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## **“Give Me Your Tired, Your Poor, Your Huddled Masses”: The Case to Reform U.S. Asylum Law to Protect Climate Change Refugees**

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**“Give Me Your Tired, Your Poor, Your Huddled Masses”:  
The Case to Reform U.S. Asylum Law to Protect Climate Change Refugees**

Shea Flanagan\*

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**INTRODUCTION**

As the consequences of climate change continue to exacerbate environmental conditions worldwide, the world’s poorest and most vulnerable communities experience the most drastic effects. In fact, underdeveloped communities in poor countries have contributed only 1% of global greenhouse gas emissions, and yet have suffered 99% of the deaths from climate change-related disasters thus far.<sup>1</sup> Further, this issue raises significant environmental justice concerns, as the world’s richest countries, who are also the highest emitters of global greenhouse gases, do not have viable legal frameworks that provide sufficient relief to refugees displaced by the consequences of those emissions. As the destructive effects of climate change will increasingly be felt in poor communities around the world, an estimated 200 million people will be forced to become “climate

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\* J.D. Northwestern Pritzker School of Law, 2020; B.A. University of Connecticut, 2017. I would like to thank Professor Debbie Chizewer, for her thoughtful advising of this paper and encouragement to pursue publication, Clinical Professor Uzoamaka Emeka Nzelibe, for her expertise and guidance in advocating for immigrants seeking asylum, and Vanessa Kamberis, Editor-in-Chief of the DePaul Law Journal for Social Justice, for her great friendship over the years and the publication opportunity.

<sup>1</sup> HUMAN IMPACT REPORT: CLIMATE CHANGE–THE ANATOMY OF A SILENT CRISIS, GLOBAL HUMANITARIAN FORUM 1, 3 (2009), <http://www.ghf-ge.org/human-impact-report.pdf>.

change” refugees by the year 2050.<sup>2</sup> Yet, despite this drastic increase in the migration of climate change refugees, the world’s highest emitting countries will not be able to provide these migrants with legal protection, despite the fact that these countries have externalized the costs of climate change to these vulnerable communities.<sup>3</sup>

Currently, the asylum laws in the United States do not provide any relief to refugees who flee their home country due to climate change-related environmental disasters. To meet the legal test for asylum eligibility in the United States, an asylum applicant must show that they have a well-founded fear of persecution perpetuated by the government, or an entity the government is unable or unwilling to control, on account of that person’s race, religion, nationality, political opinion, or membership in a particular social group.<sup>4</sup> Similarly, on an international level, environmental refugees are not protected by the 1951 Geneva Refugee Convention, as this framework only provides relief to those fleeing persecution, war, or violence.<sup>5</sup> Because the United Nations has strongly advocated for the acceptance of millions of Syrian refugees fleeing civil war in recent years, the United Nations has advised against recognizing climate change refugees on an international basis due to the concern of losing political support of cooperating countries.<sup>6</sup>

While the lack of an international approach to climate change refugees is certainly concerning, this paper focuses narrowly on reforming the asylum laws in the United States to protect climate change refugees. Most of the literature on reforming refugee laws has been aspirational at the international level, calling for a new Refugee Convention to provide protections

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<sup>2</sup> *Id.* at 49.

<sup>3</sup> See *Protecting Climate Refugees: Securing International Protection for Climate Refugees*, ENVTL. JUSTICE FOUND. (2017), <https://ejfoundation.org/what-we-do/climate/protecting-climate-refugees>.

<sup>4</sup> 8 C.F.R. § 208.13(b)(1).

<sup>5</sup> ENVTL. JUSTICE FOUND., *supra* note 3.

<sup>6</sup> W.H., *Why Climate Migrants Do Not Have Refugee Status*, THE ECONOMIST (Mar. 6, 2018), <https://www.economist.com/the-economist-explains/2018/03/06/why-climate-migrants-do-not-have-refugee-status>.

for climate change refugees through an amended framework.<sup>7</sup> While such a change is an important step in the future, I provide a more specific, technical, and tenable solution that can be practically applied at the domestic level in the near future.

Part I provides background information about climate change and its effects on vulnerable communities worldwide. Part II makes the case for why U.S. asylum law should be reformed, arguing that the United States has a moral responsibility to protect these refugees because of the United States' significant contributions to climate change, and also making the case that asylum is the most appropriate form of relief to provide this protection. Part III discusses the current U.S. asylum legal framework by explaining each statutory requirement, as well as why the current asylum laws fail to protect climate change refugees. Lastly, Part IV proposes two specific reforms to U.S. asylum law that could effectively protect climate change refugees. The first proposal is to create a new environmental protected ground for asylum that specifically addresses this class of refugees fleeing climate change-related disaster. The second proposal is to construe climate change refugees into the current "membership in a particular social group" protected ground for asylum. Overall, this paper will argue that climate change refugees are deserving of U.S. asylum protection, and that it would be unethical and unjust for the United States to reject these refugees considering the country's large contribution of global emissions.

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<sup>7</sup> See Benoit Mayer, *The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework*, 22 COLO. J. INT'L ENVTL. L. & POL'Y 357 (2011) (proposing an international framework that could be adopted by a United Nations General Assembly resolution); Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349 (2009) (proposing a new international treaty for climate change refugees); Julia Toscano, *Climate Change Displacement and Forced Migration: An International Crisis*, 6 ARIZ. J. ENVTL. L. & POL'Y 457 (2015) (advancing proposals to international regulations to better safeguard the human rights of climate change migrants).

## **I. CLIMATE CHANGE AND THE CONSEQUENCES FOR VULNERABLE COUNTRIES**

Climate change is a global phenomenon of increasing global temperature that is largely a result of human activity through the emission of greenhouse gases. Most of the global emissions of greenhouse gases can be attributed to a small number of wealthy countries.<sup>8</sup> Historically, the world's highest emitting countries include the United States, European Union countries, China, Russia, and India.<sup>9</sup> It is estimated that by 2100, the United States, EU countries, and China will contribute to 50% of the global temperature increase based on their cumulative global emissions.<sup>10</sup>

Scientists are in consensus that climate change exists, although the effects of climate change are yet to be fully realized.<sup>11</sup> During the 20<sup>th</sup> century, the average global temperature increased by 0.76 degrees Celsius and sea levels rose by 17 centimeters.<sup>12</sup> During the 21<sup>st</sup> century, the global temperature is expected to increase by 1.8 degrees to 4 degrees and sea levels are expected to rise by an additional 18 to 59 centimeters.<sup>13</sup> Also, it is expected that the increases in air and ocean temperatures and extreme heat will result in more frequent and severe weather issues, such as droughts, heavy precipitation, extreme heat, widespread melting of snow and ice, changes in soil moisture and runoff, and tropical storms.<sup>14</sup>

While these effects may seem like minor changes to the environment, human beings experience the consequences of climate change in a variety of ways. For instance, populations can be exposed to the effects of climate change directly through extreme weather events, such as a

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<sup>8</sup> Marcia Rocha et al., *Historical Responsibility for Climate Change – From Countries Emissions to Contribution to Temperature Increase*, CLIMATE ANALYTICS (2015).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 12–17 (2007), available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

hurricane, but can also be exposed to the effects of climate change indirectly through changes in water, air quality, food quality and quantity, ecosystems, agriculture, and infrastructure.<sup>15</sup> Thus, the consequences of climate change may directly or indirectly threaten the health of vulnerable communities who lack the proper resources to adapt to changing conditions.

While wealthy countries that are the highest emitters of greenhouse gases benefit from the economic use of greenhouse gases, these countries externalize the costs of climate change to poor and vulnerable countries who are forced to face the dire consequences. Small island countries and coastal cities that are only a few meters above sea level risk losing their entire communities due to rising sea levels,<sup>16</sup> people living on river basins or deltas (i.e. Bangladesh) are threatened, and communities prone to desertification and drought (i.e. African countries) risk losing their way of life through water scarcity, land degradation, and droughts.<sup>17</sup> These consequences of climate change will undoubtedly result in mass migration in the future because these populations cannot afford to protect themselves and survive under these drastic conditions. In 2008, the International Organization for Migration (IOM) estimated that 20 million people have currently been displaced by extreme weather events, which far exceeds the 4.6 million people who were displaced by conflict and violence over the same time period.<sup>18</sup> While the impacts of climate change could be tempered by appropriate infrastructure investments and by changes in water and land-use

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<sup>15</sup> Mayer, *supra* note 7.

<sup>16</sup> For example, the island country of Tuvalu has already lost one of its ten islands due to rising sea levels, and scientists predict the country's other nine islands will be destroyed within the next 50 years. While countries like Tuvalu have tried to make plans with nearby countries, such as Australia and New Zealand, to re-populate its communities, these countries have made no commitments to Tuvalu. See Mayer, *supra* note 7.

<sup>17</sup> See ENVTL. JUSTICE FOUND., *supra* note 3.

<sup>18</sup> COMPENDIUM OF IOM'S ACTIVITIES IN MIGRATION, CLIMATE CHANGE, AND THE ENVIRONMENT, INT'L ORG. FOR MIGRATION (IOM) 11 (2009), *available at* [https://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/env\\_degradation/compendium\\_climate\\_change.pdf](https://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/env_degradation/compendium_climate_change.pdf).

management, the implementation of such measures would entail costs that few world powers have shown they are willing to endure.<sup>19</sup>

## **II. THE CASE TO PROVIDE ASYLUM TO CLIMATE CHANGE REFUGEES**

Based on the inevitable mass migration of climate change refugees, U.S. asylum law should be reformed to protect this special class of migrants. First, although there is no legal obligation to protect climate change refugees, the United States has a moral responsibility to protect these refugees because the United States has significantly contributed to climate change. Second, U.S. asylum law in particular is the best form of refugee relief to reform because Temporary Protected Status (TPS)<sup>20</sup> is inadequate to protect climate change refugees in a sustainable manner.

### **A. The United States' Responsibility to Protect Climate Change Refugees**

First, U.S. asylum law should be reformed because the United States has a moral responsibility to accept refugees fleeing the negative effects of climate change that the United States largely created. As aforementioned, the United States has historically been one of the world's highest emitters of global greenhouse gases.<sup>21</sup> While the United States reaps the economic benefits of those emissions, people who live in developing countries have not benefitted, or have only benefitted little, from greenhouse gas emissions.<sup>22</sup> From a moral perspective, environmental ethicists contend that equitable principles support spreading responsibility for the negative effects felt in certain communities by providing a safe haven for those forced to flee their homes.<sup>23</sup>

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<sup>19</sup> See Diana Reckien & Elisaveta P. Petkova, *Who is Responsible for Climate Change Adaptation?*, 14 ENVTL. RES. LETTERS 1–13 (2019).

<sup>20</sup> 8 U.S.C. § 1254a.

<sup>21</sup> Rocha et al., *supra* note 8.

<sup>22</sup> *Id.*

<sup>23</sup> See, e.g., Trevor Hedberg, *Climate Change, Moral Integrity, and Obligations to Reduce Individual Greenhouse Gas Emissions*, 21 J. ETHICS, POL'Y, & ENVTL. 64–80 (2018) (siding with environmental ethicists who believe individuals who contribute to climate change have a moral obligation to reduce greenhouse gas emissions).

Complicating the argument that the United States has a responsibility to protect climate change refugees is the fact that there is no existing international legal obligation to do so. For example, the United States and other countries pledged to reduce their global emissions by 2020 in the Copenhagen Accord, but those commitments are not legally enforceable.<sup>24</sup> The United States also withdrew from the Paris Agreement in 2017, where high-emitting countries pledged (also in a non-legally binding manner) to invest in the adaptation efforts of developing nations facing the consequences of climate change.<sup>25</sup> Despite the lack of a legal hook obligating the United States to reduce emissions or accept climate change refugees, the United States should still be morally obligated to mitigate the harm of their global emissions. For instance, people expect companies to act responsibly and “do no harm,” and companies would be expected to mitigate harms beyond just stopping pollution in a given community.<sup>26</sup> Following this principle of mitigation, the United States should accommodate climate change refugees as a way to mitigate the harm of their global emissions.<sup>27</sup>

Further, if the United States becomes one of the first countries to provide asylum to climate change refugees, there is an inevitable fear of the “floodgates opening,” meaning all people facing

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<sup>24</sup> United Nations Framework Convention on Climate Change, Conference of the Parties, Copenhagen, Den., Dec. 7-19, 2009, *Information provided by Parties to the Convention relating to the Copenhagen Accord* (2010), available at <https://unfccc.int/process/conferences/pastconferences/copenhagen-climate-change-conference-december-2009/statements-and-resources/information-provided-by-parties-to-the-convention-relating-to-the-copenhagen-accord> (showing the United States pledged to reduce their global emissions by 17 percent by the year 2020 compared to 2005 emissions).

<sup>25</sup> See Johannes Urpelainen, *Trump’s Withdrawal from the Paris Agreement Means Other Countries Will Spend Less to Fight Climate Change*, WASH. POST (Nov. 21, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/21/trumps-noncooperation-threatens-climate-finance-under-the-paris-agreement/?utm\\_term=.4f6e598879cd](https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/21/trumps-noncooperation-threatens-climate-finance-under-the-paris-agreement/?utm_term=.4f6e598879cd).

<sup>26</sup> See Susan S. Kuo & Benjamin Means, *Corporate Social Responsibility After Disaster*, 89 WASH. U. L. REV. 973 (2012).

<sup>27</sup> See Ahmed Bayes, *Who Takes Responsibility for the Climate Refugees?*, 10 INT’L J. OF CLIMATE CHANGE STRATEGIES & MANAGEMENT 5–26 (2018) (arguing based on global emissions, the U.S. should take responsibility of 10 percent of the overall global share of climate refugees based on equitable principles); Jeff Spross, *Here’s Why the U.S. is Morally Obligated to Act on Climate Change*, THINK PROGRESS (Jun. 6, 2013), <https://thinkprogress.org/heres-why-the-u-s-is-morally-obligated-to-act-on-climate-change-d50f00fa94b0/> (arguing self-interest aside, the simple morality of carbon emissions inequities requires mitigating the harm).



environmental issues will pour into the United States. U.S. political leaders often fear that expansive asylum laws will result in mass migration to the United States.<sup>28</sup> For example, migrants forced to flee their home countries do not always go to the nearest country, as seen by Syrian refugees traveling to Germany and Central American refugees traveling through Mexico to reach the United States, because the ability to settle, make a living, and obtain legal status may influence their decision.<sup>29</sup> However, it is in the national security interest of the United States to provide a clear legal process for climate change refugees to gain asylum status. Mass migration will inevitably occur as climate change exacerbates, which could lead to large scale migration through covert and illegal methods due to the urgency of the environmental conditions if there is no process to provide legal protection for these communities. Thus, the fear of mass migration is real, but the inevitable nature of the issue requires lawmakers to control the migration of climate change refugees through a carefully crafted asylum law.

Of course, climate change is a global collective responsibility issue in the sense that numerous countries around the world acted together over time to create the phenomenon of climate change, and thus share responsibility for its harmful effects. For this reason, the United States cannot be the only country that is expected to act. While it would be desirable to solve this pitfall in the world's asylum laws at the international level, other countries have begun to step up and fill the gap by providing a form of asylum protection at the domestic level. For instance, in 2004 Finland enacted subsidiary asylum protections to protect climate change refugees who were unable to return to their native country because of an environmental disaster, and Sweden enacted similar

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<sup>28</sup> See Maria Sacchetti, *U.S. Asylum Process is at the Center of Trump's Immigration Ire*, WASH. POST (Apr. 9, 2019), [https://www.washingtonpost.com/immigration/us-asylum-process-is-at-the-center-of-trumps-immigration-ire/2019/04/09/7f8259b8-5aec-11e9-842d-7d3ed7eb3957\\_story.html?utm\\_term=.489cb4eed48c](https://www.washingtonpost.com/immigration/us-asylum-process-is-at-the-center-of-trumps-immigration-ire/2019/04/09/7f8259b8-5aec-11e9-842d-7d3ed7eb3957_story.html?utm_term=.489cb4eed48c).

<sup>29</sup> *Many Migrants Don't Want to Stay in the First Country They Reach*, BBC NEWSBEAT (Sep. 6, 2015), <http://www.bbc.co.uk/newsbeat/article/34168277/many-migrants-dont-want-to-stay-in-the-first-country-they-reach>.

subsidiary asylum protections in 2005.<sup>30</sup> While Finland and Sweden repealed their subsidiary asylum protections for environmental migrants in 2016 due to fairness concerns, these initial efforts demonstrate attempts to fulfill a moral obligation to provide a safe environment to these refugees.<sup>31</sup> In light of these fairness concerns, the United States should act to fulfill its moral obligation to protect climate change refugees, which would subsequently pressure other countries who share responsibility for climate change to follow suit.

Thus, the United States should provide a path for climate change refugees at the domestic level, not just because it would aid with national security concerns, but because the United States has a moral responsibility to mitigate the harm of their global emissions. Providing a safe haven to refugees whose communities have been destroyed based on actions tied to U.S. greenhouse gas emissions is a viable way to mitigate these harms. A path to legal status through U.S. asylum law would provide sustainability and certainty to refugees forced to flee their homes, while also providing the chance to rebuild their community identity.

## **B. Temporary Protected Status (TPS) is an Inadequate Form of Relief**

Further, U.S. asylum law should be reformed to protect climate change refugees because it would require minor changes to the language of the current law, while subsequently providing these refugees with meaningful benefits compared to other forms of relief. Temporary Protected Status (TPS) is currently the only form of refugee relief designed to deal with those fleeing

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<sup>30</sup> See Emily Hush, *Developing a European Model of International Protection for Environmentally-Displaced Persons: Lessons from Finland and Sweden*, COLUM. J. EUR. L. BLOG (Sept. 7, 2017), <http://cjel.law.columbia.edu/preliminary-reference/2017/developing-a-european-model-of-international-protection-for-environmentally-displaced-persons-lessons-from-finland-and-sweden/> (describing the subsidiary protections for environmental migrants provided in the Finnish Aliens Act and the Swedish Aliens Act). Countries like Canada, Australia, New Zealand, Belgium, and Spain refused to follow Finland and Sweden's approach to provide asylum protection to climate change refugees, arguing that "such situations were not mentioned in any international legal instrument," and such unfortunate environmental disaster does not constitute persecution by high-emitting countries without the motivation to harm. See Toscano, *supra* note 7.

<sup>31</sup> See Hush, *supra* note 30.

environmental destruction.<sup>32</sup> However, TPS is inadequate in providing sustainable relief for climate change refugees due to only temporary protection and limited benefits.

Congress established TPS through the Immigration Act of 1990.<sup>33</sup> Its intent is to protect foreign nationals in the United States from being returned to their home country if it became unsafe during the time they were in the United States, and return would put them at risk of violence, disease, or death.<sup>34</sup> The Secretary of the Department of Homeland Security (DHS) may designate a country for TPS in four scenarios presenting temporary conditions in a given country: (1) ongoing armed conflict, (2) an environmental disaster, (3) an epidemic, or (4) other extraordinary and temporary conditions.<sup>35</sup> TPS may be designated or extended in 6, 12, or 18-month increments, and at least 60 days before the end of a designation period, the Secretary must review country conditions, and determine whether those conditions warrant extension of TPS status.<sup>36</sup> TPS may be extended by the Secretary as many times as necessary, as long as the country's dangerous conditions continue.<sup>37</sup>

As of January 2020, there are ten countries designated with TPS status. Those countries include: (1) El Salvador, due to a 2010 earthquake; (2) Haiti, due to a 2010 earthquake; (3) Honduras, due to Hurricane Mitch in 1998; (4) Nepal, due to a 2015 earthquake; (5) Nicaragua, due to Hurricane Mitch in 1998; (6) Somalia, due to ongoing armed conflict; (7) Sudan, due to ongoing armed conflict; (8) South Sudan, due to ongoing armed conflict; (9) Syria, due to ongoing armed conflict; and (10) Yemen, due to ongoing armed conflict.<sup>38</sup> As one can see from this list,

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<sup>32</sup> 8 U.S.C. § 1254a.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> I.N.A. § 244.

<sup>36</sup> 8 U.S.C. § 1254a(b)(2)(B); 8 U.S.C. § 1254a(b)(3)(C).

<sup>37</sup> 8 U.S.C. § 1254a(b)(3)(C).

<sup>38</sup> *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGR. SERVS. (last updated Mar. 27, 2019), <https://www.uscis.gov/humanitarian/temporary-protected-status>.

five of the ten countries are designated due to an environmental disaster, such as an earthquake or hurricane. In the past, the United States has also designated TPS status due to a 1995 volcano eruption in the case of Montserrat, a British colony in the eastern Caribbean, though its TPS status expired in 2005.<sup>39</sup>

While TPS is a form of relief designed to address some environmental disasters, TPS is an inadequate solution to protect climate change refugees. TPS is inherently unreliable because it can be revoked by the U.S. government, making it only a temporary protection.<sup>40</sup> Further, people with TPS status in the United States obtain illusory benefits of not being removable, having the opportunity to obtain employment authorization, and having the ability to be granted travel authorization.<sup>41</sup> These benefits are illusory because TPS is a *temporary* status, so the benefits are meaningful only for a temporary period without a path to become a legal permanent resident or obtain other legal status. Accordingly, the inevitable result of TPS is people being forced to return to their home country once the temporary disaster has been resolved, no matter the length of time it takes to resolve that issue, and regardless of whether the conditions are temporary or recurring. Therefore, to provide meaningful and sustainable protection to climate change refugees, U.S. asylum law should provide a guaranteed permanent protection that people know that they can seek, instead of a reactive and temporary fix like TPS.

In contrast, those who receive asylum in the United States are able to obtain significant *permanent* benefits with "asylee" status. For example, unless an asylee commits a serious crime or otherwise violates her status, she cannot be removed from the United States.<sup>42</sup> An asylee is also

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<sup>39</sup> See Nina Bernstein, *U.S. is Ending Haven for Those Fleeing a Volcano*, N.Y. TIMES (Aug. 9, 2004), <https://www.nytimes.com/2004/08/09/nyregion/us-is-ending-haven-for-those-fleeing-a-volcano.html>.

<sup>40</sup> See *id.* (describing how the Department of Homeland Security forced Montserratians to leave the United States by February 2005, when its TPS status expired, which "stunned islanders who rebuilt their lives in America from scratch.").

<sup>41</sup> 8 U.S.C. § 1254a(f)(1)–(4).

<sup>42</sup> 8 C.F.R. § 208.24.

able to obtain employment authorization to work in the United States.<sup>43</sup> Further, within two years of gaining asylum status, an asylee can petition for entry into the United States on behalf of her spouse and any unmarried children who were under the age of 21 at the time the asylum application was received by the U.S. government.<sup>44</sup> Most importantly, an asylee is provided with a path to lawful permanent resident status after one year of maintaining asylum status, which can ultimately lead to citizenship.<sup>45</sup>

For the foregoing reasons, Temporary Protected Status is an inadequate form of relief to protect climate change refugees when compared with asylum relief. Reforming the current U.S. asylum law framework is a far better option to provide meaningful and sustainable protection for climate change refugees fleeing environmental disaster in their home countries.

### **III. CURRENT U.S. ASYLUM LAW FRAMEWORK**

Before proposing reforms to U.S. asylum law, it is important to understand the statutory requirements of U.S. asylum law. U.S. asylum law provides persons who have suffered or fear persecution in their home countries based on their race, religion, nationality, political opinion, or membership in a particular social group can apply for asylum in the United States.<sup>46</sup> This right to apply for asylum is set forth in the 1951 United Nations Convention Relating to the Status of Refugees, and was implemented in the 1967 United Nations Protocol Relating to the Status of Refugees.<sup>47</sup> The United States Congress codified refugee and asylee protection in 1980 through the Refugee Act, and the protections were further codified in the Immigration and Nationality Act (INA), most recently amended in 1996.<sup>48</sup>

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<sup>43</sup> 8 C.F.R. § 208.7.

<sup>44</sup> 8 C.F.R. § 208.21.

<sup>45</sup> 8 C.F.R. § 208.14(g).

<sup>46</sup> 8 C.F.R. § 208.13(b)(1).

<sup>47</sup> United Nations Protocol Relating to the Status of Refugees art. 1 (Oct. 4, 1967).

<sup>48</sup> 8 C.F.R. § 208.13(b)(1); I.N.A. § 101(a)(42)(A).

To qualify for asylum, an applicant must be physically present in the United States.<sup>49</sup> An applicant who presents herself at a port of entry or is present in the United States, and not in removal proceedings, can apply for asylum affirmatively by applying directly to the United States Citizenship and Immigration Services (USCIS) asylum office, regardless of whether that person entered the United States without status.<sup>50</sup> If USCIS denies the application and the person does not have any legal status, removal proceedings would subsequently commence against that person. Alternatively, if the person is arrested by DHS prior to applying for asylum, or is otherwise placed in removal proceedings, she must apply for asylum defensively with the immigration court.<sup>51</sup> Asylum thus acts in this context as a defense against removal from the United States.

#### **A. Statutory Requirements to Qualify for Asylum**

The legal requirements for asylum are set out by the INA. To meet the legal test for asylum eligibility, an asylum applicant must show that they have a well-founded fear of persecution perpetuated by the government, or an entity the government cannot or will not control, on account of one of five protected grounds: race, religion, nationality, political opinion, or membership in a particular social group.<sup>52</sup>

An asylum applicant who can prove she has suffered past persecution on account of one of the five protected grounds meets the legal test and establishes a rebuttable presumption that she has a well-founded fear of persecution.<sup>53</sup> At this point, the burden would shift to the government to establish, by a preponderance of the evidence, that conditions in the person's home country have changed such that the applicant no longer has a well-founded fear, or that it would be safe and

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<sup>49</sup> 8 C.F.R. § 208.4(a)(2)(i).

<sup>50</sup> *Id.* § 208.2(a).

<sup>51</sup> *Id.* § 208.2(b).

<sup>52</sup> *Id.* § 208.13(b)(1).

<sup>53</sup> 8 C.F.R. § 208.13(b)(1).

reasonable for the applicant to move to another part of the country to avoid persecution.<sup>54</sup> However, if the applicant's asylum case hinges solely on their well-founded fear of persecution (i.e. if they did not suffer past persecution but just fear return), the burden would be on the asylum applicant to demonstrate there has been no change in country conditions and that relocation in their home country would not be safe or reasonable.<sup>55</sup>

To summarize, in order to meet the statutory requirements for asylum, an applicant must demonstrate that they have: (1) a well-founded fear, (2) of persecution, (3) perpetuated by the government or an entity the government cannot or will not control, (4) on account of one of the five protected grounds, and (5) if the claim is based on future persecution, there has been no change in country conditions and relocation would not be safe or reasonable. As discussed below, some of these requirements are viable for climate change refugees to meet in their current form. However, because certain requirements are not viable for climate change refugees to meet, climate change refugees are currently unable to meet *all* the statutory requirements necessary to gain protection. Because a sound understanding of each statutory requirement is essential to understanding how certain requirements should be reformed to protect climate change refugees, each statutory requirement is briefly discussed below.

### **1. Well-Founded Fear**

An applicant must first show that she has a well-founded fear of persecution, and this requirement can be viably met by climate change refugees. The Supreme Court held that an applicant's fear must be subjectively real and objectively reasonable to qualify as well-founded.<sup>56</sup> To satisfy the subjective component, an applicant must show that she has a genuine fear of

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<sup>54</sup> *Id.* § 208.13(b)(1)(i).

<sup>55</sup> *Id.* § 208.13(b)(3)(i).

<sup>56</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429–32 (1987).

returning to her home country.<sup>57</sup> To satisfy the objective component, the applicant must demonstrate that a reasonable person in her circumstances would fear persecution if forced to return to her home country.<sup>58</sup> As aforementioned, if the applicant has faced persecution in the past, they are entitled to a presumption that they have a well-founded fear of persecution so long as they establish the remaining requirements of asylum.<sup>59</sup>

Showing a well-founded fear of persecution is a requirement of the U.S. asylum framework that climate change refugees can viably meet. Asylum applicants who flee their home countries due to climate change-related disaster could demonstrate a subjective fear that they will face hardship or death if returned to their home country, and can show that this fear is objectively reasonable through evidence of their home country's environmental conditions. Perhaps if there was merely a climate change-related threat that does not force migration, then it could be difficult to demonstrate that an applicant's fear is well-founded. However, this statutory requirement would apply to refugees who are forcibly displaced due to climate change-related consequences under U.S. asylum law.

## 2. Of Persecution

Second, an applicant must demonstrate that her well-founded fear is of "persecution" in her home country. Persecution is not defined in the substantive law; however, case law has interpreted the types of harms that are sufficient to rise to the level of persecution. The Seventh Circuit case, *Stanojkova v. Holder*, provides the most useful guidance in understanding the term "persecution."<sup>60</sup> The court classified three different types of persecution: (1) the "use of significant

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<sup>57</sup> *Asani v. INS*, 154 F.3d 719, 725 (7th Cir. 1998). To assess genuine fear, courts look to whether the applicant fled her home country right away, whether she knows anyone who has been persecuted in the same way, whether there have been recent threats in her home country, etc. *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> 8 C.F.R. § 208.13(b)(1)(i).

<sup>60</sup> 645 F.3d 943, 947–49 (7th Cir. 2011).



physical force against a person's body," (2) "the infliction of comparable physical harm without direct application of force," and (3) "nonphysical harm of equal gravity . . . even though the only harm it causes is psychological."<sup>61</sup> Further, the Seventh Circuit case, *Ahmed v. Gonzales*, further provides that persecution "inflicts substantial harm or suffering, but it need not be life-threatening or freedom-threatening."<sup>62</sup>

With respect to climate change refugees, demonstrating persecution would be viable under current asylum law. For instance, where the environmental conditions in the applicant's home country are drastic or uninhabitable, the effect of those conditions would be to cause severe physical or psychological harm to those living in the community. Further, the disastrous effects of climate change, such as hurricanes, water scarcity, droughts, and rising sea levels, can devastate communities and leave people without basic human rights to live.<sup>63</sup> Under *Stanojkova*, these conditions inflict severe physical harms (either directly or indirectly) and psychological harms onto vulnerable communities.<sup>64</sup>

### **3. Perpetuated by the Government or an Entity the Government Cannot or Will Not Control**

Third, an applicant must show that the persecution they have experienced in the past, or that they fear in the future, would be perpetuated by the government or inflicted by a group that the government is unable or unwilling to control.<sup>65</sup> The willingness or ability of a government to protect an applicant is a question of fact that must be assessed based on the evidence presented in each case.<sup>66</sup> The fact that an applicant did not seek government protection does not necessarily

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<sup>61</sup> *Id.* at 948.

<sup>62</sup> 467 F.3d 669, 673 (7th Cir. 2006).

<sup>63</sup> See Mayer, *supra* note 7.

<sup>64</sup> 645 F.3d 943, 948 (7th Cir. 2011).

<sup>65</sup> Matter of S-A-, 22 I&N Dec. 1328, 1335 (BIA 2000).

<sup>66</sup> See, e.g., Sarhan v. Holder, 658 F.3d at 660 (assessing the record comprehensively to find the BIA erred in denying on government protection).

undermine the requisite showing if the applicant either had insufficient access to government authorities or it would have been futile to seek protection.<sup>67</sup>

This statutory requirement could potentially be a challenge for climate change refugees to meet. Applicants could argue that their own government has persecuted them through an unwillingness to protect them against climate change-related consequences. For instance, applicants could argue that their home nation has adaptation responsibilities to undertake disaster prevention and response, flood management, wetlands restoration, and drought conditions response.<sup>68</sup> A failure of a government to fulfill these responsibilities would then constitute an unwillingness to protect citizens from the consequences of climate change. However, the challenge with this theory is that many vulnerable communities lie in developing countries that lack the resources and funds to fulfill these adaptation responsibilities.<sup>69</sup> This concern is evident in the many efforts to encourage wealthy countries to invest in vulnerable nations to better equip their communities to adapt to climate change.<sup>70</sup> 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.

Alternatively, applicants could argue they are persecuted by an entity their government cannot or will not control: high-emitting countries who externalize the costs of climate change to

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<sup>67</sup> See *Matter of S-A-*, 22 I.&N. Dec. at 1335.

<sup>68</sup> See Reckien & Petkova, *supra* note 19 (noting individual citizens lack knowledge about how to adapt, requiring local governments to fulfill adaptation responsibilities).

<sup>69</sup> See N.Y. TIMES EDITORIAL BOARD, *Many Countries Will Need Help Adapting to Climate Change*, N.Y. TIMES (Aug. 8, 2016), <https://www.nytimes.com/2016/08/08/opinion/many-countries-will-need-help-adapting-to-climate-change.html> (“Developing countries will not be able to make the investments needed to survive conditions brought on by global warming—nor should they have to do so alone, as a matter of fairness. Industrialized nations bear the greatest responsibility for climate change. It is also in their interest to help the rest of the world adapt, because experts expect that tens of millions to several hundred million people will be displaced by climate change.”).

<sup>70</sup> *Id.* (“Developed countries have said that they will increase their support, to \$100 billion a year starting in 2020, to help developing countries reduce emissions and adapt to climate change. That promise was made at the climate meeting in Copenhagen in 2009 and reaffirmed in Paris.”).

the applicants' communities. Under this theory, an applicant could argue that if a high-emitting country knows about a community's environmental vulnerability, and does not reduce their global emissions, then the high-emitting country is persecuting that community. Further, applicants would have to argue either (1) their own government is *unwilling* to control high-emitting countries, by providing evidence the country has not attempted to work with high-emitting countries to reduce emissions, or (2) that their home country is *unable* to control high-emitting countries, due to the lack of global political power of developing countries. For instance, an applicant could argue that their home country has no political power to compel wealthy countries to reduce their emissions. Thus, while identifying a persecutor poses a challenge to climate change refugees, applicants could argue their persecution was perpetuated by their own government or by high-emitting countries that their home country is unwilling or unable to control.

#### **4. On Account of a Protected Ground ("Nexus")**

Fourth, an applicant must show a nexus between the persecution and one of the protected grounds for asylum: race, religion, nationality, political opinion, or membership in a particular social group.<sup>71</sup> This requires that the applicant first demonstrate she is part of a protected group. Then, the applicant must then demonstrate that the protected group "was or will be at least one central reason for persecuting the applicant."<sup>72</sup> The applicant can establish a nexus through direct or circumstantial evidence that suggests the motivations of her persecutor.<sup>73</sup>

Establishing an appropriate protected ground is the primary challenge for climate change refugees to demonstrate in a case for asylum. Under current asylum law, it is quite a stretch for climate change refugees to argue they are being persecuted because of their race, religion,

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<sup>71</sup> I.N.A. § 208(b)(1)(B)(i).

<sup>72</sup> *Shaikh v. Holder*, 702 F.3d 897, 902 (7th Cir. 2012).

<sup>73</sup> *Martinez-Buendia v. Holder*, 616 F.3d 711, 715 (7th Cir. 2010).

nationality, political opinion, or membership in a particular social group, and then to establish a link between this protected ground and their persecution by their own government or high-emitting countries their government cannot or will not control. For this reason, the basis of the two proposals discussed in Part IV is to provide a suitable protected ground for asylum that climate change refugees can viably link to their persecution.

Further, it may be difficult for climate change refugees to argue that their protected ground is a central reason for their government's failure to fulfill adaptation responsibilities or for high-emitting countries externalizing the costs of climate change onto their communities. Certain vulnerable communities could argue they are particularly unprotected by their own government based on the location of where they live.<sup>74</sup> For example, "both lack of income . . . or lack of rights may compel many disadvantaged people to live in locations prone to climate hazards, such as coastal low-lying areas, along river banks, or at the bottom of hills that experience mudslides."<sup>75</sup> These conditions based on one's location may be connected to systemic inequities of race, religion, nationality, or other groups of people the government has historically under-protected.<sup>76</sup> These intersections of race, religion, nationality, etc. with climate change vulnerability would thus bolster the case of climate change refugees that they are being persecuted on account of one of those bases.

It is also possible for climate change refugees to argue that high-emitting countries are persecuting them on a protected asylum ground (though this argument is fairly weak under current law). For example, high-emitting countries could be aware of the drastic consequences they are inflicting onto these countries, and yet continue to emit large contributions of global emissions. In

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<sup>74</sup> See THE NEXUS BETWEEN CLIMATE CHANGE AND INEQUALITIES, UN/DESA POLICY BRIEF #45 1 (2016), available at <https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/WESS2016-PB2.pdf> ("Empirical evidence shows that exposure to the adverse effects of climate change is largely determined by the *location* where people choose or are forced to live.").

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

this situation, an argument can be made that a central reason for the persecution is based off of an environmental ground, even if economic gain plays a central role as well.

### **5. No Change in Country Conditions and Relocation Would Not Be Safe or Reasonable**

Lastly, the applicant must show that there has been no change in country conditions so that her fear is still well-founded and that relocation in the applicant's home country would not be safe, nor reasonable. If the applicant's case rests solely on her fear of future persecution (i.e. she did not suffer past persecution), the burden is on the applicant to demonstrate these requirements.<sup>77</sup> However, if the applicant establishes that she experienced past persecution, she is presumed to possess a well-founded fear of future persecution.<sup>78</sup> At this point, the burden would shift to the government to establish, by a preponderance of the evidence, that conditions in the person's home country have changed such that the applicant no longer has a well-founded fear, or that it would be safe and reasonable for the applicant to move to another part of the country to avoid persecution.<sup>79</sup>

Generally, it would not be difficult for climate change refugees to establish their fear remains well-founded by showing there has been no change in country conditions. In the case where the climate change-related disaster did permanent damage to a community, it would be relatively easy to show that there is no change in the environmental conditions that would allow the applicant to live without fear of physical or psychological harm. However, this requirement could be problematic in cases of temporary environmental disaster, because the government could argue that the disaster passed and it is now safe to return. This begs the question of what should happen with temporary but recurring disasters in an applicant's home country. In both the single

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<sup>77</sup> 8 C.F.R. § 208.13(b)(2).

<sup>78</sup> 8 C.F.R. § 208.13(b)(1)(i).

<sup>79</sup> *Id.*

temporary disaster scenario and temporary but recurring disaster scenario, an applicant could argue that their fear is still well-founded because their government remains unable to protect them. For example, if the government cannot feasibly fulfill adaptation responsibilities to protect communities vulnerable to climate change-related disaster, the conditions of the government have not changed even if the disaster has passed.<sup>80</sup>

Likewise, a climate change refugee could also likely establish relocation in her home country would not be safe or reasonable. In such cases, the government must demonstrate relocation would be both (1) safe, such that the applicant could avoid persecution in another part of her home country, and (2) reasonable, under a totality of the circumstances. The regulations provide a non-exhaustive list of the factors adjudicators should consider when determining the reasonableness of any internal relocation options, including "ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographic limitations; and social and cultural constraints, such as age, gender, health, social and familial ties."<sup>81</sup>

Meeting this requirement is viable for climate change refugees in cases where a small island has been fully submerged or an entire country is facing dire consequences of climate change. But, in temporary disasters where time has passed, it would be difficult to argue that the applicant could not relocate in their home country. However, many people are vulnerable to climate change because of the stark inequalities that influence the location of certain groups of people.<sup>82</sup> Thus, other parts of the country may not be accessible to these communities based on their sex, race, or

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<sup>80</sup> See Reckien & Petkova, *supra* note 19.

<sup>81</sup> 8 C.F.R. § 208.13(b)(3).

<sup>82</sup> Suzanne Fisher, *Challenging Inequity is at the Heart of Climate Change Adaptation*, INT'L INST. FOR ENV'T. & DEV. (Apr. 23, 2013), <https://www.iied.org/challenging-inequality-heart-climate-change-adaptation> (noting people are vulnerable to climate change because of the unequal power structures in their society and are forced to live in certain areas to earn a living based on these inequities).

socio-economic class. For this reason, relocation would not be reasonable in many developing countries.<sup>83</sup>

#### IV. TWO POTENTIAL U.S. ASYLUM REFORMS

While an international solution is desirable to spread the responsibility to protect climate change refugees, a more tenable solution is necessary at the domestic level in the meantime to ensure protection. Nearly everyone in the United States agrees that immigration law is not working as a whole.<sup>84</sup> While legislators are considering immigration reform, the following proposals to asylum law should be considered because it is desirable to provide a sustainable fix in anticipation of the inevitable mass migration of climate change refugees in the near future.<sup>85</sup>

As discussed in Part III, it is viable for the majority of the U.S. asylum law statutory requirements to be met by climate change refugees. Thus, the following proposals work with the primary weakness outlined in Part II. There are potentially two specific reforms to the current protected grounds of U.S. asylum law (i.e. race, religion, political opinion, nationality, and membership in a particular social group) that could effectively protect climate change refugees. The first proposal is to create a new environmental protected ground for asylum that specifically addresses this class of refugees fleeing climate change-related disaster. The second proposal is to construe this class of climate change refugees into the current “membership in a particular social group” basis for asylum.

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<sup>83</sup> *Id.* (explaining why women in Bangladesh are particularly vulnerable to climate change due to their lack of political power, which causes many women to have to work in agriculture).

<sup>84</sup> See Gromer Jeffers, Jr., *Republicans, Democrats Continue to Kick the Can on Immigration Reform*, DALLAS NEWS (Feb. 4, 2019), <https://www.dallasnews.com/opinion/commentary/2019/02/04/republicans-democrats-continue-kick-can-immigration-reform>.

<sup>85</sup> See Johnathan Blitzer, *How Climate Change is Fueling the U.S. Border Crisis*, THE NEW YORKER (Apr. 3, 2019), <https://www.newyorker.com/news/dispatch/how-climate-change-is-fuelling-the-us-border-crisis>.

### A. Creating An "Environmental" Protected Ground for Climate Change Refugees

First, instead of trying to force climate change refugees into one of the current protected grounds of asylum, a new "environmental" protected ground could be created to specifically protect this unique class of climate change refugees. Such a reform would require amending U.S. asylum law to provide a new protected ground. However, this would pose a challenge by relying on lawmakers to implement such a change. Nevertheless, the creation of a specific protected ground designated specifically for climate change refugees could allow the circumstances of these refugees to more neatly fit into U.S. asylum law.

The primary challenge with the creation of a new environmental protected ground for U.S. asylum law is developing a definition that is narrow enough to provide appropriate relief to climate change refugees, but not too broad to encompass all environmental issues worldwide. Some scholars have proposed amending U.S. asylum law to include an environmental protected ground, however, the existing proposals are not satisfactory due to the perils of being either too narrow or too broad.<sup>86</sup> For instance, Biermann and Boas propose a narrow, but arguably too restrictive, definition of "people who have to leave their habitats, immediately or in the near future, because of sudden or gradual alterations in their natural environment related to at least of the three impacts of climate change: sea-level rise, extreme weather events, and drought and water scarcity."<sup>87</sup> On the other hand, the Environmental Justice Foundation proposes a broader definition specific to climate change of "persons or groups of persons who, for reasons of sudden or progressive climate-related change in the environment that adversely affects their lives or living conditions, are obliged to leave their habitual homes either temporarily or permanently."<sup>88</sup>

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<sup>86</sup> See Docherty & Giannini, *supra* note 7; see also Molly Conisbee & Andrew Simms, *Environmental Refugees: The Case for Recognition*, 17 (2003).

<sup>87</sup> Docherty & Giannini, *supra* note 7.

<sup>88</sup> ENVTL. JUSTICE FOUND., *supra* note 3.



There is little consensus about what the proper definitional boundaries should be for such a reform—especially given the “floodgates” concern that comes with a broader definition. To minimize the floodgates concern, I propose a narrow, but not unduly restrictive, definition of the environmental protected ground that relates to a climate change-related environmental stressor. The environmental protected ground for asylum would be defined as: “people who are forced to flee across national borders due to climate change-related forces that render their home country uninhabitable.” Specifically, the term “uninhabitable” would encompass both permanent environmental disasters, as well as temporary but recurring disasters where applicants’ home countries cannot fulfill adaptation responsibilities to protect them.

Drawing from the five protected grounds already codified under U.S. asylum law, this definition would provide asylum for refugees whose central reason for fleeing is because there are climate change-related consequences, which is consistent with the United States’ responsibility for causing climate change, rather than any undesirable change to the environment or economic conditions (i.e. overuse of natural resources). Climate change-related consequences could encompass both direct and indirect effects of climate change that inflict severe disaster on the people of vulnerable countries.<sup>89</sup> Such a definition also focuses on forced migration, which is consistent with providing a permanent form of relief since these applicants could not be returned after a temporary period like they could with TPS.<sup>90</sup> Further, a focus on uninhabitable living conditions is also consistent with severe physical or psychological harm rising to the level of persecution, which is essential for human security.<sup>91</sup> While all victims of environmental harm may

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<sup>89</sup> See Mayer, *supra* note 7.

<sup>90</sup> See *supra* Part II.B.

<sup>91</sup> See *supra* Part III.A.2.

deserve some form of protection and aid, for asylum purposes it is important to focus on providing protection to those who are forced to migrate, not those who voluntarily leave.

With such a definition narrowed to climate change-related disaster, and not environmental disasters generally, there arises an additional challenge in establishing a “nexus” between the environmental disaster in an applicant’s home country and climate change.<sup>92</sup> This requires distinguishing those who flee environmental disasters that are unconnected to climate change, versus those who flee due to climate change consequences caused by human activity. While scientists are in consensus that climate change exists, the current political climate also includes climate change deniers who do not believe there is enough empirical data to link many environmental disasters to human activity.<sup>93</sup> Despite this challenge, scientific advancements have made it at least possible to help applicants and immigration judges determine what environmental disasters are caused, at least partly, by climate change, which greatly reduces the “nexus” concern.<sup>94</sup> Based on these scientific advancements, it is possible for scientists to link certain environmental disasters with the significant emissions of greenhouse gases in order for U.S. asylum law to provide protection to climate change refugees.<sup>95</sup>

Last, there is a floodgates concern that a new ground for asylum could flood the pool of applicants and make it more difficult for other deserving applicants who fall under the five traditional protected grounds (race, religion, political opinion, nationality, and membership in a

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<sup>92</sup> See *supra* Part III.A.4.

<sup>93</sup> See, e.g., Phil McKenna, *That Global Warming Hiatus? It Never Happened. Two New Studies Explain Why.*, INSIDE CLIMATE NEWS (Dec. 18, 2018), <https://insideclimatenews.org/news/18122018/global-warming-hiatus-pause-never-happened-studies-explain-climate-change-risbey-oreskes-mann>.

<sup>94</sup> See Amanda A. Doran, Comment, *Where Should Haitians Go? Why “Environmental Refugees” Are Up the Creek Without a Paddle*, 22 VILL. ENVTL. L.J. 117, 124 (2011).

<sup>95</sup> There are concerns with scientist’s ability to link certain environmental disasters, such as extreme weather events, to climate change. However, data about the increased severity and frequency of extreme weather events may be introduced to provide a stronger link to global emissions. See, e.g., *The Science Connecting Extreme Weather to Climate Change*, UNION OF CONCERNED SCIENTISTS (2018), <https://www.ucsusa.org/our-work/global-warming/science-and-impacts/climate-attribution-science>.

particular social group) to get asylum.<sup>96</sup> This concern arises from the fact that countries limit the number of refugees they accept each year.<sup>97</sup> However, the core goal of asylum law is to protect a person fleeing their home country where their safety is no longer guaranteed and their human rights are threatened. In the context of climate change refugees, this goal is furthered by providing asylum protection to people who are equally deserving of legal protection as applicants who fall under the other protected grounds, and who deserve the human right to safety, security and a tolerable environment. Thus, the concern about the numerosity of climate change refugees should not override the fundamental goal of U.S. asylum law to provide protection to those who cannot be safe in their home country because they will be persecuted on account of a protected ground.

### **B. Fitting Climate Change Refugees into the “Particular Social Group” Ground**

A different proposal for reform to U.S. asylum law is to fit climate change refugees into the current U.S. asylum framework through the membership in a “particular social group” protected ground. Membership in a particular social group is a protected ground for asylum that is broad and constantly evolving in the case law. While this protected ground has been significantly narrowed in the last few years, a benefit of this proposed reform is that it utilizes the current framework already in place, which allows applicants more flexibility to work with the existing standards.

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<sup>96</sup> See Doran, *supra* note 94.

<sup>97</sup> See David Nakamura et al., *Trump Administration Slashes Refugee Limit for the Third Consecutive Year to a Historic Low of 18,000*, WASH. POST (Sept. 26, 2019), [https://www.washingtonpost.com/politics/trump-administration-proposes-slashing-refugee-limit-for-the-third-consecutive-year-to-a-historic-low-of-18000/2019/09/26/3a554a60-e0a4-11e9-be96-6adb81821e90\\_story.html](https://www.washingtonpost.com/politics/trump-administration-proposes-slashing-refugee-limit-for-the-third-consecutive-year-to-a-historic-low-of-18000/2019/09/26/3a554a60-e0a4-11e9-be96-6adb81821e90_story.html) (explaining that the Trump administration’s 2020 refugee admissions cap of 18,000 “represents a 40 percent drop from the 2019 cap and marks the third consecutive year that the administration has slashed the program since the United States admitted nearly 85,000 refugees in President Barack Obama’s final year in office.”).

## 1. What Makes a "Particular Social Group" Legally Cognizable?

Generally, a particular social group is defined as a group of people who share or are defined by certain common and immutable characteristics, which means characteristics that a group cannot change or is so fundamental to one's individual identity or conscience that a person ought not be required to change.<sup>98</sup> These characteristics could be traits such as age, class background, ethnic background, family ties, gender, and sexual orientation. Further, immutable characteristics can include "a shared past experience or status [that] has imparted some knowledge or labeling that cannot be undone."<sup>99</sup>

Complicating the "immutability" definition of a particular social group are two additional requirements that the Board of Immigration Appeals (BIA) has added in recent years: (1) "particularity," and (2) "social distinction."<sup>100</sup> Particularity refers to a requirement that the social group must be discrete and have definable boundaries to allow for the sorting of its members.<sup>101</sup> Social distinction refers to a requirement that the social group must be recognized as a distinct group.<sup>102</sup> This does not mean the group has to be literally visible to the eye, but it means that applicants must demonstrate that the defined group they proffer is a recognized group in their home country.<sup>103</sup> These changes reflect the trend in the case law of restricting what can constitute a particular social group, which reflects efforts to curb the use of the particular social group ground by asylum applicants fleeing domestic violence and gang violence in recent years.

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<sup>98</sup> *Matter of Acosta*, 19 I.&N. Dec. 211, 233 (BIA 1985), *overruled on other grounds by* *Matter of Mogharrabi*, 19 I.&N. Dec. 439 (BIA 1987).

<sup>99</sup> *Cece v. Holder*, 733 F.2d 662 (7th Cir. 2013) (en banc).

<sup>100</sup> *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014); *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008); *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008).

<sup>101</sup> *Matter of M-E-V-G-*, 26 I&N Dec. at 239.

<sup>102</sup> *Id.*

<sup>103</sup> The BIA reframed its "social visibility" requirement as a "social distinction" requirement in the 2014 case *Matter of M-E-V-G-*, 26 I&N Dec. at 239.

Thus, in most U.S. immigration courts, a cognizable particular social group must be: (1) immutable, (2) particular, and (3) socially distinct. It is important to note that as of January 2020, the Seventh Circuit has not given *Chevron* deference to the BIA's added requirements of particularity and social distinction, and still strictly uses the immutability test to decide whether a social group is cognizable.<sup>104</sup> This is because the Seventh Circuit contends that the BIA's line of social group cases found cognizable solely under the immutability test are inconsistent with its line of social group cases found not cognizable using the heightened social group requirements of particularity and social distinction.<sup>105</sup> Accordingly, the Seventh Circuit has concluded that the BIA's heightened social group test is an unreasonable interpretation of the ambiguous term "particular social group," though it is unclear whether the Circuit will ultimately defer to the heightened requirements in the future.<sup>106</sup> As discussed below, in order for the proposal to apply the particular social group ground to climate change refugees to be a viable solution, it is essential that the conflict among the Circuits be resolved since the particularity and social distinction requirements could be a challenge that climate change refugees may need to meet.

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<sup>104</sup> See, e.g., *W.G.A. v. Sessions*, 900 F.3d 957, 964 (7th Cir. 2018) (declining to rule on whether the Board's particularity and social distinction requirements are entitled to *Chevron* deference but noting that it "remains an open question in this circuit.").

<sup>105</sup> See *Cece v. Holder*, 733 F.2d 662, 616 (7th Cir. 2013) (en banc) (declining to give deference to the Board's particularity and social distinction requirements because "[w]hen an administrative agency's decisions are inconsistent, a court cannot pick one of the inconsistent lines and defer to that one . . . [because] [s]uch picking and choosing would condone arbitrariness and usurp the agency's responsibilities") (citing *Gatimi v. Holder*, 578 F.3d 611, 616 (7th Cir. 2009)).

<sup>106</sup> See *id.* The Board's three-requirement particular social group test was recently affirmed by the Attorney General in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018). Before *Matter of A-B-*, the Third Circuit and Seventh Circuit refused to give *Chevron* deference to the Board's three-requirement test, continuing to solely use immutability as the test for social group cognizability. See *Valdiviezo-Galdamez v. U.S. Att'y Gen.*, 663 F.3d 582, 603 (3d. 2011); *Cece*, 733 F.2d at 676–67. Since *Matter of A-B-* was decided, the Third Circuit has since changed its jurisprudence by giving *Chevron* deference to the Board's heightened social group requirements, while the Seventh Circuit has not yet decided. Compare *S.E.R.L. v. U.S. Att'y Gen.*, 894 F.3d 535, 549–50 (concluding that the Board's particularity and social distinction requirements are entitled to *Chevron* deference), with *W.G.A. v. Sessions*, 900 F.3d 957, 964 (7th Cir. 2018) (declining to rule on whether the Board's particularity and social distinction requirements are entitled to *Chevron* deference but noting that it "remains an open question in this circuit.").

## 2. Applying the "Particular Social Group" Ground to Climate Change Refugees

Similar to the proposed creation of an environmental protected ground, delineating a social group that applies to climate change refugees that is (1) immutable, (2) particular, and (3) socially distinct, is a challenge. Some scholars have proposed a social group could be defined by the group's "common fear of being displaced by the effects of climate change," although it is not clear this common fear is immutable.<sup>107</sup> Another scholar suggested defining the social group as composed of people "who lack the political power to protect their own environment," since this is a characteristic that the people cannot change.<sup>108</sup>

Applying the membership in a "particular social group" protected ground to climate change refugees is viable because this class arguably shares immutable characteristics. First, the combination of race and poverty underlying the vulnerability of certain populations to climate change may operate as immutable characteristics they cannot change—given these traits are so inextricably tied to climate change.<sup>109</sup> Another theory of immutability could be based on the shared past experience of "citizens of [a given country] who lack the political power to protect their environment from climate change-related disaster," which is a narrower version of the proposal discussed above.<sup>110</sup> The characteristic of lacking political power is a shared past experience that cannot be changed or undone in a practical manner, where the affected populations cannot force their own governments to fulfill adaptation responsibilities or high-emitting countries to reduce their emissions. This social group could then be linked to persecution by a home nation, which

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<sup>107</sup> See, e.g., Jessica B. Cooper, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 N.Y.U. ENVTL. L.J. 480 (1998).

<sup>108</sup> *Id.*

<sup>109</sup> Fisher, *supra* note 78 (noting people are vulnerable to climate change because of the unequal power structures in their society and are forced to live in certain areas to earn a living based on these inequities).

<sup>110</sup> See *Cece*, 733 F.2d at 670 (explaining that "[s]ometimes the characteristic is immutable because a shared past experience or status has imparted some knowledge or labeling that cannot be undone.").

fails to adapt properly to climate change, or by high-emitting countries who do have political power in deciding whether to emit greenhouse gases despite the disasters it creates.

Alternatively, a different theory of immutability involves a shared characteristic “so fundamental to one’s individual identity or conscience that a person ought not be required to change.”<sup>111</sup> Using this theory, climate change refugees could delineate a social group composed of “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.” These beliefs are arguably so fundamental to one’s identity that a person should not be required to change those beliefs, and these beliefs could be linked to persecution by high-emitting countries who are aware of the costs and continue to emit greenhouse gases.

While developing a social group composed of immutable characteristics for climate change refugees seems at least plausible under the definitional requirements, it would be much harder for applicants to argue that the social groups described above are particular and socially distinct. Regarding particularity, applicants would have to argue that the group characteristics are discrete and have definable boundaries, which seems to conflict with the idea that any person from an uninhabitable country could fall into the group. However, it is well-settled that the breadth and size of a social group is irrelevant to whether the social group is viable for asylum purposes.<sup>112</sup> For instance, the Seventh Circuit contends that “[i]t would be antithetical to asylum law to deny refuge to a group of persecuted individuals who have valid claims merely because too many have valid claims.”<sup>113</sup> Using this basic principle, some circuits that have given *Chevron* deference to the

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<sup>111</sup> *Id.* at 669.

<sup>112</sup> See *Cece*, 733 F.2d at 673–74 (“[T]he breadth of category has never been a per se bar to protected status.”); *N.L.A. v. Holder*, 744 F.3d 425, 438–39 (7th Cir. 2014) (rejecting numerosity as a reason to deny a social group); *Ticas-Guillen v. Whitaker*, 744 Fed.Appx. 410, 410 (9th Cir. 2018) (rejecting the reasoning that the social group “Guatemalan women” was “‘just too broad’ to satisfy the ‘particularity’ requirement”).

<sup>113</sup> See *Cece*, 733 F.2d at 675.

BIA's heightened requirements have been willing to overturn the decisions of immigration judges when a social group is rejected for particularity because it is "too broad."<sup>114</sup> Thus, it is possible for a particular social group consisting of climate change refugees to meet the particularity requirement, though it would certainly be a challenge.

Regarding social distinction, it could be argued that the group characteristics are socially distinct because movements, such as the Environmental Justice Movement, recognize groups that are politically powerless in protecting themselves from climate change.<sup>115</sup> For example, the mere fact that the Environmental Justice Movement recognizes vulnerable communities facing the consequences of climate change could be offered as evidence that such a social group exists and is recognized.<sup>116</sup> However, these groups may not be recognizable in their own society, which could work against the social distinction.

It is essential that the conflict as to whether the particularity and social distinction elements are required beyond immutability is resolved by the circuit courts for this proposal to viably work. The Seventh Circuit's reasoning that the *Acosta* immutability test is proper, and that particularity and social distinction are not required, is consistent with asylum law and should be the prevailing social group test.<sup>117</sup> The implication that social groups must be limited in size or cannot have significant internal diversity is inconsistent with much of the case law on social groups. Further, such a requirement would also contradict with the other four protected grounds that cover large groups of people defined by race, religion, nationality, or political opinion.<sup>118</sup> However, even if the BIA's heightened particularity and social distinction standards are uniformly adopted, this

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<sup>114</sup> See, e.g., *Ticas-Guillen*, 744 Fed.Appx. at 410.

<sup>115</sup> ENVTL. JUSTICE FOUND., *supra* note 3.

<sup>116</sup> *Id.*

<sup>117</sup> See *Cece*, 733 F.2d 662.

<sup>118</sup> See *id.*



proposal could still work if immigration judges, the BIA, and/or the circuit courts are receptive to the arguments outlined above that work within this framework. Therefore, although a new application of the “membership in a particular social group” protected ground would likely face some resistance, such an application should be accepted for the ease of dealing with inevitable problem of climate change refugees, while not having to deal with a drastic reform to existing law.

### **CONCLUSION**

To conclude, the United States needs to realize that climate change refugees are deserving of asylum protection, and that the U.S. asylum laws should be reformed to provide asylum to this class of refugees. The United States has an obligation to provide asylum protection to climate change refugees who did not contribute, or at least did not largely contribute, to the environmental consequences they suffer in their home countries. For this reason, it would be unethical and unjust to refuse to accept these refugees and send them back to an uninhabitable home country that the United States in effect helped destroy.

Certainly, international cooperation by amending the Refugee Convention to provide a coordinated approach would be desirable to facilitate burden sharing and collective action for a global problem that is not from any one country itself.<sup>119</sup> Further, investment in these vulnerable communities and international cooperation to reduce greenhouse gas emissions would help abate the consequences and would ultimately reduce the large number of future environmental refugees. For example, New Zealand committed to provide a \$150 million investment to support the climate change adaptation efforts of the Pacific island countries surrounding them, knowing that if disaster

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<sup>119</sup> See Benjaim Glahn, ‘Climate Refugees’? Addressing the International Legal Gaps, INT’L BAR ASS’N (June 11, 2009), <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=B51C02C1-3C27-4AE3-B4C4-7E350EB0F442> (recognizing the need to revise the Refugee Convention to protect climate refugees).

occurs they will flee to New Zealand.<sup>120</sup> However, the likelihood of high-emitting countries making this commitment in the near future is not promising.

Thus, until these international efforts are coordinated in the future, high-emitting countries like the United States have a moral responsibility to ensure that appropriate legal pathways are available on a domestic level to protect climate change refugees. While asylum law does not perfectly fit the circumstances of climate change refugees, it is the most appropriate and sustainable form of relief to provide to this class because it is a permanent form of relief meant to protect those who are not guaranteed basic safety and human rights in their home country. Further, because it is viable for most climate change refugees to meet most of the statutory requirements for asylum, minor reforms to the protected ground requirement, such as creating a new environmental ground or applying the membership in a particular social group ground, could successfully provide sustainable relief to this class of refugees. While such changes might face some pushback from adjudicators, it is necessary for the United States to reform asylum law in order to preemptively deal with an inevitable problem of mass migration as a result of the country's global emissions.

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<sup>120</sup> *Ardern Announces \$150m Pacific Climate Funding*, RNZ (Aug. 15, 2019), <https://www.rnz.co.nz/news/political/396718/prime-minister-jacinda-ardern-announces-150m-pacific-climate-funding>.