessing the suffering of others, are other forms of nonphysical harm that federal appellate courts have explicitly recognized.<sup>123</sup> The well-demonstrated relationship between climate change and increased incidence of mental health problems suggests that

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119. See Kozoll, *supra* note 99, at 297 (considering the possible rebuttal that “the project inflicting the environmental harm on the group was intended to benefit the group through economic development, jobs, or by forcing the group into the mainstream culture”).

120. See, e.g., *Matter of T-Z*, 24 I. & N. Dec. at 170–71 (framing economic deprivation as occurring through governmental measures); see also, e.g., *Wu v. U.S. Att’y Gen.*, 745 F.3d 1140, 1157 (11th Cir. 2014) (concerning administration of fines as economic harm); *Vincent v. Holder*, 632 F.3d 351, 355 (6th Cir. 2011) (involving government forces burning an applicant’s home); *Zhang v. Gonzales*, 495 F.3d 773, 777–78 (7th Cir. 2007) (rejecting an economic harm claim when an applicant did not experience continuing harm from his government and when the harm was remediable); *Li v. U.S. Att’y Gen.*, 400 F.3d 157, 166–69 (3d Cir. 2005) (likewise characterizing administration of fines as economic harm). The UNHCR’s guidance seems to adopt a similar perspective. See UNHCR Handbook, *supra* note 6, ¶ 63 (recognizing grounds for refugee status when “economic measures destroy the economic existence of a particular section of the population,” illustrating the importance of persecutory intent).

121. For an extension of this argument analogizing economic to environmental harm, see Kozoll, *supra* note 99, at 298–306 (asserting environmental and economic harm are analogous; further examining a constellation of environmental harms, including river pollution, landscape destruction, ruin of arable land, air pollution from mining, and impacts of these on health, culture, and community life, and concluding that they more than amount to persecution).

122. *Matter of T-Z*, 24 I. & N. Dec. at 171.

123. See, e.g., *Ouk v. Gonzales*, 464 F.3d 108, 111 (1st Cir. 2006) (recognizing that “a finding of past persecution might rest on a showing of psychological harm” (internal quotation marks omitted) (quoting *Makhoul v. Ashcroft*, 387 F.3d 75, 80 (1st Cir. 2004)); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004) (similarly finding that “emotional or psychological” harm may constitute persecution); see also USCIS, Persecution, *supra* note 117, at 24 (recognizing psychological harm as a type of nonphysical harm that could amount to persecution). But see *Niang v. Gonzales*, 492 F.3d 505, 512 (4th Cir. 2007) (finding that “psychological harm, without any accompanying physical harm, does not constitute ‘persecution[.]’” with respect to withholding of removal).



this may be an apt basis for a persecution claim.<sup>124</sup> The Intergovernmental Panel on Climate Change (IPCC) has found that discrete climate events, such as storms, floods, heatwaves, wildfires, and droughts, have “significant negative consequences” for mental health across national contexts, increasing rates of PTSD, anxiety, and depression.<sup>125</sup> Furthermore, there is an “observable association” between increased heat and severe mental health problems, including suicide, psychiatric hospital admissions, anxiety, depression, and acute stress.<sup>126</sup> Adverse mental health outcomes are also secondary consequences of climate change’s impacts on economic, social, food, and healthcare systems.<sup>127</sup> For instance, current or future threats to livelihood correlate to increased rates of suicide, suicidal ideation, and substance abuse, while malnutrition and food insecurity also jeopardize mental health.<sup>128</sup> Consequently, refugees whose experience with climate change–based environmental harm caused severe

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124. See Carlos Corvalan, Brandon Gray, Elena Villalobos, Aderita Sena, Fahmy Hanna & Diarmid Campbell-Lendrum, WHO, *Mental Health and Climate Change: Policy Brief 4* (2022), <https://www.who.int/publications/i/item/9789240045125> [<https://perma.cc/7DRJ-Z4EB>] (demonstrating the deleterious impacts of climate change on environmental, social, and economic determinants of mental health and calling for measures to address climate change to protect mental health); see also Guéladio Cissé et al., *Health, Wellbeing and the Changing Structure of Communities*, in *Intergovernmental Panel on Climate Change, Climate Change 2022: Impacts, Adaptation and Vulnerability* 1041, 1076–78 (Hans-Otto Pörtner et al. eds., 2022), <https://www.ipcc.ch/report/ar6/wg2/> [<https://perma.cc/L9ZK-4ZAK>] (discussing observable increases in mental health risks in conjunction with discrete and persistent climate change effects); Molly Monsour, Emily Clarke-Rubright, Wil Lieberman-Cribbin, Christopher Timmins, Emanuela Taioli, Rebecca M. Schwartz, Samantha S. Corley, Anna M. Laucis & Rajendra A. Morey, *The Impact of Climate Change on the Prevalence of Mental Illness Symptoms*, 300 *J. Affective Disorders* 430, 436 (2022) (finding that climate change–induced sea level rise and tropical cyclone exposure in coastal Florida increased the risk of PTSD, anxiety, and depression). Despite this well-established relationship, states’ responses to climate change have rarely included mental health support. See WHO, *2021 WHO Health and Climate Change Global Survey Report* 60–61 (2021), <https://www.who.int/publications/i/item/9789240038509> [<https://perma.cc/GV75-ZWS6>] [hereinafter *WHO 2021 Survey*] (finding that, of the ninety-five countries surveyed, only eight had developed a “climate-informed health early warning system” for issues related to mental and psychosocial health). Of the small island nations surveyed, only the Marshall Islands and Palau met this criterion. *Id.*

125. See Cissé et al., *supra* note 124, at 1076–78 (emphasizing that youth are particularly vulnerable and identifying risks associated with displacement, migration, and concern about climate change, among other factors discussed in the text *infra*).

126. *Id.* at 1076.

127. *Id.*; Hans Pörtner et al., *Technical Summary*, in *Climate Change 2022: Mitigation of Climate Change* 37, 63 (Hans Pörtner et al. eds., 2022), [https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC\\_AR6\\_WGII\\_TechnicalSummary.pdf](https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_TechnicalSummary.pdf) [<https://perma.cc/3EG2-VK4W>] (“Mental health impacts are expected to arise from exposure to extreme weather events, displacement, migration, famine, malnutrition, degradation or destruction of health and social care systems, climate-related economic and social losses and anxiety and distress associated with worry about climate change . . .”).

128. Cissé et al., *supra* note 124, at 1078 (identifying farmers as particularly vulnerable and observing that mental health impacts from childhood malnutrition persist into adulthood).

psychological or emotional distress might allege that their experience amounts to persecution on this basis.

The deprivation of fundamental human rights recognized by customary international law may also rise to the level of persecution.<sup>129</sup> USCIS, in its training manual for asylum and refugee officers, provides the greatest context for what rights might qualify, listing arbitrary deprivation of life, legal personhood, and freedom of conscience as examples.<sup>130</sup> Climate refugees would need to successfully demonstrate rights directly threatened by climate change, such as life and an adequate standard of living,<sup>131</sup> are equally fundamental under customary international law in order to prevail on this basis.<sup>132</sup> Members of indigenous communities might also allege that climate change, by depriving them of their traditional land and livelihoods, has violated their right to self-determination, recognized in Article 1 of the ICCPR.<sup>133</sup>

Because the range of rights recognized in customary international law depends on state practice, this basis for asserting persecution has the potential to become more favorable to climate refugees over time. For instance, no consensus has emerged as to whether the right to a healthy

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129. USCIS, Persecution, *supra* note 117, at 17.

130. See *id.* (noting that the “[d]eprivation of these rights may also constitute persecution”).

131. See OHCHR, Understanding Human Rights and Climate Change: Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change 13–18 (2021), <https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf> [<https://perma.cc/WDM4-HHQ9>] [hereinafter OHCHR Submission] (identifying these two rights as among those most threatened by climate change).

132. The United States’ conventional rejection of economic, social, and cultural rights or those that impose positive obligations on states poses a challenge for such arguments. Compare William A. Schabas, The Customary International Law of Human Rights 303–12 (2021) (recognizing a universal right to an adequate standard of living as a matter of customary international law), with UN Hum. Rts. Council, Rep. of the Working Group on the Universal Periodic Review, U.S. Am., Addendum: Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State Under Review, ¶ 12, UN Doc. A/HRC/30/12/Add.1 (Sept. 14, 2015) (rejecting the UN General Assembly resolution recognizing a right to safe and clean drinking water and sanitation as legally binding).

133. See Catalina Devandas Aguilar, John H. Knox, Philip Alston, Léo Heller & Virginia Dandan, OHCHR, The Effects of Climate Change on the Full Enjoyment of Human Rights 15–16, 20 (Apr. 30, 2015), [https://unfccc.int/files/science/workstreams/the\\_2013-2015\\_review/application/pdf/cvf\\_submission\\_annex\\_1\\_humanrights.pdf](https://unfccc.int/files/science/workstreams/the_2013-2015_review/application/pdf/cvf_submission_annex_1_humanrights.pdf) (on file with the *Columbia Law Review*) (recognizing that deprivation of territory or loss of livelihood due to climate change implicates indigenous peoples’ right to self-determination); see also ICCPR, *supra* note 39, art. 1, 999 U.N.T.S. at 173 (enshrining the right to self-determination). The right is also recognized in Art. 1 of the International Covenant on Economic, Social, and Cultural Rights, which the United States has not signed. International Covenant on Economic, Social, and Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 4, 5. For further discussion of environmental harm to indigenous communities amounting to persecution, see generally Kozoll, *supra* note 99 (arguing that harm to the natural resources of indigenous groups amounts to “environmental persecution”).

environment has fully entered into customary international law.<sup>134</sup> Nonetheless, the United States' vote to recognize this right in July 2022, part of its overwhelming adoption by the UN General Assembly, affirms its salience.<sup>135</sup> As international practice related to state obligation to ensure the right to a healthy environment evolves, the case for asserting that its violation amounts to persecution may strengthen.

2. *Persecutory Actor.* — In the context of climate asylum, the persecutory actor is best defined as the set of state actors and non-governmental actors, such as the industrial sectors of high-emitting countries and private corporations, whose emissions have substantially contributed to climate change.<sup>136</sup> Because these persecutors are external actors, a climate asylum claim must demonstrate that an applicant's government was unable or unwilling to control them.<sup>137</sup> Government complicity, or even involvement with this third party, is not a requirement.<sup>138</sup>

Demonstrating that the government is unable or unwilling to control the persecutors requires analysis of the extent to which the government could impose “controls and restraints” on the entities inflicting harm, the applicant's attempts to avail itself of the government's protection, and the

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134. See Schabas, *supra* note 132, at 335 (concluding, based on review of regional instruments and state practice that “[t]here is compelling evidence for a human right to a safe, clean, healthy, and sustainable environment under customary international law.”). But see Edward Heartney, Couns. for Econ. & Soc. Affs., Explanation of Position on the Right to a Clean, Healthy, and Sustainable Environment Resolution, U.S. Mission to UN (July 28, 2022), <https://usun.usmission.gov/explanation-of-position-on-the-right-to-a-clean-healthy-and-sustainable-environment-resolution/> (on file with the *Columbia Law Review*) (explicitly rejecting that the American decision to sign the UN General Assembly resolution recognizing a right to a healthy environment makes the right a norm of customary international law).

135. See Jacob Katz Cogan, The United States Recognizes the Human Right to a Clean, Healthy, and Sustainable Environment, *in* Contemporary Practice of the United States Relating to International Law, 117 Am. J. Int'l L. 128, 129 (Jacob Katz Cogan ed., 2023) (“Not only was the U.S. vote in the General Assembly a reversal of its consistent stance against the right to a healthy environment, it was also a striking exception to the long-standing resistance of the United States to the recognition of ‘new’ human rights.”).

136. For quantification of global greenhouse gas emissions by state, see Historical GHG Emissions, ClimateWatch, [https://www.climatewatchdata.org/ghg-emissions?end\\_year=2020&start\\_year=1990](https://www.climatewatchdata.org/ghg-emissions?end_year=2020&start_year=1990) (on file with the *Columbia Law Review*) (observing 60% of total emissions come from only ten countries).

137. Federal appellate courts have widely accepted the unwilling or unable standard for third-party actors. See, e.g., *Nabulwala v. Gonzales*, 481 F.3d 1115, 1118 (8th Cir. 2007) (recognizing that harm “inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control” may constitute persecution (alteration in original) (internal quotation marks omitted) (quoting *Suprun v. Gonzales*, 442 F.3d 1078, 1080 (8th Cir. 2006))); *Faruk v. Ashcroft*, 378 F.3d 940, 944 (9th Cir. 2004) (affirming that “private individuals that the government is unable or unwilling to control can persecute someone” (internal quotation marks omitted) (quoting *Singh v. Immgr. & Naturalization Serv.*, 134 F.3d 962, 967 n. 9 (9th Cir. 1998))).

138. USCIS, Persecution, *supra* note 117, at 28.

government's response.<sup>139</sup> Evidence of whether climate refugees' governments have attempted to mitigate the impacts of climate change will thus be instrumental to determining whether they are "unwilling" to address climate change-based persecution.<sup>140</sup> It is difficult to argue, however, that failure to address climate change due to lack of resources equates to "unwillingness"; it would be better to characterize such governments as "unable" to effectively respond.<sup>141</sup>

Federal appellate courts have found that the state's inability to prevent persecutory acts would satisfy the government nexus requirement.<sup>142</sup> Their precedent requires "more than just a difficulty controlling private behavior"; the government must have "at least demonstrated a complete helplessness to protect the victims."<sup>143</sup> It is true that climate-vulnerable countries cannot regulate emissions from other states or independently address mounting climate change, so that their governments, despite good-faith effort on their part to do so, remain unable to fully stop the persecutory acts. Nonetheless, some governments, such as those of vanishing island nations, have taken steps to mitigate climate degradation, adapt to climate change, and advocate for international efforts to resolve the crisis.<sup>144</sup> In such cases, climate refugees must demonstrate that, in their individual circumstances, their

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139. *Id.* at 28–29.

140. The BIA notes that "government authorities' timely response to a respondent reporting harm may be indicative of their ability or willingness to protect the respondent from harm." See *Matter of C-G-T*, 28 I. & N. Dec. 740, 743 (B.I.A. 2023).

141. See Flanagan, *supra* note 15, at 17 ("Thus, under current asylum law, it is a stretch to argue that the fact a government cannot afford to fulfill adaptation responsibilities constitutes an unwillingness to protect climate change refugees."); see also *Khan v. Holder*, 727 F.3d 1, 7 (1st Cir. 2013) ("[W]here a government is 'making every effort to combat' violence by private actors, and its 'inability to stop the problem' is not distinguishable 'from any other government's struggles,' the private violence has no government nexus and does not constitute persecution." (quoting *Burbiene v. Holder*, 568 F.3d 251, 255–56 (1st Cir. 2009))).

142. See Charles Shane Ellison & Anjum Gupta, *Unwilling or Unable? The Failure to Conform the Nonstate Actor Standard in Asylum Claims to the Refugee Act*, 52 *Colum. Hum. Rts. L. Rev.* 441, 470–90 (2021) (conducting a comprehensive review of federal appellate engagement with the "unwilling or unable" standard and concluding it had been universally adopted).

143. *Gutierrez-Vidal v. Holder*, 709 F.3d 728, 732 (8th Cir. 2013) (internal quotation marks omitted) (quoting *Salman v. Holder*, 687 F.3d 991, 995 (8th Cir. 2012)).

144. See, e.g., Ministry of Climate Change & Adaptation, Gov't of Vanuatu, *Vanuatu Climate Change & Disaster Risk Reduction Policy 2022–2030*, at 8 (2d ed. 2022), <https://www.nab.vu/sites/default/files/documents/National%20CCDRR%20Policy%2022-2030.pdf> [<https://perma.cc/G9AA-PFFL>] (providing Vanuatu's climate mitigation strategy); UN General Assembly Seeks World Court Ruling on Climate Change, *Hum. Rts. Watch* (Mar. 29, 2023), <https://www.hrw.org/news/2023/03/29/un-general-assembly-seeks-world-court-ruling-climate-change> [<https://perma.cc/TP43-6UFK>] (discussing Vanuatu's push for an I.C.J. advisory opinion on climate change).

government “demonstrated a complete helplessness” to redress the harm they suffered.<sup>145</sup>

### C. *Nexus*

The nexus—the causal link between the protected ground and the climate change–based harm suffered—requires creative application of existing asylum law related to persecutory intent.<sup>146</sup> Constructive knowledge of the impact of greenhouse gas emissions and resulting climate change, even in the absence of malicious intent, should satisfy the nexus requirement.

Recognition of persecution does not require subjective punitive or malignant intent on the persecutor’s part.<sup>147</sup> The U.S. Court of Appeals for the 9th Circuit has suggested that “even actions engaged in for the nominal good of the individual affected may be deemed persecution if they in fact inflict harm on the claimant.”<sup>148</sup> Moreover, USCIS indicates that the nexus may be established when the persecutor believes they have the right to harm the persecuted because of their membership in a group.<sup>149</sup> In the climate asylum context, high-emitting actors may believe that they have the right to take actions driving climate change even if they cause harm to specific groups, or even that they are economically benefitting the persecuted through their actions.<sup>150</sup>

Under the BIA’s mixed-motives doctrine, the protected characteristic must be “one central reason” for the alleged persecution.<sup>151</sup> Requiring it to be a “reason” rather than a “motive” imposes a causal rather than an intentional relationship. Nonetheless, this is a demanding standard, which

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145. USCIS, Persecution, *supra* note 117, at 31 (internal quotation marks omitted) (quoting *Gutierrez-Vidal*, 709 F.3d at 732–33).

146. See Flanagan, *supra* note 15, at 18–19 (characterizing this as the greatest challenge of a climate asylum claim).

147. *Matter of Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996). But see Carey DeGenaro, Comment, Looking Inward: Domestic Policy for Climate Change Refugees in the United States and Beyond, 86 U. Colo. L. Rev. 991, 1014 (2015) (denying the existence of a persecutory actor in climate degradation and thus concluding that no nexus exists).

148. Kozoll, *supra* note 99, at 295 (commenting on *Pitcherskaia v. Immigr. & Naturalization Serv.*, 118 F.3d 641, 646 (9th Cir. 1997), which observed that “[n]either the Supreme Court nor this court has construed the Act as imposing a requirement that the [noncitizen] prove that [their] persecutor was motivated by a desire to punish or inflict harm”).

149. See USCIS, Nexus, *supra* note 106, at 26–27 (“The important inquiry is whether the persecutor is motivated to harm the applicant on account of his or her . . . protected characteristics . . .”).

150. See Kozoll, *supra* note 99, at 295 (emphasizing that a persecutory actor may rely on economic benefit to excuse environmental harm).

151. See *Matter of J-B-N- & S-M*, 24 I. & N. Dec. 208, 212 (B.I.A. 2007). The B.I.A. also recognized that the reason could not be “incidental, tangential, superficial, or subordinate to another reason for harm.” *Id.* at 214.

a presumption of the actual or constructive knowledge of high-emitting actors helps to satisfy.

Given the wide availability of evidence for emissions causing climate change, high-emitting actors should be presumed to have at least constructive, if not actual, knowledge of the geographically disparate impacts of their emissions.<sup>152</sup> With respect to both nationality and particular social group formulations with a geographic tie, such as indigenous heritage, physical location is the primary reason why climate refugees experience the harm that prompts their relocation.<sup>153</sup> A similar argument applies to climate refugees who experienced severe deprivation of the essentials of life because climate change decimated natural resources upon which their livelihoods depend.<sup>154</sup> Presuming persecutors' constructive knowledge of the existence of and harm experienced by climate-vulnerable populations links the protected ground as a central reason for climate refugees' *experience* of climate change-based harm to the *infliction* of that harm. Such an argument is consistent with the BIA's holding that applicants need not demonstrate the exact motivation of their persecution, the standard being only a "well-founded fear" that persecution arises from the protected ground.<sup>155</sup>

Given this nexus between the protected grounds discussed above and climate change-based harm amounting to persecution, climate refugees can assert an initial asylum claim based on their experience of climate degradation.

### III. CLAIMING HUMANITARIAN ASYLUM

Climate refugees could receive asylum based only on establishing past persecution. If the U.S. government is able to rebut the presumption of future persecution on either of the bases discussed *infra* in section III.B, however, relief will depend on the grant of humanitarian asylum. This Part argues that climate refugees justly qualify for humanitarian asylum based

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152. See Kate McKenzie, *Due Diligence – The Lay of the Land from an Ocean-Climate Perspective*, 17 *Carbon & Climate L. Rev.* 35, 50–52 (2023) (arguing that the international law governing oceans requires constructive as well as actual knowledge for states' due diligence obligations). But see Cournil, *supra* note 10, at 103 (arguing that mere fact of human contributions to global warming does not satisfy the intent requirement).

153. See Carly Marcs, *Spoiling Movi's River: Towards Recognition of Persecutory Environmental Harm Within the Meaning of the Refugee Convention*, 24 *Am. U. Int'l L. Rev.* 31, 62–64 (2008) (illustrating how indigenous heritage might link an applicant to land and thus to climate change-based harm).

154. See *supra* note 12 and accompanying text (discussing such an example in Cameroon).

155. *Matter of S-P*, 21 I. & N. Dec. 486, 489–90 (B.I.A. 1996).

on recognition that “other serious harm” will befall them if returned to their countries of origin.<sup>156</sup>

A. *Humanitarian Asylum in the Climate Change Context*

Humanitarian asylum differs from other forms of relief provided in response to natural disasters or other humanitarian crises, such as temporary protected status (TPS) or humanitarian parole.<sup>157</sup> While the latter are mechanisms for authorized entry into the United States in response to urgent humanitarian situations, they are temporary measures independent from the more substantial requirements of and protections afforded by the Refugee Convention.<sup>158</sup>

In contrast, humanitarian asylum still requires demonstration of past persecution but permits other factors to substitute for a well-founded fear of future persecution, including demonstrated risk of suffering severe harm upon return, even if it does not amount to persecution.<sup>159</sup> In particular, the “other serious harm” basis for humanitarian asylum permits the adjudicator to evaluate the full range of reasons why the applicant may have fled and the harms they fear upon return.<sup>160</sup> Critically, this provides an opportunity for climate refugees to fully present evidence of the harm they have experienced or would be likely to suffer as a result of climate change, even if it is independent from persecution.<sup>161</sup>

1. *Introduction to Humanitarian Asylum.* — Awarded only “in certain rare cases,”<sup>162</sup> humanitarian asylum may be granted discretionarily if an applicant has established past persecution<sup>163</sup> but failed to demonstrate a

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156. See 8 C.F.R. § 208.13(b)(1)(iii)(B) (2024) (establishing the criteria for humanitarian asylum). 8 C.F.R. § 208 has been duplicated at 8 C.F.R. § 1208; reviewing courts may cite to either provision.

157. Temporary protected status provides temporary but extendable work and residence permission for migrants unable to return to their home countries due to humanitarian crises. For further definition and discussion, see generally Diana Roy & Claire Klobucista, *What Is Temporary Protected Status?*, Council on Foreign Rels., <https://www.cfr.org/background/what-temporary-protected-status> [<https://perma.cc/495X-529Q>] (last updated Sept. 21, 2023). Humanitarian parole is generally related to urgent individual humanitarian situations, such as medical crises, and provides temporary entry to the United States without a visa. See *Explainer: Humanitarian Parole*, Nat'l Immigr. F. (Mar. 24, 2022), <https://immigrationforum.org/article/explainer-humanitarian-parole/> [<https://perma.cc/Y2NL-LYVJ>] (explaining the context for and process of humanitarian parole).

158. See *Explainer: Humanitarian Parole*, supra note 157 (describing these two forms of temporary status).

159. See 8 C.F.R. § 208.13(b)(1)(iii) (establishing the criteria for humanitarian asylum).

160. See *infra* section III.A.2.

161. See *infra* section III.A.2.

162. *Mirzoyan v. Gonzales*, 457 F.3d 217, 220 (2d Cir. 2006).

163. While this is the general consensus, the Second Circuit has recently indicated that humanitarian asylum could afford protection in the absence of past persecution. See *M.M.M. v. Barr*, 831 F. App'x 544, 548 (2d Cir. 2020) (holding that “[b]ecause M.M.M. did

well-founded fear of future persecution.<sup>164</sup> The INA provides two possible grounds for humanitarian asylum:

(A) The applicant has demonstrated *compelling reasons* for being unwilling or unable to return to the country arising out of the severity of the past persecution; or

(B) The applicant has established that there is a reasonable possibility that [they] may suffer *other serious harm* upon removal to that country.<sup>165</sup>

Federal appellate courts have not interpreted the humanitarian asylum provision to be a form of relief independent from asylum; rather, an applicant who asserts past persecution and provides evidence of one of these two statutory bases for humanitarian asylum will preserve the latter claim, even without separately raising it before the immigration judge.<sup>166</sup>

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not establish past persecution on account of a protected ground, she had to demonstrate” one of the two statutory bases for humanitarian asylum). This, however, directly contradicts the BIA’s interpretation of the statute, as well as the interpretations of other circuits, and is seemingly inconsistent with statutory structure. See *Matter of L-S-*, 25 I. & N. Dec. 705, 710 (B.I.A. 2012) (“We emphasize that every asylum applicant who arrives at this stage of the analysis has demonstrated past persecution and thus has proven he or she is a ‘refugee.’”); see also *Ayala v. Holder*, 683 F.3d 15, 18 (1st Cir. 2012) (stating that past persecution is required for humanitarian asylum, as 8 C.F.R. § 208.13(b)(1)(iii)(B) applies only to “an applicant described in [8 C.F.R. § 208.13(b)(1)(i)],” which discusses an individual “found to be a refugee on the basis of past persecution” (internal quotation marks omitted) (quoting 8 C.F.R. § 208.13(b)(1))); *Kholyavskiy v. Mukasey*, 540 F.3d 555, 577 (7th Cir. 2008) (finding that an applicant must have established past persecution to seek humanitarian asylum). For a more recent and forceful formulation of this position, see *Goncalves de Oliveira v. U.S. Att’y Gen.*, No. 22-2743, 2023 WL 4542004, at \*2 (3d Cir. July 14, 2023) (“By requesting asylum for ‘other serious harm,’ without first establishing past persecution, [the applicant] is attempting to take an unauthorized shortcut. We only consider whether a[] [noncitizen] has a well-founded fear of persecution based on ‘other serious harm’ if [they] ha[ve] already established past persecution.”).

164. 8 C.F.R. § 208.13(b)(1)(iii); see also *Matter of L-S-*, 25 I. & N. Dec. at 713 (recognizing that the burden is on the applicant to demonstrate “why asylum should be granted on this basis in the exercise of discretion”). The BIA’s denial of humanitarian asylum is “conclusive unless manifestly contrary to the law and an abuse of discretion.” 8 U.S.C. § 1252(b)(4)(D).

165. 8 C.F.R. § 208.13(b)(1)(iii) (emphasis added).

166. See, e.g., *B.L.L. v. U.S. Att’y Gen.*, No. 22-2039, 2023 WL 2423482, at \*3 (3d Cir. Mar. 9, 2023) (“We . . . conclude that a noncitizen does not waive a request for humanitarian asylum where [their] asylum application asserts past persecution and provides facts showing compelling reasons for [their] being unable or unwilling to return to that country or that [they] would face other serious harm if removed.”); *Juan Antonio v. Barr*, 959 F.3d 778, 798 (6th Cir. 2020) (finding that humanitarian asylum is preserved even if it is not explicitly requested before the Immigration Judge because it is “one avenue to achieve asylum under the broader statutory scheme, rather than a distinct form of relief”); *Martínez-Pérez v. Sessions*, 897 F.3d 33, 42 (1st Cir. 2018) (rejecting the argument that humanitarian asylum is waived if not explicitly raised before the Immigration Judge); cf. *Mbonga v. Garland*, 18 F.4th 889, 898 (6th Cir. 2021) (denying humanitarian asylum not because the issue was first argued at the appellate level but rather because the applicant neither raised the issue in his opening brief nor provided arguments supporting its grant on either statutory basis).



Of the two possible bases for humanitarian asylum, only the “other serious harm” provision merits further examination. The well-developed jurisprudence surrounding the “compelling reasons” basis almost certainly forecloses it as a possible avenue to relief for climate refugees. The language originated as a regulatory amendment designed to ensure that humanitarian asylum was awarded “*only* where there are compelling reasons related to the severity of the past persecution, providing relief to those who have suffered worst.”<sup>167</sup> Most relevantly, its language intentionally foreclosed the possibility that humanitarian asylum might be granted on the basis of “general humanitarian factors, unrelated to the [past persecution], such as age, health, or family ties.”<sup>168</sup> Yet such experiences, including severe human rights violations not directly related to past persecution, are common drivers of climate migration.<sup>169</sup>

Subsequent interpretation has not deviated from this original intent. Humanitarian asylum based on “compelling reasons” requires multiple experiences of extremely severe violence, rather than the pattern of ongoing human rights abuses—perhaps interspersed with discrete climate change-based events—that characterizes the experience of many climate refugees.<sup>170</sup> The BIA considers the “degree of harm suffered by the applicant” and the “length of time over which the harm was inflicted.”<sup>171</sup> Appellate courts have further characterized the “compelling reasons” standard as requiring “extraordinary suffering”<sup>172</sup> and “reserved for ‘atrocious forms of persecution.’”<sup>173</sup> The paradigmatic example of a group

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167. See *Sheriff v. U.S. Att’y Gen.*, 587 F.3d 584, 595 (3d Cir. 2009) (examining the Supplementary Information provided in the proposed rule introducing this language); see also New Rules Regarding Procedures for Asylum and Withholding of Removal, 63 Fed. Reg. 31,945, 31,947 (proposed June 11, 1998) (to be codified at 8 C.F.R. § 208) [hereinafter New Asylum Rules] (introducing the amendment in question).

168. *Sheriff*, 587 F.3d at 594–95 (alteration in original) (internal quotation marks omitted) (quoting New Asylum Rules, *supra* note 167, at 31,947).

169. See *supra* notes 25–32 and accompanying text; see also Ayesha Tandon, In-Depth Q&A: How Does Climate Change Drive Human Migration?, Carbon Br. (Apr. 10, 2024), <https://interactive.carbonbrief.org/climate-migration/> [<https://perma.cc/XV7B-RD85>] (“Climate change can interact with other factors, such as conflict, economic opportunity and politics, to drive migration.”).

170. See *Scott*, *supra* note 26, at 53–56 (discussing the complex interplay of acute and ongoing climate events that climate refugees are likely to experience).

171. *Matter of N-M-A*, 22 I. & N. Dec. 312, 326 (B.I.A. 1998). The BIA also considers the “evidence of severe psychological trauma stemming from the harm.” *Id.* For another standard widely used in appellate jurisprudence, see *Jalloh v. Gonzales*, 498 F.3d 148, 151–52 (2d Cir. 2007) (*per curiam*) (requiring a demonstration of “severe harm” and “long-lasting physical or mental effects of . . . persecution”).

172. *Zarouite v. Gonzales*, 424 F.3d 60, 64 (1st Cir. 2005) (citing *Tokarska v. Immigr. & Naturalization Serv.*, 978 F.2d 1, 1–2 (1st Cir. 1992) (*per curiam*)).

173. *Kone v. Holder*, 596 F.3d 141, 152 (2d Cir. 2010) (quoting *Matter of Chen*, 20 I. & N. Dec. 16, 19 (B.I.A. 1989)); see also *Precetaj v. Holder*, 649 F.3d 72, 77 (1st Cir. 2011) (“[S]o much abuse has been directed against the victim that the suffering is projected into the future and that a return of the applicant to the place where the harm was inflicted would magnify the prior suffering.”); *Kazlauskas v. Immigr. & Naturalization Serv.*, 46 F.3d 902,

that meets this threshold is survivors of genocide.<sup>174</sup> While this extraordinary level of harm need not be considered the threshold for qualification, “there can be no dispute that severe *means* severe.”<sup>175</sup> Even repeated or extended experiences of substantial violence may not qualify.<sup>176</sup>

Because climate refugees experience complex forms of harm less clearly attributable to individual perpetrators, including human rights violations resulting from exacerbation of preexisting inequities,<sup>177</sup> they are unlikely to be able to persuasively argue that they have experienced such “atrocious” or “extraordinary” persecution that they have “compelling reasons” to fear return. Indeed, because persecution must adopt an unusual characterization in a climate asylum claim,<sup>178</sup> reliance on persecution should be minimized when possible—here, in favor of an argument predicated upon “other serious harm.”

2. “*Other Serious Harm*”. — Because the “other serious harm” ground permits consideration of the full range of harms for which climate refugees might be at risk upon return—not merely those related to persecution—it better provides an avenue for relief. A “forward-looking” inquiry, it focuses on “current conditions and the potential for new physical or psychological harm that the applicant might suffer.”<sup>179</sup> The BIA has recognized that the standard for qualifying for humanitarian asylum

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906 (9th Cir. 1995) (holding that asylum was warranted only if the applicant or their family had suffered “atrocious forms of persecution” (quoting *Acewicz v. Immigr. & Naturalization Serv.*, 984 F.2d 1056, 1062 (9th Cir. 1993))); *Tokarska*, 978 F.2d at 2 (holding that an applicant must demonstrate “past persecution so severe that repatriation would be inhumane” (internal quotation marks omitted) (quoting *Baka v. Immigr. & Naturalization Serv.*, 963 F.2d 1376, 1379 (10th Cir. 1992))).

174. See *Bucur v. Immigr. & Naturalization Serv.*, 109 F.3d 399, 405 (7th Cir. 1997) (declaring that humanitarian asylum on the basis of severe persecution was “designed for the case of the German Jews, the victims of the Chinese ‘Cultural Revolution,’ survivors of the Cambodian genocide, and a few other such extreme cases” (citation omitted) (quoting *Matter of Chen*, 20 I. & N. Dec. at 18–19)).

175. *Sheriff v. U.S. Att’y Gen.*, 587 F.3d 584, 594 (3d Cir. 2009).

176. See *Hoxhallari v. Gonzales*, 468 F.3d 179, 182, 184 (2d Cir. 2006) (finding that the harm suffered by an applicant did not rise to the necessary level when he was beaten and harassed six times for his political affiliation); *Gonahasa v. Immigr. & Naturalization Serv.*, 181 F.3d 538, 540, 544 (4th Cir. 1999) (rejecting the applicant’s claim when he was detained by government police for two weeks, beaten, and cut with bayonets). But see *Lopez-Galarza v. Immigr. & Naturalization Serv.*, 99 F.3d 954, 961–63 (9th Cir. 1996) (remanding for consideration of humanitarian asylum when the applicant, after being imprisoned for her political beliefs, was raped by government officials).

177. See UNHCR, *Legal Considerations*, *supra* note 20, at 6–7 (focusing on climate change as exacerbating preexisting socioeconomic inequalities); see also *Mastor et al.*, *supra* note 26, at 344 (“It can . . . be difficult to pinpoint the direct cause for a refugee-triggering event because of the multi-causal factors that create a situation in which people are forced to leave their home countries.”).

178. See *supra* section II.B.1 (characterizing aggregated nonphysical harm as persecution).

179. *Matter of L-S*, 25 I. & N. Dec. 705, 714 (B.I.A. 2012).

based on “other serious harm” (a “reasonable possibility”) is lower than that for “compelling reasons.”<sup>180</sup> Thus, cases not rising to the level of “compelling reasons” to fear severe future persecution may nonetheless meet the “other serious harm” threshold. The “compelling reasons” ground need not be adjudicated first, however; either basis for relief can be asserted, and the second ought to be considered if relief is denied under the first.<sup>181</sup>

The DOJ introduced “other serious harm” as a basis for humanitarian asylum to broaden paths to the discretionary grant.<sup>182</sup> It recognized that the current law failed to afford protection to applicants who, though they could demonstrate past persecution, feared “future harm that is not related to a protected ground.”<sup>183</sup> While “other serious harm” must “be so serious that it equals the severity of persecution,” it need not be related to past harm or inflicted based on one of the five protected Refugee Convention grounds.<sup>184</sup> This distinction is critical to the success of a climate asylum claim because it permits consideration of a much broader range of harms in the country of origin, many of which would otherwise have been excluded from the process of establishing a well-founded fear of persecution.<sup>185</sup>

To this end, the BIA has established that the adjudicator must “be cognizant of conditions in the applicant’s country of return” and “pay particular attention to major problems that large segments of the population face or conditions that might not significantly harm others but that could severely affect the applicant.”<sup>186</sup> A nonexhaustive list of such conditions includes “those involving civil strife, extreme economic deprivation beyond economic disadvantage, or situations where the claimant could experience severe mental or emotional harm or physical

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180. *Id.* Indeed, cases not rising to the level of the latter have been remanded for consideration under the “other serious harm” prong. See, e.g., *Hanna v. Keisler*, 506 F.3d 933, 939 (9th Cir. 2007) (rejecting applicant’s “compelling reasons” claim but remanding to the BIA for consideration of humanitarian asylum based on “other serious harm,” when the applicant seemed to have a “reasonable possibility” of suffering harm based on his Christian faith if returned to Iraq).

181. See *Matter of L-S*, 25 I. & N. Dec. at 713 n.8 (“Asylum applicants who suffered past persecution should be able to state whether they are pursuing humanitarian asylum under either or both provisions. However, if relief is denied on one basis, the other should also be considered.”); see also *Bardewa v. Barr*, 763 F. App’x 47, 48 (2d Cir. 2019) (finding the BIA abused its discretion where it rejected applicant’s humanitarian asylum claims solely on the “compelling reasons” prong without considering the possibility of “other serious harm”); *Zongxun Jiang v. Holder*, 487 F. App’x 655, 657 (2d Cir. 2012) (same).

182. *New Asylum Rules*, *supra* note 167, at 31,947.

183. *Id.*

184. *Matter of L-S*, 25 I. & N. Dec. at 714 (emphasizing that no nexus with a Refugee Convention ground is required).

185. See, e.g., *Mastor et al.*, *supra* note 26, at 339 (identifying “major disasters, imminent impacts of climate change, wars and conflicts brought on by resource scarcity” as harms unrelated to persecution).

186. See *Matter of L-S*, 25 I. & N. Dec. at 714.

injury.”<sup>187</sup> However, “[m]ere economic disadvantage or the inability to practice one’s chosen profession” would not rise to this threshold.<sup>188</sup>

Immigrant rights advocates have already suggested that climate change should be considered in determining “other serious harm.”<sup>189</sup> The strong relationship between the factors weighed in the “other serious harm” calculus and the types of harm produced by climate change provides robust support for this assertion. For instance, serious and widespread human rights abuses, including violations of the rights to food, water, health, and life, are common consequences of climate degradation and of a comparable scale to the enumerated bases.<sup>190</sup> In addition to being forms of “other serious harm” in their own right, these may result in the severe mental, emotional, or physical injury referenced by the statute.<sup>191</sup>

Climate change may also cause “extreme economic deprivation” by disrupting agriculture and producing natural disasters that destroy regional infrastructure, among other effects.<sup>192</sup> For example, in Yemen’s Hajar District, extreme and inconsistent weather events and patterns due to climate change have devastated the agricultural industry.<sup>193</sup> Consequent widespread loss of livelihood has led to estimated rates of food insecurity

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187. *Id.*

188. Asylum Procedures, 65 Fed. Reg. 76,121, 76,127 (Dec. 6, 2000) (codified at 8 C.F.R. pt. 208).

189. See Camila Bustos, John Willshire Carrera, Deborah Anker, Thomas Becker & Jeffrey S. Chase, Harvard Immigr. & Refugee Clinical Program, HLS Immigr. Project, Univ. Network for Hum. Rts., Yale Immigr. Just. Project & Yale Env’t L. Ass’n, Shelter From the Storm: Policy Options to Address Climate Induced Migration From the Northern Triangle 34 (Apr. 2021), [https://static1.squarespace.com/static/5b3538249d5abb21360e858f/t/6092e7854c5e4362887c0197/1620240265281/Shelter\\_Final\\_5May21.pdf](https://static1.squarespace.com/static/5b3538249d5abb21360e858f/t/6092e7854c5e4362887c0197/1620240265281/Shelter_Final_5May21.pdf) [<https://perma.cc/ZMZ7-GWFR>] (“Climate change factors should be considered as part of the ‘other serious harm’ determination, which requires no nexus to a Convention ground, but relates to ‘the potential for new physical and psychological harm’ to the applicant.” (quoting *Matter of L-S*, 25 I. & N. Dec. at 714)).

190. See OHCHR Submission, *supra* note 131, at 2–20 (finding that such human rights violations “will disproportionately affect individuals, groups and peoples in vulnerable situations including, women, children, older persons, indigenous peoples, minorities, migrants, rural workers, persons with disabilities and the poor”); see also *supra* notes 129–135 and accompanying text (discussing fundamental human rights abuses resulting from climate change in the context of establishing persecution).

191. See *supra* notes 122–128 and accompanying text (demonstrating the established relationship between climate change and increased mental and physical health problems).

192. Asylum Procedures, 65 Fed. Reg. at 76,127; see also Intergovernmental Panel on Climate Change, Climate Change 2023: Synthesis Report 98–100 (The Core Writing Team, Hoesung Lee & José Romero eds., 2023), [https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC\\_AR6\\_SYR\\_FullVolume.pdf](https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_FullVolume.pdf) [<https://perma.cc/X8X7-MV58>] [hereinafter IPCC Report] (discussing a range of climate change effects, including droughts, natural disasters, and rain variability, that impact climate-vulnerable occupations).

193. Yemen Pol’y Ctr., Rising Temperatures, Falling Resources: Climate Change Impacts on Yemen’s Agrarian and Coastal Communities 10 (2023), [https://ceobs.org/wp-content/uploads/2023/10/Rising\\_Temperatures\\_Falling\\_Resources\\_Bosch\\_Eng.pdf](https://ceobs.org/wp-content/uploads/2023/10/Rising_Temperatures_Falling_Resources_Bosch_Eng.pdf) [<https://perma.cc/9YJF-7FZE>] (discussing the Hajar region, which is heavily dependent upon agricultural production).

as high as eighty percent.<sup>194</sup> Similarly, climate change–induced variability in Lake Chad’s water levels has decimated the livelihoods of Cameroonian farmers and fishermen.<sup>195</sup> Such examples are more severe than “[m]ere economic disadvantage,” imperiling basic human needs, and arguably meet the statutory threshold.<sup>196</sup>

As a threat multiplier, climate change often precipitates “civil strife.”<sup>197</sup> In Cameroon, for instance, violent conflict between pastoralists and a group of farmers and fishermen arose from the latter’s attempts to adapt to the changing climate.<sup>198</sup> Separately, reports from displaced Cameroonians suggest that instability due to climate vulnerability was one factor in Boko Haram establishing its base in the region, thus contributing to instability and violence.<sup>199</sup> As climate change continues to intensify, its influence as a factor underlying conflict will increase.<sup>200</sup>

Though the impacts of climate change will often amount to “other serious harm,” relevant evidence should be framed in the manner most favorable to the applicant. That is, while climate change may be responsible in full or in part for “extreme economic deprivation,” mental or physical injury, civil unrest, or situations posing similar risks to fundamental human rights, climate change need not be framed as the unifying basis for “other serious harm.” Instead, evidence should encompass all relevant harm climate refugees might experience in their country of origin’s unique context if returned.

3. *Federal Appellate Precedent.* — Though relevant precedent delineating “other serious harm” is limited, several federal appellate courts have recognized combinations of factors that might rise to the requisite level of seriousness. The preeminent example is the U.S. Court of Appeals for the Seventh Circuit’s opinion in *Kholjavskiy v. Mukasey*,

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194. *Id.* at 11 (explaining that interviewees generally estimated that Hajar District has a poverty rate of 60–80 percent).

195. See *supra* note 12 and accompanying text (discussing this case study in greater detail).

196. See *Matter of L-S-*, 25 I. & N. Dec. 705, 714 (B.I.A. 2012) (noting that “[m]ere economic disadvantage” cannot constitute “other serious harm”).

197. *Id.* (discussing “civil strife” in relationship to “other serious harm”); *Mastor et al.*, *supra* note 26, at 344 (discussing the role of climate change as a threat multiplier).

198. Siegfried, *supra* note 11 (explaining that “in northern Cameroon in 2021, hundreds of people were killed and tens of thousands fled to neighbouring Chad following violence between herders and fishermen that was sparked by dwindling water resources linked to climate change”).

199. See Tower, *supra* note 28, at 27 (reflecting extremely low development indicators, “fishermen and subsistence farmers have often felt marginalised by their governments,” causing “underdevelopment . . . exacerbated by the impacts of climate change,” upon which Boko Haram capitalized to establish itself in the region).

200. See IPCC Report, *supra* note 192, at 72 (“With every increment of warming, climate change impacts and risks will become increasingly complex and more difficult to manage. . . . [M]ultiple climatic and non-climatic risk drivers such as biodiversity loss or violent conflict will interact, resulting in compounding overall risk and risks cascading across sectors and regions.”).

which considered “other serious harm” in the context of mental illness.<sup>201</sup> It noted that the applicant would, if returned, lose access to the “only medications that effectively have controlled the symptoms of his mental illness[,] . . . be incapable of functioning on his own,” and likely be unable to obtain basic necessities such as housing and healthcare.<sup>202</sup> “Debilitation and homelessness,” it concluded, appeared to be examples of serious harm.<sup>203</sup> The U.S. Court of Appeals for the Third Circuit has, in several instances, commented upon the *Kholyavskiy* ruling, similarly recognizing that lack of access to critical medical care might amount to “other serious harm”<sup>204</sup> and positing that, based on the Seventh Circuit’s reasoning, the threat of murder should rise to the necessary level.<sup>205</sup>

If returned to their country of origin, climate refugees may face threats of equal severity and comparable scope. They would likewise risk “debilitation” on account of deprivation of fundamental necessities, including, in some cases, adequate food and water.<sup>206</sup> Based on *Kholyavskiy*, applicants who can demonstrate critical deficiencies in physical and mental healthcare in their countries of origin should assert these as bases for serious harm if returned.<sup>207</sup> Though the BIA has not yet commented on the extent of deprivation of fundamental necessities necessary to meet the “other serious harm” threshold, such arguments are consistent with federal appellate application of the statute.<sup>208</sup>

4. *Justifying Climate Change as a Basis for Humanitarian Asylum.* — Perhaps the greatest challenge with respect to humanitarian asylum is to argue why, when it has been denied to victims of torture, it should be extended in the context of climate asylum.<sup>209</sup> The gradual accrual of harm unattributable to an individual perpetrator, inflicted across a period of years, is more difficult to conceptualize than isolated instances of extreme

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201. See 540 F.3d 555, 577 (7th Cir. 2008) (remanding to the BIA to evaluate the applicant’s humanitarian asylum claim based on its recognition of possible bases for “other serious harm”).

202. See *id.*

203. *Id.*

204. *Pllumi v. U.S. Att’y Gen.*, 642 F.3d 155, 162–63 (3d Cir. 2011).

205. *Sheriff v. U.S. Att’y Gen.*, 587 F.3d 584, 596 (3d Cir. 2009).

206. See, e.g., IPCC Report, *supra* note 192, at 98–100 (“Continued sea level rise and increased frequency and magnitude of extreme sea level events encroaching on coastal human settlements and damaging coastal infrastructure (high confidence), . . . expanding land salinization (very high confidence), with cascading to risks to livelihoods, health, well-being, cultural values, food and water security (high confidence).” (emphasis omitted)).

207. For a survey of countries’ efforts to address the physical and mental health impacts of climate change, see WHO 2021 Survey, *supra* note 124, at 60–61.

208. See *Pllumi*, 642 F.3d at 162–63 (positing that lack of necessary medical care could constitute “other serious harm”); *Sheriff*, 587 F.3d at 596 (suggesting that the threat of murder might meet the statutory level); *Kholyavskiy*, 540 F.3d at 577 (recognizing “debilitation” due to inability to access medication and “homelessness” as forms of “other serious harm”).

209. See *supra* note 176 for examples of denial of humanitarian asylum to victims of torture.

physical or mental anguish.<sup>210</sup> Humanitarian asylum, however, does not depend solely on the intensity of individual experiences of harm. Instead, especially with respect to the “other serious harm” determination, it is concerned with the overall severity of harm over time.<sup>211</sup> As the “other serious harm” factors illustrate, condemnation to the ongoing deprivation of fundamental rights and necessities demands a more substantial form of protection than acute experiences of harm without guarantee of repetition.<sup>212</sup> Because of the comprehensive threat that climate change-induced harm poses, particularly to vulnerable groups in impacted countries, it provides a strong basis for asserting a claim to humanitarian asylum.<sup>213</sup>

B. *Statutory Challenges: Evaluating the Strengths of Potential Government Rebuttals*

As noted above, the INA establishes two grounds for governmental rebuttal of the presumption of a well-founded fear of future persecution: changed country circumstances and reasonable internal relocation.<sup>214</sup> With respect to the former, the government may argue that there has been “a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant’s country of nationality.”<sup>215</sup> The latter inquiry considers whether future persecution could be avoided by relocating to another region of the country of origin in which the “circumstances . . . are substantially better” than those underlying the applicant’s original claim.<sup>216</sup> However, “substantially better” circumstances alone are insufficient; it must be “reasonable under all the circumstances” to expect the applicant to do so.<sup>217</sup> This section first

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210. See *supra* notes 25–31 and accompanying text (discussing challenges in viewing harm attributable to climate change in the asylum context).

211. See 8 C.F.R. § 208.13(b)(1)(iii) (2024) (establishing that to meet the “other serious harm” threshold, an asylum applicant need only show a “reasonable probability” of harm upon removal); see also *Matter of L-S*, 25 I. & N. Dec. 705, 714 (B.I.A. 2012) (describing the same standard as a “forward-looking” inquiry that considers conditions, especially widespread problems, in the country of return).

212. Compare the denial of humanitarian asylum under the “compelling reasons prong” for repeated instances of torture, *supra* note 176, with the “other serious harm” factors, see *Matter of L-S*, 25 I. & N. Dec. at 714.

213. See IPCC Report, *supra* note 192, at 51 (“Across sectors and regions, the most vulnerable people and systems have been disproportionately affected by the impacts of climate change (high confidence).” (emphasis omitted)).

214. 8 C.F.R. § 208.13(b)(1)(i).

215. *Id.* § 208.13(b)(1)(i)(A).

216. *Matter of M-Z-M-R*, 26 I. & N. Dec. 28, 33 (B.I.A. 2012); see also 8 C.F.R. § 208.13(b)(1)(i)(B) (providing grounds for discretionary denial of asylum if the applicant “could avoid future persecution by relocating to another part of [their] country of nationality . . . and under all the circumstances, it would be reasonable to expect the applicant to do so”).

217. *Matter of M-Z-M-R*, 26 I. & N. Dec. at 36 (requiring the Immigration Judge to “balance the factors identified at 8 C.F.R. § 1208.13(b)(3) in light of the applicable burden

examines the close relationship between humanitarian asylum predicated upon “other serious harm” and the reasonableness of internal relocation. It then discusses what changes in an applicant’s country of origin might be sufficient to undermine their claim to fear future persecution.

1. *Reasonable Internal Relocation.* — The three phases of an asylum adjudication are often characterized by courts as a burden-shifting framework.<sup>218</sup> But in cases involving both humanitarian asylum on the basis of “other serious harm” and the reasonableness of internal relocation, as is likely to occur in climate asylum cases, this categorization proves inapposite. In determining whether internal relocation would be reasonable, the BIA requires consideration of, among other factors, “whether the applicant would face *other serious harm* in the place of suggested relocation.”<sup>219</sup> According to its defining regulation, the term “other serious harm” has the same meaning in the context of humanitarian asylum and as a factor for determining the reasonableness of internal relocation.<sup>220</sup> Consequently, these two components of the asylum adjudication should not be considered independent evaluations.

In contrast to thinking of a climate asylum claim under a simple burden-shifting framework, it would be better to characterize the “other serious harm” element as a shared consideration. That is, a demonstration that “other serious harm” would befall an applicant upon return to their country of origin more broadly, as opposed to the specific location they fled, ought to foreclose the reasonableness of internal relocation, even if a “substantially better” area of the country can be identified.<sup>221</sup> Consequently, in asserting “other serious harm,” climate refugees should demonstrate country-wide harms when possible and emphasize clear barriers to internal relocation.

2. *Changed Country Conditions.* — The most appropriate parallels between existing precedent and the context of climate asylum are those cases in which the government has reduced a third-party’s ability to inflict

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of proof to determine whether it would be reasonable under all the circumstances to expect the” applicant to relocate).

218. See *supra* note 14 and accompanying text (establishing the burden-shifting framework).

219. *Matter of M-Z-M-R*, 26 I. & N. Dec. at 34 (emphasis added) (quoting 8 C.F.R. § 1208.13(b)(3) (2012)) (requiring adjudicators to additionally consider factors including but not limited to “any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties” (quoting 8 C.F.R. § 1208.13(b)(3))). The BIA further notes that these factors “are not necessarily determinative of whether it would be reasonable for the applicant to relocate.” *Id.* at 35 (quoting 8 C.F.R. § 208.13(b)(3)).

220. New Asylum Rules, *supra* note 167, at 31,947 (“We intend that this ‘other serious harm’ standard for determining when internal relocation is not reasonable refers to the same type of ‘other serious harm’ that may warrant a humanitarian grant of asylum to an applicant who shows past persecution but who has no well-founded fear of future persecution.”).

221. See *id.*



persecution upon the applicant.<sup>222</sup> While climate refugees' governments will be unable to exert control over other actors driving climate change, they may be able to adapt or mitigate its effects sufficiently to improve living conditions for their residents.<sup>223</sup> Whether an evaluation of changed country conditions rebuts the presumption of fear of future persecution may largely depend upon their government's success in addressing climate change.<sup>224</sup> Even if country conditions improve slightly, as in the case of island nations attempting to mitigate the impacts of climate change,<sup>225</sup> it will be difficult to demonstrate that circumstances changed to "such an extent" that the applicant's fear of persecution is no longer well-founded.<sup>226</sup> But if the government of the applicant's country of origin successfully ameliorated the major harms suffered by the applicant,<sup>227</sup> the burden would likely shift to the applicant to establish a claim to humanitarian asylum.

#### CONCLUSION

Applied expansively, in recognition of the humanitarian aims of the Refugee Convention and the Refugee Act, American asylum law provides grounds for asserting a climate asylum claim. Under circumstances of severe harm caused by climate change, climate refugees might successfully allege past persecution and, as necessary, a substantial risk of suffering "other serious harm" if returned to their countries of origin. A claim based on either membership in a particular social group or nationality could provide the requisite nexus to climate change-based persecution to satisfy the requirements of U.S. asylum law.

Nonetheless, a more expansive particular social group standard would significantly simplify climate asylum claims. As discussed in section III.B, the BIA's three-part test for evaluating membership in a particular social group, in addition to receiving sharp criticism from the UNHCR and immigrant rights advocates, has not been universally adopted by appellate courts. In 2021, President Biden requested executive action to provide clarity.<sup>228</sup> Subsequently, DHS and the DOJ have issued a Notice of

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222. See, e.g., *Matter of A-E-M*, 21 I. & N. Dec. 1157, 1160 (B.I.A. 1998) (finding that the Peruvian government's ability to limit persecution inflicted by the Shining Path undermined the presumption of the applicant's fear of future persecution).

223. See *Teitiota* Opinion, *supra* note 33, ¶ 9.12–.13 (discussing measures taken by Kiribati to mitigate the impacts of climate change).

224. See *id.*

225. See *supra* note 144 (discussing Vanuatu's efforts to mitigate and adapt to climate change).

226. *Matter of A-E-M*, 21 I. & N. Dec. at 1172.

227. In its *Teitiota* opinion, the Human Rights Committee based its determination that the applicant's rights had not been violated in the mitigation efforts taken by his government. *Teitiota* Opinion, *supra* note 33, ¶ 9.12–.13.

228. See Exec. Order No. 14,010, 86 Fed. Reg. 8267, 8271 (Feb. 2, 2021) (requesting redefinition of the term "particular social group").

Proposed Rulemaking to amend the definition of “membership in a particular social group,” as well as to redefine other terms relevant to a claim on this basis, including “the requirements for failure of State protection, and determinations about whether persecution is on account of a protected ground.”<sup>229</sup>

In clarifying the definition of these terms, the U.S. government ought to intentionally accommodate climate refugees. At minimum, returning to the *Matter of Acosta* standard would bring the United States back into compliance with the international norms enshrined in the Refugee Convention.<sup>230</sup> A sole requirement of immutability would simplify the establishment of a particular social group, permitting the focus of climate asylum cases to shift from establishing a protected ground to the characterization of persecution, a line of legal reasoning more consistent with the New Zealand Supreme Court’s and the Human Rights Committee’s decisions in *Teitiota*.<sup>231</sup> Explicit recognition that harm due to climate change may be an example of persecution based on failure of state protection, as well as that such harm can satisfy the nexus requirement, would substantially strengthen the argument for awarding climate asylum.

At present, the Seventh Circuit appears to be the most favorable federal appellate forum for a climate asylum case.<sup>232</sup> It alone relies upon the favorable *Matter of Acosta* standard for membership in a particular social group,<sup>233</sup> and its opinion in *Kholyavskiy* acknowledges that severe violations of economic and social rights upon return to one’s country of origin can constitute “other serious harm.”<sup>234</sup> No other federal appellate court’s precedent provides so expansive a basis for either the initial asylum claim or an argument for humanitarian asylum.

Yet even under the more demanding standards of other fora, American asylum law as it stands can, if maximized to humanitarian ends, afford protection to climate refugees. Even as the majority of forced migrants cannot qualify for political asylum, regardless of the severity of

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229. Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions (Fall 2022), 88 Fed. Reg. 10,966, 11,054 (Feb. 22, 2023).

230. See Flanagan, *supra* note 15, at 31–32 (arguing that the Seventh Circuit’s jurisprudence should be adopted by the other circuits).

231. See *Teitiota* Opinion, *supra* note 33, ¶¶ 9.6, 9.11 (referencing *Teitiota v. Chief Exec of the Ministry of Bus., Innovation & Empl.* [2015] NZSC 107 at [13] (N.Z.)) (identifying the risk of refoulement and noting that the New Zealand Supreme Court recognized “the possibility that the effects of climate change or other natural disasters could provide a basis for protection” and identifying the risk of refoulement).

232. As discussed *supra* note 93 and accompanying text, the extent to which the Supreme Court’s recent decision in *Loper Bright* might alter this landscape is not yet clear.

233. See, e.g., *W.G.A. v. Sessions*, 900 F.3d 957, 964 & n.4 (7th Cir. 2018) (affirming the *Matter of Acosta* immutability test and noting that it has “sometimes strongly” “disapproved” of the B.I.A.’s additional particularity and social distinction requirements).

234. See *Kholyavskiy v. Mukasey*, 540 F.3d 555, 577 (7th Cir. 2008) (“Debilitation and homelessness both would appear to constitute serious harms for purposes of 8 C.F.R. § 1208.13(b)(iii)(B).”).

harm they have experienced, climate asylum will not be a suitable basis for protection for many climate migrants—even truer for a broader class of victims of environmental harm whose experiences are not clearly attributable to climate change. This broader challenge requires novel protection through legislative and executive action.<sup>235</sup> Nonetheless, because severe impacts of climate change may amount to the level of persecution requisite for an asylum claim, those who qualify should be able to avail themselves of the protections and privileges of this established framework.

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235. See *supra* section I.C (discussing the need for more extensive immigration reform in the context of the United States' climate migration response plan).

