The Racism in Climate Change Law: Critiquing the Law on Climate Change-Related Displacement with Critical Race Theory

Dylan Asafo*

The recent decision by the UN Human Rights Committee in Ioane Teitiota v. New Zealand was celebrated in the media as a "landmark" and "historic" decision for people in the Pacific Islands and around the world facing realities of climate change-related displacement. However, in adopting a Critical Race Theory (CRT) lens, this Article offers a critique that examines the racism underpinning the Committee's reasoning in doing so. My central thesis is that the Committee's decision, and the decisions of the New Zealand courts it affirmed, should be understood as an instance of racist climate change law. Specifically, I argue that in these decisions, racism manifested when the white privilege of the predominantly white decision-makers (which I refer to as "judicial white privilege") led them to impose poor standards of living for Black, Indigenous, and people of color, adopt inadequate and empty lines of reasoning to justify their judicial inaction, and obscure the racist colonial roots of vulnerabilities to climate change in the Pacific Islands.

In considering the implications of this racism, this Article then confronts the tension between the apparent need to find legal solutions to climate change-related displacement and long standing calls by people in the Pacific Islands for wealthy states to fulfil their obligations to reduce their emissions and support climate change adaptation measures in the Pacific Island region.

In opting to support the latter and in being inspired by the relationship between racism and climate change in the Pacific, this Article proposes that climate justice movements consider adopting a racial justice framing of climate

*Lecturer on Law, University of Auckland, New Zealand. The Author would like to thank Professor Kenneth Mack for his wise and patient supervision. He is also very grateful to Professor Jane McAdam, Professor Alan Jenkins, and to all the scholars and activists in the Critical Race Theory, racial justice, and climate justice movements for their foundational work and teachings that have inspired the ideas in this Article. He would also like to thank all of the editors and staff of the Berkeley Journal of International Law for their kindness, invaluable comments, and hard work in editing this Article. All errors are his alone.

change in the Pacific. The Article suggests that this racial justice framing may effectively change the hearts and minds of lawmakers to make meaningful strides in mitigating climate change and helping Pacific Islanders and other Black, Indigenous, and people of color to adapt to climate change.

PROLOGUE: THE SPACE MOVERS

January 1, 2035

The first surprise was not their arrival. The messages through social media and streaming platforms had been sent weeks before. Despite the initial shock and panic, the visitors had provided details of their bodies, history, culture, and more importantly their intentions to "do no harm, only help" in a series of documentaries and videos that eventually eased most of the world's fears and concerns.

No, the first surprise was their ships. Contrary to depictions in countless films over the decades that imagined grand vessels towering beyond the skies, the visitors actually arrived in five sleek silver crafts that looked strikingly similar to regular airplanes they were used to flying in themselves.

Then came the second surprise. The visitors could speak every human language and appeared to have a deep understanding of all the different societies, cultures, traditions, histories, technologies, and contemporary concerns of the world–in particular, the force of destruction called climate change that had by now submerged whole cities and nations and made devastating natural disasters a weekly occurrence in every continent.

This led to the third surprise. In a live-streamed announcement upon their arrival, the visitors' leader stated that their pods contained hundreds of thousands of mini-planes that could easily transform into the normal sized ones with a press of a button. These planes were capable of transporting approximately 500 million beings across space to other planets the visitors had inhabited, one of which was a perfect replica of Earth as it was in 1760 before the Industrial Revolution. The visitors announced that it could be a "New Earth," a second chance for humans to avoid making the mistakes that inevitably lead to climate change. The visitors had only one condition—only white people could move to the New Earth, and all Black, Indigenous, and people of color were to remain on Earth, or what they called the "Old Earth."

As the world's leaders and their people listened in disbelief and awe, the visitors' leader emphasized that the world leaders were free to reject their proposal and that no pressure or force would be used to coerce them into accepting it. Not one of the visitors, who were labelled the "Space Movers" by one of the world leaders, revealed why they would only allow white people to move to the New Earth and wanted all Black, Indigenous, and people of color to remain in the so-called Old Earth. The Space Movers simply wished them a good day and said that they would appear again in 72 hours to receive a response to their offer.

January 2, 2035

Chaotic outrage, dread, and violent terror spread across the world immediately after the Space Movers' proposal was announced. An "Anti-Moving

Coalition," led by the leaders and activists of color of the world, was quickly established to put pressure on the world's leaders to reject the visitors' racist proposal. All of the world's leaders quickly assured their respective populations that they would reject the offer and asked for calm. However, a secret meeting between the leaders of a few select nations (the United States, the United Kingdom, Russia, France, and Australia) was taking place. The President of the United States had set up the meeting to ask the leaders of the powerful, majority-white states to take the offer – "the survival of humanity is at stake." After a few moments, they all agreed.

Knowing that a secret meeting like this would take place, the leader of China rushed to propose a deal with the colluding leaders of the majority-white states–1 million seats on the planes for Chinese people in exchange for their technological advances and expertise, as well as ceding economic advantage to the majority-white states on the New World for ten years. The leaders of the powerful, majority-white nations promised to propose an ultimatum to the Space Movers for honoring this deal with China. An hour later, the leaders of India, Sri Lanka, Brazil, and other non-white majority nations made the same deal.

January 3, 2035

With four hours to go before the seventy-two-hour deadline, the leaders of the five white states announced their decision to accept the Space Movers' proposal. Immediately, leaders from the non-white majority countries declared war against the powerful five leaders and even the Space Movers themselves. However, their armies paled in comparison, and their threats simply came too late.

As the sun set, the Space Movers directed hundreds of millions of white people around the world to check their luggage, line up, and finally enter the planes. In China, India, Brazil, and other non-white majority nations, the wealthy and powerful elite eagerly waited for the planes promised to them by the leaders of the powerful, majority-white states–but these planes never came. A few of them even tried to board planes elsewhere, but standing by every one of the planes around the world stood guards, guns at the ready, who ignored their claims of a secret deal guaranteeing their entry to the New Earth. They had been betrayed. For them, like all people of color, there was no escape from the Old Earth, no alternative life. They could only look on with heads bowed and hearts linked in solidarity, as white people left the Old Earth to conquer new frontiers just as their ancestors had done before them.

INTRODUCTION

If our entire world were to become uninhabitable due to climate change, do you think the powerful leaders of predominantly white countries would leave Black, Indigenous, and people of color behind to move to a brand new world?

To some people, this would probably be a ridiculous, outrageous, and even offensive question to ask. However, this question is not so outrageous to those who continue to observe inaction against climate change by leaders of predominantly white countries in the face of increasingly disproportionate impacts on Black, Indigenous, and people of color.[1] It is very much worth asking and grappling with.

The fictional story above is based on *Space Traders* by Derrick Bell, a story of aliens coming to Earth and the United States in particular to offer gold, safe nuclear power, and other alluring technological advances. In exchange, the government would hand over all Black US citizens so that they could be taken by the aliens back to their home planet in chains.[2] Bell's narrative posits that the US government would make this trade and hold a referendum to enable it—and even Black, wealthy conservatives who thought of themselves as exempt due to their political and socioeconomic standing would find out that this would not be the case.

In *Space Movers*, I globalize the narrative beyond the United States and reverse the migration paradigm to explore what Bell's hypothesis in *Traders* (that wealthy, powerful governments of predominantly white countries would willingly exchange white advancement for Black enslavement and suffering) means in our current global climate crisis in 2020. In adopting Bell's hypothesis, the *Movers* narrative posits that when given the chance, wealthy, powerful governments of predominantly white nations such as the United States would abandon all Black, Indigenous, and people of color to live in a fresh new world while escaping the consequences of their actions (or inactions).

An important feature of my narrative is that even the wealthy and powerful Black, Indigenous, and people of color in predominantly non-white nations like China, Brazil, and India (regarded as among the key contributing nations to carbon emissions[3]) will not be spared from the racist agenda despite their money

1. Kara Thompson, *Traffic Stops, Stopping Traffic: Race and Climate Change in the Age of Automobility*, 24 INTERDISC. STUD. LITERATURE AND ENV'T 92, 93 (2017) (noting "[s]cholars and activists who take up the racialized contours of climate change offer widespread evidence that effects of global warming disproportionately affect people of color and others in structurally oppressed positions because of class, geographic location, and citizenship status.").

2. DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM, 158 (1992).

3. Jeff Tollefson, *The hard truths of climate change — by the numbers*, 573 NATURE 324, 326 (2019) ("Where China goes, the world goes. The country is the largest source of CO2 and its emissions are growing . . ."). In January 2020, it was found that previous reports that India and China had reduced their emissions from 2014-2017 were unfounded. Kieran M. Stanley et al., *Increase in global*

and status. This was a hard lesson learned by the Black conservative character Professor Gleason Golightly when he was prevented from fleeing the United States in Bell's *Traders*.

Despite the science fiction flare, *Movers* is inspired by our current reality. In a less literal but still very real way, powerful governments of predominantly white nations are failing to act effectively against climate change but still evading the brunt of its destructive impacts, leaving Black, Indigenous, and people of color bearing those burdens disproportionately.[4] As I illustrate in *Movers*, this failure is heavily racialized, and government actions (or more accurately, inactions) against climate change can be called out as racism against Black, Indigenous, and people of color who continue to suffer disproportionately from climate change compared to white people.

To further understand this racism, this Article offers a critique of legal responses to climate change from a Critical Race Theory (CRT) perspective. As

emissions of HFC-23 despite near-total expected reductions, 11 NATURE COMM. 397, 397 ("Starting in 2015, China and India, who dominate global HCFC-22 production [75% in 2017], set out ambitious programs to reduce HFC-23 emissions. Here, we estimate that these measures should have seen global emissions drop by 87% between 2014 and 2017. Instead, atmospheric observations show that emissions have increased and in 2018 were higher than at any point in history."). However, while the wealthy ruling classes in developing countries like India, Sri Lanka, China, and Brazil have the highest emissions and contributions to climate change, I argue that their status as developing status and high rates of abject poverty follow that their capacity and responsibility to divest from fossil fuels need to be distinguished from that of wealthy developed countries like the United States, New Zealand, and Australia. TEALL CROSSEN, THE CLIMATE DISPOSSESSED – JUSTICE FOR THE PACIFIC IN AOTEAROA, 41 (2020).

> ("Some of the larger developing countries have more advanced economies and are increasingly responsible for current greenhouse gas emissions, including China, India, Brazil and South Africa. Avoiding the worst impacts of climate change is dependent on these countries, along with every other country, reducing their pollution. Per capita emissions from developing countries, however, while growing in some, remain lower than in the developed world. For example, in 2015 India's per capita emissions were around 2.7 tCO2e [tonnes of carbon dioxide equivalent], less than half the world's average of around 7 tCO2e.27 By comparison, New Zealand's per capita emissions were 17.5 tCO2e, more than double the world average, enabling people in New Zealand to enjoy a relatively high standard of living. Around 31 million homes in India do not have access to electricity. More than 25 per cent of the population of Brazil – a staggering fifty-five million people – live below the poverty line. That's not to say there aren't growing middle classes and very wealthy people in both India and Brazil. But there is also a lot of abject poverty. And right now, the only proven, viable and affordable path out of poverty at scale is the burning of fossil fuels.").

4. Thompson, *supra* note 1, at 93. *See generally* J. Andrew Hoerner and Nia Robinson, *Just Climate Policy—Just Racial Policy*, 16 RACE, POVERTY & THE ENV'T 32, 32 (2009) ("Climate change is not only an issue of the environment; it is also an issue of justice and human rights, one that dangerously intersects race and class . . . In all cases, people of color, indigenous peoples, and low-income communities bear disproportionate burdens from climate change itself, from ill-designed policies to prevent it, and from the side effects of energy systems that cause it."); S. Nazrul Islam and John Winkel, *Climate Change and Social Inequality* 17 (DESA Working Paper No. 152ST/ESA/2017/DWP/152, 2017) (observing that the "differential effect of climate change with respect to race is found in both developing and developed countries, although in both cases low income status is also intertwined. with race and ethnicity status.").

a "movement of a collection of activists and scholars interested in studying and transforming the relationship among race, racism, and power,"[5] CRT provides an apt framework with various tools and analyses that can help explain why this inaction is racism and what a racial justice framing of climate change advocacy means moving forward.

While there are many topics related to legal responses to climate change that could benefit from a CRT analysis, this Article focuses on the laws around climate change-related displacement. This phenomenon consists of communities and individuals being relocated from their homes, both within and across borders, because their homelands have (or will soon) become uninhabitable due to impacts related to climate change.[6]

Climate change-related displacement for communities and individuals of color is happening all over the world.[7] This Article examines the specific realities of displaced peoples from the Pacific Islands as a case study.

The recent decision by the UN Human Rights Committee in *Ioane Teitiota v. New Zealand*[8] has been celebrated as a "landmark"[9]and "historic[10] decision for people in the Pacific Islands and around the world facing realities of climate change-related displacement. However, in adopting a CRT lens, this Article observes that despite the praise surrounding the Committee's decision, it actually upheld decisions of the New Zealand courts to deny claims of protection from climate change-related displacement. Therefore, in adopting a CRT lens, this

5. RICHARD DELGADO AND JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION, 2 (2001).

6. *See* Walter Kälin, *Conceptualising Climate-Induced Displacement*, CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSP. 84 (Jane McAdam ed., 2010) (finding that when it comes to the "best" way to conceptualise climate-induced displacement, the following three "non-controversial observations" can be made: "(i) climate and climate change per se do not trigger the movement of people, but some of their effects, in particular sudden and slow-onset disasters, have the potential to do so; (ii) such movement may be voluntary, or it may be forced; and (iii) it may take place within a country or across international borders.").

7. This includes but is not limited to: Alaskan Native villages in the United States, Bangladesh, African States, and States in Latin America and the Caribbean. S*ee generally* Craig Welch, *Climate Change Has Finally Caught Up to This Alaska Village*, NAT'L GEOGRAPHIC, Oct. 22, 2019; Jane McAdam & Ben Saul, *Displacement with Dignity: International Law and Policy Responses to Climate Change Migration and Security in Bangladesh*, 53 GERMAN YEARBOOK OF INT'L L. 233 (2010); TAMARA WOOD, THE ROLE OF FREE MOVEMENT OF PERSONS AGREEMENTS IN ADDRESSING DISASTER DISPLACEMENT: A STUDY OF AFRICA, Platform on Disaster Displacement (2018); DAVID JAMES CANTOR, CROSS-BORDER DISPLACEMENT, CLIMATE CHANGE AND DISASTERS: LATIN AMERICA AND THE CARIBBEAN, Platform on Disaster Displacement (JULY 2018).

8. Ioane Teitiota v. New Zealand, U.N. Human Rights Committee Dec. 2728/2016, CCPR/C/127/D (Jan. 27, 2020).

9. Melissa Goodin, *Climate Refugees Cannot Be Forced Home, U.N. Panel Says in Landmark Ruling*, TIME (Jan. 20, 2020).

10. U.N. Off. of the High Comm'r for Hum. Rts., Historic UN Human Rights case opens door to climate change asylum claims (Jan. 21, 2020), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25482.

Article offers a critique that examines the racial dynamics of the Committee's reasoning in doing so.

My central thesis is that the Committee's majority decision and the decisions of the New Zealand courts it upheld should be understood as instances of racism in climate change law. Specifically, I argue that in this series of decisions, racism manifested when the predominantly white decision-makers' white privilege (which I refer to as "judicial white privilege") led them to impose poor standards of living for Black, Indigenous, and people of color, adopt inadequate and empty lines of reasoning to justify their judicial inaction, and obscure the racist colonial roots of vulnerabilities to climate change in the Pacific Islands.

In considering the implications of this racism, this Article then confronts the tension between calls to find legal solutions to climate change-related displacement and persistent demands by Pacific Island peoples for wealthy states to reduce their emissions and support climate change adaptation measures in the Pacific.

In opting to support the latter, and in being inspired by the relationship between racism and climate change in the Pacific, this Article proposes that climate justice movements should consider adopting a racial justice framing of climate change in the Pacific. This racial justice framing may effectively change the hearts and minds of lawmakers and inspire them to make meaningful strides in climate mitigation and adaptation for Pacific peoples, and all Black, Indigenous, and peoples of color at the forefront of climate change's impacts.

This Article proceeds in four parts. Part I provides a brief overview of the problem of climate change-related displacement in the Pacific Islands. Part II outlines the current international and domestic legal framework for addressing climate change-related displacement as elucidated by the Committee's majority decision. Part III critiques this framework with a CRT lens and argues that the Committee's majority decision to uphold the denial of protection to peoples of color facing climate change-related displacement must be understood as racist climate change inaction. Finally, in seeking a way forward, Part IV explores the adoption of a racial justice reframing by climate justice and racial justice activists to motivate governments to honor the aspirations of Black, indigenous, and people of color at the forefront of climate change's impacts.

I.
CLIMATE CHANGE-RELATED DISPLACEMENT IN THE PACIFIC ISLANDS

It is well established that the Pacific Island region is and will continue to be among the worst-affected by climate change in the world.[11] The ongoing impacts

11. John Campbell, *Climate-Induced Community Relocation in the Pacific: The Meaning and Importance of Land*, CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSP. 57, 57 (Jane McAdam ed., 2010) ("The Pacific Islands . . . have been singled out as being among those places that may be rendered uninhabitable by the effects of climate change.").

of climate change in the Pacific Islands—such as rising sea levels, increasing ocean temperatures, and increasing frequencies of adverse weather events tropical cyclones[12]—have led to increased coastal erosion, flooding, and saltwater intrusions resulting in unclean water, food insecurity, sewage overflow leading to increased rates of communicable diseases,[13] and increased tensions and disputes due to competition for space and resources.[14]

It is important to emphasize that these realities in the Pacific Islands are not due to climate change alone. Rather, as McAdam emphasizes, climate change is a "threat multiplier" that exacerbates not only the geographic and environmental vulnerabilities of the Islands in being low-lying and having tropical climates, but also their socioeconomic vulnerability as developing countries with poorly-funded infrastructure and high poverty rates.[15] Accordingly, climate change has and will continue to have an "incremental impact" by worsening existing problems and compounding existing threats to life in the Pacific Islands.[16] As this Article will discuss later, these increasing threats to life have led to a significant amount of discourse around the appropriateness of small and large-scale efforts to relocate Pacific Island communities to larger neighbouring Organisation for Economic Co-operation and Development (OECD) countries (such as New Zealand and Australia).

12. Adelle Thomas, Patrick Pringle, Peter Pfleiderer & Carl-Friedrich Schleussner, Climate Analytics (2017) at 1 ("The South Pacific has recently been hit by particularly destructive cyclones like Winston and Pam. Estimated economic cost of Cyclone Pam in Vanuatu across all sectors was approximately 64% of the country's GDP in 2016. In Fiji, Cyclone Winston displaced over 130,000 people. Attribution of tropical cyclones to climate change is difficult. However, a robust increase of the most devastating storms with climate change is evident. Under 2.5°C of global warming, the most devastating storms are projected to occur up to twice as often as today.").

13. *See generally* Jon Barnett, *Climate Change and Food Security in the Pacific Islands*, *in* FOOD SECURITY IN SMALL ISLAND STATES (Springer 2020) at 25–38; Johan Bell, Mary Taylor, Moses Amos, & Neil Andrew, *Climate Change and Pacific Island Food Systems* (CGIAR Research Program on Climate Change, Agriculture and Food Security and the Technical Centre for Agricultural and Rural Cooperation, 2016) at 14-15; Lachlan McIver et al., *Health Impacts of Climate Change in Pacific Island Countries: A Regional Assessment of Vulnerabilities and Adaptation Priorities*, 124 ENV'T HEALTH PERSP. 1707, 1708 (2016).

14. AF (Kiribati), [2013] at 72. Here the Immigration and Protection Tribunal noted, "The general observations earlier regarding the potential for environmental degradation and natural disasters to result in conflict is demonstrated in the case of Kiribati. Credible evidence has been given that this can cause tension over land which has given rise to physical assaults and even deaths," referring to expert evidence given by climate change researcher, John Cochran.

15. Jane McAdam, *Conceptualizing Climate Change-Related Movement*, CLIMATE CHANGE, FORCED MIGRATION, AND INT'L LAW, 24 (2012). ("[I]t is inherently fraught to speak of 'climate change' as the 'cause' of human movement, even though its impacts may exacerbate existing socio-economic or environmental vulnerabilities.").

16. *Id.*

II.
AN OVERVIEW OF THE JURISPRUDENCE AROUND CLIMATE CHANGE-RELATED DISPLACEMENT

A. The Plight of Ioane Teitiota in the New Zealand Courts

There is currently no specific policy or legal framework of international law to protect people who have been or will be displaced due to climate change-related factors.[17] While there are a number of international law instruments touching on the rights and entitlements of displaced peoples—namely, the Refugee Convention, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention Against Torture—none of these instruments explicitly provide specific protection for vulnerable people facing displacement from the impacts of climate change.[18] As Rive notes, this reveals a "protection deficit" in the international law framework.[19] This protection deficit has been most vividly illustrated by the plight of Ioane Teitiota from the Pacific Island nation of Kiribati in his attempt to seek protection from climate change-related displacement.

1. The Facts

In 2007, Teitiota and his wife migrated from Kiribati to New Zealand on temporary residency permits because various climate change-related problems had made their home uninhabitable.[20] Observing that the impacts of climate change had only worsened, he, his wife, and the three children they had had since arriving decided to stay in New Zealand after their visas expired in October 2010.[21] Facing deportation, Teitiota applied for protection as a refugee per the Refugee Convention and as a protected person per the ICCPR, which are both incorporated into the relevant domestic legislation, the Immigration Act of 2009.[22]

Teitiota's application claimed that freshwater had become scarce because of saltwater contamination and overcrowding on his island of Tarawa. He also claimed that land on the island had eroded, resulting in a housing crisis and land disputes that have caused a number of physical conflicts and even deaths.

17. Vernon Rive, *Safe Harbours, Closed Borders? New Zealand Legal and Policy Responses to Climate Displacement in the South Pacific*, THE SEARCH FOR ENVIRONMENTAL JUSTICE (Paul Martin, Sadeq Z. Bigdeli, Trevor Daya-Winterbottom, Willemien du Plessis, Amanda Kennedy, eds., 2015) at 224.

18. *Id.*

19. *Id.*

20. Kiribati [2013] NZIPT 800413 at 40. This was not the stated reason for their visa as no such visa ground existed and exists today, but this rationale for their move was testified to in their claim to the Tribunal.

21. Ioane Teitiota, *supra* note 8, at 4.1.

22. Immigr. Act, 2009 (Act No. 51/2009) (N.Z.).

Additionally, the damage to crops and other infrastructure meant he could not find employment to support himself and his wife.[23] A climate change researcher and doctoral candidate at the University of Waikato provided expert evidence in support of these circumstances. Their testimony "described Kiribati as a society 'in crisis' as the result of population pressure and climate change."[24] Overall, Teitiota claimed that his home on Tarawa had become an uninhabitable environment for him despite well-meaning attempts by the government to combat sea-level rise with an adaptation plan in 2007 that had largely been ineffective.[25]The Tribunal and appellate court's review of these claims are laid out below.

2. The Refugee Status Claim

Teitiota made his refugee status claim under Section 129(1) of the Immigration Act of 2009, which required the Tribunal (and the appellate courts) to determine whether Teitiota met the following elements of a "refugee" as defined in Article 1A (2) of the Refugee Convention:[26]

(1) The claimant is living outside their home country;
(2) They are not able or willing to return to their home country;
(3) This is due to a "well-founded fear of being persecuted"; and
(4) The fear is based on a Convention recognized reason of race, religion, nationality, membership of a particular social group or political opinion.

The Tribunal determined that while elements (1) and (2) were evident, (3) and (4) were not fulfilled on the evidence provided. In the Court's view, element (4) was clearly not satisfied as "the effects of environmental degradation on [Teitiota's] standard of living were, by his own admission, faced by the population generally," and the government had not failed to take steps to protect him from harm due to a Convention recognized reason.[27]

With regard to element (3), the Tribunal concluded that Teitiota did not have a "well-founded fear of being persecuted" because he did not objectively face a real risk of persecution if he returned to Kiribati.[28] The Tribunal reasoned that he had not been personally subjected to any land dispute in the past and there was no evidence that he faced a real chance of suffering serious physical harm from violence linked to housing, land, or property disputes in the future. It also determined Teitiota would be able to find land to provide accommodation for

23. Kiribati, [2013] NZIPT 800413 at 40.
24. *Id.* at 12-24.
25. *Id.* at 5-6.
26. Immigr. Act, 2009, § 129(1).
27. Kiribati, [2013] NZIPT 800413 at 75.
28. *Id.* at 74.

himself and his family; it would be difficult but not impossible.[29] The Tribunal found no evidence to support his contention that he was unable to grow food or obtain potable water, or that the environmental conditions he faced on returning to Tarawa were so perilous as to jeopardize his life.[30]

When Teitiota appealed to the High Court, Justice Priestly affirmed the Tribunal's ruling and added that it was not possible for Teitiota to seek refuge within the very countries that were allegedly "persecuting" him. [31]

In Teitiota's subsequent appeal to the Court of Appeal, Justice Wild endorsed this reasoning and also noted that Teitiota's claim "attempts to stand the Convention on its head", and therefore could not be accepted.[32] Finally, in its short six-page judgment upholding the rulings below, the Supreme Court also concluded that Teitiota did not face "serious harm" and that the Government of Kiribati had not failed to protect him on any convention ground.[33]

3. The Protected Person Status Claim

In terms of Teitiota's claim under Section 130 of the Immigration Act of 2009, which incorporates and adapts Article 6 of the ICCPR, the Tribunal and the appellate courts needed to be satisfied that in facing deportation from New Zealand, there were "substantial grounds for believing [Teitiota] would be in danger of being subjected to arbitrary deprivation of life or subjected to cruel treatment."[34]

The relevant ground here was arbitrary deprivation of life. The Tribunal emphasized that the "arbitrariness" requirement was not satisfied on the grounds that the Government of Kiribati did not fail to take programmatic steps providing for the basic necessities of life to meet its positive obligation to fulfil Teitiota's right to life.[35] In fact, the Tribunal observed that the Government had taken steps to address the effects of climate change according to the 2007 National Adaptation Programme of Action submitted by Kiribati under the United Nations Framework Convention on Climate Change.[36]

29. *Id.* at 73.

30. *Id.* at 74.

31. Teitiota v. Chief Exec. Ministry Bus. Innovation and Emp., [2013] NZHC 3125 at 55 (reasoning that granting Teitiota refugee status would reverse the Convention's paradigm and be inconsistent with the historical context of the Convention in being designed for innocent people caught in conflict).

32. Teitiota v. Chief Exec. Ministry Bus. Innovation and Emp., [2014] NZCA 173 at 40.

33. Teitiota v. Chief Exec. Ministry Bus. Innovation and Emp., [2015] NZSC 107 at 12.

34. Immigr. Act, 2009, § 131(1).

35. Kiribati, [2013] NZIPT 800413 [2013], at 86-88.

36. *Id.* at 88.

The relevant ICCPR case law suggests that there is also an "imminence" requirement, which means that the risk to life must be "at least, likely to occur."[37] The Tribunal found in the evidence that Teitiota would not imminently face life-threatening conditions and that his claim of facing an arbitrary deprivation of life was firmly "in the realm of conjecture or surmise" and therefore could not be accepted.[38]

Agreeing with the judgments of the High Court and Court of Appeal, the Supreme Court unanimously held that "the provisions of the ICCPR relied on [did not] have any application on these facts."[39] Finally, the Court was not persuaded that there was "any risk of a substantial miscarriage of justice."[40] In the final paragraph of its judgment, the Court stressed that the decision to dismiss Teitiota's claim and allow his deportation was due to the lack of appropriate factual circumstances and that there could be a "pathway" to protection in the future, stating:

> That said, we note that both the Tribunal and the High Court emphasized their decisions did not mean that environmental degradation resulting from climate change or other natural disasters could never create a pathway into the Refugee Convention or protected person jurisdiction. Our decision in this case should not be taken as ruling out that possibility in an appropriate case.[41]

B. The "Landmark" Human Rights Committee Decision

1. The Majority Judgment

After the Supreme Court's decision, New Zealand deported Teitiota back to Kiribati in September 2015. Teitiota then filed a communication with the Human Rights Committee that same month, claiming that New Zealand, as a State party to the ICCPR, violated his right to life under Article 2 by deporting him to Kiribati.[42]

In order to find a violation, the Committee has to be satisfied that the State party's determination was clearly arbitrary or amounted to a manifest error or a denial of justice.[43] The Committee dismissed the claim by a 16-2 majority. The majority accepted the general finding from the Tribunal and the appellate courts

37. *Id.* at 89-90 (referring to Aalbersberg v. Netherlands CCPR/C/87/D/1440/2005 at 6.3 (Aug. 14, 2006).

38. *Id.* at 91-92.

39. Teitiota, [2015] NZSC 107 at 12.

40. *Id*.

41. *Id.* at 13.

42. Ioane Teitiota, *supra* note 8, at 1.1.

43. *Id.* at 9.3, *citing* inter alia, M.M. v. Denmark (CCPR/C/125/D/2345/2014), para. 8.4; B.D.K. v. Canada (CCPR/C/125/D/3041/2017), para. 7.3; *see also* Human Rights Committee, *General Comment No. 32*, Article 14: Right to equality before courts and tribunals and to a fair trial (CCPR/C/GC/32) (2007).

that an arbitrary deprivation of life "must be personal" and not rooted in "the general conditions of the receiving State, except in the most extreme cases."[44] Reviewing the specific evidence, the majority reasoned that Teitiota had not demonstrated clear arbitrariness or error in the assessments by the New Zealand courts as to "whether he faced a real, personal and reasonably foreseeable risk of a threat to his right to life" from being harmed in a land dispute due to housing shortages,[45] whether he would be unable to access potable water,[46] and whether he would be unable to grow crops for food and income.[47]

Finally, the majority took note of a string of claims by Teitiota that (1) he faced threats to his life from overpopulation as well as frequent and increasingly intense flooding and breaches of sea walls, (2) the New Zealand courts erred in determining the time frame within which serious harm to Teitiota would occur in Kiribati, (3) the New Zealand courts did not give sufficient weight to the expert testimony of the climate change researcher, and (4) that Kiribati would become uninhabitable within ten to fifteen years.[48] In response, the majority made two comments.

First, the New Zealand courts were correct in their assessment of the facts: a State party may be in breach of its human rights obligations if it returns someone to a country where "the effects of climate change in receiving states may expose individuals to a violation of their rights . . . thereby triggering the *non-refoulement* obligations of sending states."[49] Second, regarding Teitiota's claim that Kiribati will not survive in ten to fifteen years, the Committee stated:

> The timeframe of 10 to 15 years, as suggested by the author, could allow for intervening acts by the Republic of Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population. The Committee notes that the State party's authorities thoroughly examined this issue and found that the Republic of Kiribati was taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms.[50]

Therefore, in finding no error or arbitrariness in the New Zealand court's assessment of the evidence, and no non-refoulement obligations triggered by the

44. Ioane Teitiota, *supra* note 8, at 9.3.

45. *Id.* at 9.7.

46. *Id.* at 9.8 ("While recognizing the hardship that may be caused by water rationing, the Committee notes that the author has not provided sufficient information indicating that the supply of fresh water is inaccessible, insufficient or unsafe so as to produce a reasonably foreseeable threat of a health risk that would impair his right to enjoy a life with dignity or cause his unnatural or premature death.").

47. *Id.* at 9.9 ("The Committee observes the finding of the domestic authorities that, while the author stated that it was difficult to grow crops, it was not impossible.").

48. *Id.* at 9.10.

49. *Id.* at 9.11.

50. *Id.* at 9.12.

present facts, as well as believing there was a suitable time frame for intervening acts, the Committee decided that it was "not in a position to hold that the author's rights under Article 6 of the Covenant were violated upon his deportation to the Republic of Kiribati in 2015."[51]

2. The Dissenting Opinions

(a) Committee member Sancin

The dissenting opinion from Committee member Sancin rejected the majority's heavy reliance on the evidence that Teitiota and his family had access to potable water, explaining that "'potable' should not be equated with 'safe drinking water.'"[52] Her dissent also recognized that potable water could contain microorganisms dangerous to health, particularly for children—especially since all three of the Teitiota's dependent children were born in New Zealand and had never been exposed to the particular microorganisms in Kiribati.[53]

Committee member Sancin also expressed concern with the majority's satisfaction with the steps taken by the government of Kiribati with its 2007 National Adaptation Programme of Action. She noted that a more detailed analysis of Kiribati's adaptation measures would reveal that the measures did not relate to water access and that those planned had not been implemented.[54] In light of these circumstances, Committee member Sancin stated that the onus should be on New Zealand to demonstrate that Teitiota would enjoy access to safe drinking (or even potable) water in Kiribati in order to comply with its "positive duty to protect life from risks arising from known natural hazards" per Article 6.[55] Accordingly, her dissent concluded that the New Zealand courts' assessment of Teitiota's situation was "clearly arbitrary or manifestly erroneous" and constituted a breach of Article 6.[56]

(b) Committee member Muhumuza

The second dissent, from Committee member Muhumuza, argued that the majority placed an "unreasonable burden of proof" on Teitiota to establish a real risk of danger of arbitrary deprivation of life, stressing that "the facts before the Committee reemphasize[d] the need to employ a human-sensitive approach to human rights issues."[57] In undertaking this approach, the high evidential threshold

51. *Id.* at 9.14.
52. *Id.* at Annex 1, para. 3.
53. *Id.*
54. *Id.* at Annex 1, para. 5.
55. *Id.*
56. *Id.* at Annex 1, para. 6.
57. *Id.* at Annex 2, para. 1.

imposed by the New Zealand courts and approved by the majority was criticized as follows:

> It would indeed be counterintuitive to the protection of life, to wait for deaths to be very frequent and considerable; in order to consider the threshold of risk as met. It is the standard upheld in this Committee, that threats to life can be a violation of the right, even if they do not result in the loss of life. It should be sufficient that the child of the author has already suffered significant health hazards on account of the environmental conditions. It is enough that the author and his family are already facing significant difficulty in growing crops and resorting to the life of subsistence agriculture on which they were largely dependent.[58]

Committee member Muhumuza concluded their dissent with a critique of the majority's reasoning that Teitiota should not receive protection from New Zealand on the basis that his situation is the same as many others in Kiribati:

> While it is laudable that Kiribati is taking adaptive measures to reduce the existing vulnerabilities and address the evils of climate change, it is clear that the situation of life continues to be inconsistent with the standards of dignity for the author, as required under the Covenant. The fact that this is a reality for many others in the country, does not make it any more dignified for the persons living in such conditions. New Zealand's action is more like forcing a drowning person back into a sinking vessel, with the "justification" that after all there are other voyagers on board. Even as Kiribati does what it takes to address the conditions; for as long as they remain dire, the life and dignity of persons remains at risk.[59]

Although the Committee majority denied Teitiota's claim, its decision was celebrated by mainstream media as a "historic" and "landmark" decision for peoples facing or at risk of facing climate change-related displacement.[60] This was mainly due to the majority's comments about how non-refoulement obligations can possibly be triggered if the factual circumstances are compelling enough. The UN Office of the High Commissioner for Human Rights announced the ruling with the headline "Historic UN Human Rights case opens the door to climate change asylum claims."[61] Similarly, *Time* also reported the case with the headline "Climate Refugees Cannot Be Forced Home, U.N. Panel Says in Landmark Ruling,"[62] with *The Guardian* using a near-identical headline as well.[63] I will critique the accuracy of this portrayal of the majority's decision using CRT in Part III.

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58. *Id.* at Annex 2, para. 5.

59. *Id.* at Annex 2, para. 6.

60. U.N. Off. of the High Comm'r for Hum. Rts., *supra* note 10; Goodin, *supra* note 9.

61. U.N. Off. of the High Comm'r for Hum. Rts., *supra* note 10.

62. Goodin, *supra* note 9.

63. Kate Lyons, *Climate refugees can't be returned home, says landmark UN human rights ruling*, THE GUARDIAN (Jan. 20, 2020), https://www.theguardian.com/world/2020/jan/20/climate-refugees-cant-be-returned-home-says-landmark-un-human-rights-ruling.

III.
UNDERSTANDING THE RACISM IN CLIMATE CHANGE-RELATED DISPLACEMENT JURISPRUDENCE WITH CRITICAL RACE THEORY

A. Critical Race Theory and Climate Change

To date, critical legal scholarship on the various legal issues concerning climate change has mainly focused on framing inadequate legal responses as "carbon colonization,"[64] "slow violence,"[65] "human rights violations,"[66] and "climate [in]justice."[67] While all these perspectives are incredibly important, the foundational work by legal scholars Carmen Gonzalez and Maxine Burkett demonstrate that it is important to examine legal responses to climate change with a racial justice lens.[68]

Furthermore, scholars from other disciplines including sociology,[69] psychology,[70] geography, and communications studies have also taken up the challenge of applying such a lens to the laws and policies concerning climate change. All of these scholars have mostly dedicated their scholarship to continuing the ground-breaking work of the environmental justice movement in conceptualizing the environmental harms disproportionately facing Black, Indigenous, and people of color as "environmental racism."[71] For example,

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64. *See generally* Julia Dehm, *Carbon Colonialism or Climate Justice? Interrogating the International Climate Regime from a TWAIL Perspective*, 33 WINDSOR Y.B. ACCESS JUST. 129, 131 (2016); Sumudu Atapattu & Carmen G. Gonzalez, *The North–South Divide in International Environmental Law: Framing the Issues*, *in* INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH, 6 (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, & Jona Razzaque eds., 2015).

65. Amy McQuire & Jeffrey McGee, *A Universal Human Right to Shape Responses to a Global Problem? The Role of Self-Determination in Guiding the International Legal Response to Climate Change*, 26 RECIEL 54, 64 (2017) (quoting ROB NIXON, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR 40 (2011)).

66. Bridget Lewis, *Indigenous Human Rights and Climate Change*, 7 ILB 11 (2008); *see* Pepe Clarke, *Climate Change and Human Rights in the Pacific Islands*, 1 NELR 59, 60-61 (2009).

67. HENRY SHUE, CLIMATE JUSTICE: VULNERABILITY AND PROTECTION 264 (2014).

68. Carmen Gonzalez, *Climate Change, Race, and Migration*, 1 Journal of Law and Political Economy 109, 110 (2020) (arguing that "a race-conscious analysis of carbon capitalism grounded in political economy can foster alliances among scholars and social movements that seek systemic change by highlighting common patterns and sources of oppression"); Carmen Gonzalez, *Racial Capitalism, Climate Justice, and Climate Displacement*, 11 Oñati Socio-Legal Series 108 (2021); Maxine Burkett, *Root and Branch: Climate Catastrophe, Racial Crises, and the History and Future of Climate Justice*, 134 Harv. L. Rev. F. 326 (2020).

69. Danielle Falzon & Pinar Batur, *Lost and Damaged: Environmental Racism, Climate Justice, and Conflict in the Pacific*, *in* HANDBOOK OF THE SOCIOLOGY OF RACIAL AND ETHNIC RELATIONS (Pinar Batur & Joe R. Feagin eds., 2018).

70. Thompson, *supra* note 1.

71. Born from the environmental justice movement launched in the 1970s-80s in the United States, "environmental racism" was coined by former executive director of the United Church of Christ

geography scholar Laura Pulido explores environmental racism and related concepts of white supremacy and white privilege with regard to regulatory non-compliance[72] and racial capitalism in the context of State-sanctioned racial violence through pollution.[73] More recently, Pulido and others have explored "spectacular racism" and white nationalism in the Trump era of aggressive environmental deregulation and fossil fuel investment.[74]

In the field of communications studies, Elizabeth Dickinson has adopted CRT to critique the decision of New Mexico government officials to move protected rock carvings in Petroglyph National Monument for the construction of a road.[75] In what appears to be the only piece of scholarship on environmental racism to explicitly apply a CRT lens, Dickinson aptly describes the need to embrace CRT perspectives when critiquing cases of environmental racism:

> CRT positions [cases of environmental racism] within a critical framework, where racism and whiteness are predictable, institutional, and mainstream, and they occur materially, ideologically, locally, and globally (Crenshaw, Gotanda, Peller, & Thomas, 1995; Delgado, 1995). CRT scholars argue that a lack of true racial reform stems from the popularly held belief that, after the U.S. civil rights movement, race is no longer a significant issue (Tate, 1997). CRT repositions racism as rampant and current and not an unfortunate historic act; racism upholds the invisibility of whiteness and allows racism to endure. Race and whiteness continue to play an influential role . . . in environmental issues.
>
> CRT additionally positions racism as still having certain forms of ideological space within ''traditional liberal civil rights discourse'' (Tate, 1997, p. 203) and among left-leaning political players. Social progressivism and the judicial system are not likely to enact social change, as they are part of the problem (Tate, 1997). In this regard, racism and whiteness are not just performed by stereotypical southern poor whites, but by white collar, Democratic, liberal ''nonracist'' whites (Delgado &

(UCC) Commission for Racial Justice, Benjamin Chavis, in campaigning against hazardous waste in Warren County, North Carolina. Chavis defined the term as "racial discrimination in environmental policy making, the enforcement of regulations and laws, the deliberate targeting of communities of color for toxic waste facilities, the official sanctioning of the life-threatening presence of poisons and pollutants in our communities, and the history of excluding people of color from leadership of the ecology movements." Paul Mohai, David Pellow, & Timmons J. Roberts, *Environmental Justice*, 34 ANN. REV. OF ENV'T & RES. 405, 406–407 (2009).

72. *See generally* Laura Pulido, *Geographies of Race and Ethnicity 1: White Supremacy vs. White Privilege in Environmental Racism Research*, 39 PROGRESS IN HUM. GEOGRAPHY 809 (2015).

73. *See* Laura Pulido, *Geographies of Race and Ethnicity II: Environmental Racism, Racial Capitalism and State-Sanctioned Violence*, 41 PROGRESS IN HUM. GEOGRAPHY 524 (2017). *See also* Gonzalez, *Climate Change, Race, and Migration*, *supra* note 68.

74. *See* Laura Pulido, Tianna Bruno, Cristina Faiver-Serna & Cassandra Galentine, *Environmental Deregulation, Spectacular Racism, and White Nationalism in the Trump Era*, 109 ANNALS OF THE AMERICAN ASS'N OF GEOGRAPHERS 520, 520 (2019).

75. Elizabeth Dickinson, *Addressing Environmental Racism Through Storytelling: Toward an Environmental Justice Narrative Framework*, 5 COMMC'N, CULTURE & CRITIQUE 57 (2012).

> Stefancic, 2001; Tate, 1997). CRT writers wish to expose this contradiction and the invisibility of whiteness.[76]

Since CRT has had limited engagement with climate justice as a scholarly movement, this Article seeks to continue building CRT scholarship in this increasingly urgent area of racial injustice. Accordingly, in addition to my CRT-style storytelling with *Movers* at the beginning of this Article, my critique adopts a CRT lens that is informed by the seminal work of CRT scholars, the literature on environmental racism, and the critical legal scholarship on climate change noted above. While CRT provides a range of critical tools and modes of analysis, from intersectionality analyses to critiques of liberalism, my critique will focus on analyzing the above jurisprudence with regard to white privilege as a form of racism.

B. Conceptualizing Judicial White Privilege

As white privilege is a contentious and controversial concept, it is necessary to unpack some of these disputes before adopting a white privilege analysis to inform this critique. This Article owes a great intellectual debt to CRT scholar Khiara Bridges, whose work grappling with the implications of these contentions is exceptional among progressive race scholars.

As Bridges notes, the most influential conceptualization of white privilege comes from Peggy McIntosh's seminal essay *White Privilege: Unpacking the Invisible Knapsack*, where white privilege is defined as:

> [A]n invisible package of unearned assets which . . . can . . . [be] [cashed]in each day . . . White privilege is like an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools and blank checks.[77]

CRT scholars also emphasize this general understanding of white privilege—that it confers benefits to white people at the expense of Black, Indigenous, and people of color. For example, Devon Carbado and Mitu Gulati

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76. *Dickinson, supra* note 75*,* at 59 (citing: KIMBERLÉ CRENSHAW, NEIL GOTANDA, GARY PELLER & KENDALL THOMAS, CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (1995) (citation omitted); RICHARD DELGADO, CRITICAL RACE THEORY: THE CUTTING EDGE (1995) (citation omitted); William F. Tate IV, *Chapter 4: Critical Race Theory and Education: History, Theory, and Implications*, 22 REVIEW OF RESEARCH IN EDUCATION 195 (1997) (citation omitted); RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (2001) (citation omitted)).

77. Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 778-779 (2019), *quoting* Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, PEACE & FREEDOM, July–Aug. 1989 at 10; *see also* Khiara M. Bridges, *White Privilege and White Disadvantage*, 105 VA. L. REV. 449, 456–62 (2019); *see also* KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER 157-180, 195-214 (2019).

argue that white privilege "is nothing more than a claim about the existence of discrimination."[78]

Furthermore, Cheryl Harris helps to conceptualize white privilege as tangible and intangible "wages of whites," arguing that these wages "are available to all whites regardless of class position, even to those whites who are without power, money, or influence. Whiteness, the characteristic that distinguishes them from Blacks, serves as compensation even to those who lack material wealth."[79] However, while these common formulations of the term emphasize positive outcomes for white people, Bridges posits that white privilege need not always lead to benefits for white people and disadvantages for Black, Indigenous, and people of color. Rather, she notes that "it is not uncommon for white privilege to lead to white disadvantage. In fact, white disadvantage is an expected, one might even say *intentional*, consequence of white privilege."[80]

Other progressive race scholars have pushed back against the concept of white privilege altogether. For example, Zeus Leonardo argues that there is a need to move "beyond the discourse of 'white privilege'" because it narrowly focuses on the benefits that white people receive by virtue of their race and "turns attention away from the oftentimes violent processes that have yielded those benefits."[81] Instead of white privilege, Leonardo argues for a focus on "white supremacy."[82] However, as Bridges points out, this pushback is not about the existence of white privilege, but rather its tendency to misrepresent the realities of racial injustice.[83]

In drawing on Leonardo's insights, Pulido has also expressed reservations about using a white privilege analysis in the context of environmental racism, stating:

> I worry that I have contributed to an over-reliance on the concept to the detriment of other forms of racism, including white supremacy. Though I still believe that white privilege is a powerful force . . . it is not sufficient to explain all forms of environmental racism. Since environmental racism is produced through various means, it should not be surprising that there are multiple forms of racism at work

78. *Id.* at 779, *referring to* Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L. J. 1757, 1777 (2003) (book review).

79. *Id.* at 783, *referring to* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1759 (1993).

80. *Id.* at 785. Here, Bridges draws on the Marxist roots of the term which follow "white privilege is harmful to white people—specifically, the white working class." It is "bourgeois poison aimed primarily at the white workers, utilized as a weapon by the ruling class to subjugate black and white workers," *referring to* Letter from Noel Ignatin to Progressive Labor (Mar. 1967), *in* REVOLUTIONARY YOUTH & THE NEW WORKING CLASS 148, 152 (Carl Davidson ed., 2011).

81. Zeus Leonardo, *The Color of Supremacy: Beyond the Discourse of "White Privilege,"* 36 EDUC. PHIL. & THEORY 137, 137 (2004).

82. *Id.* (elaborating that "discourse on privilege comes with the unfortunate consequence of masking history, obfuscating agents of domination, and removing the actions that make it clear who is doing what to whom. Instead of emphasizing the process of appropriation, the discourse of privilege centers the discussion on the advantages that whites receive.").

83. *Id.* at 781.

> . . . according to Leonardo (2004), . . . dominant racial ideologies and concepts, including white privilege, have essentially eliminated all agents. White privilege highlights the benefits that whites receive while overlooking the process of taking or appropriation, including the taking of land, wages, life, liberty, health, community, and social status.[84]

While I agree with Pulido and Leonardo that common conceptualizations of white privilege can obscure the wider structural processes of "taking" or "appropriation," I argue that this is simply a matter of definition. The term can be expanded by linking the structures and processes of white supremacy, while maintaining the power of white privilege. This will accurately capture the collective mindsets within those structures and processes. White privilege can be used to describe how the harmful decisions of white people need not be driven by particular racial animus or discriminatory intent but are often simply driven by a desire to create the best opportunities for white people and their families, which, in a highly racialized society, reproduces racial inequality.[85]

Therefore, for the purposes of this Article, white privilege refers to the unearned tangible and intangible wages of whiteness that all white people own. These wages typically operate to benefit wealthy white people and possibly disadvantage lower classes of white people, but in any case, they serve to maintain structures and processes of white supremacy to the ultimate detriment of Black, Indigenous, and people of color. I also posit that white privilege must be understood and called out as racism when State institutional power reinforces the formation and fortification of systemic marginalization and subordination of Black, Indigenous, and people of color in a white supremacist society.[86] However, in an attempt to further communicate the structural force of white privilege in the context of climate change-related displacement, I will explicitly refer to and apply here "judicial white privilege" to describe the structures and dynamics surrounding judgments made by predominantly white decision-makers.[87]

C. Critiquing the Racism in Judicial White Privilege

As mentioned above, to find an Art. 6 violation, the Committee needed to have been satisfied that the conduct of the New Zealand courts met the threshold

84. Pulido, *supra* note 72 at 810, 812.

85. *Id.* at 810.

86. Here, I draw on and modify the "prejudice plus power" model popularized by Joseph Barndt, which proposes that two elements are required in order for racism to exist: (1) racial prejudice and (2) the power to codify and enforce this prejudice into society, JOSEPH R. BARNDT, DISMANTLING RACISM: THE CONTINUING CHALLENGE TO WHITE AMERICA 29 (1991).

87. In stating "predominantly white," I acknowledge that while all of the judges in the New Zealand court decisions are white, fourteen of the sixteen members of the Committee majority are white as well. I argue that despite there being two people of color in the majority, being a person of color does not prevent one from perpetuating racism and subscribing to white supremacy and thus it is fair to identify racist white privilege in the majority's decision.

of being clearly arbitrary or having amounted to a manifest error or a denial of justice.[88] In the majority's analysis, they noted how the courts applied the protected person status threshold of "imminence". The court found that Teitiota's claims—including unsafe drinking water, unsuitable crop conditions, housing unsuitability, financial insecurity, and dangers to his and his families' lives—were "firmly in the realm of surmise and conjecture," because "there was no evidence establishing that his situation in the Republic of Kiribati would be so precarious."[89] In supporting these evidentiary findings, the majority also formulated their own conclusions on the evidence to reason that the courts' conduct did not meet the Art. 6 threshold.[90]

However, I argue that their ardent efforts to minimize and dismiss the seriousness of Teitiota's situation is due to their judicial white privilege, which manifested in three main ways.

1. The Legitimization of Two Standards of Dignity

First, their findings on Teitiota's circumstances accept and legitimize low standards of living for Black, Indigenous, and people of color. For example, as Committee member Sancin emphasized in their dissent, the Committee majority clearly ignored the fact that potable water does not equal safe cleaning water and, moreover, that such water can pose real threats to the health of Teitiota's New Zealand born children. In showing their obliviousness to the "tangible wages" of their whiteness, the white decision-makers demonstrate their inability to imagine themselves and their own families in these circumstances, and therefore legitimize these health risks for Teitiota's family and the Black, Indigenous, and people of color they represent. No passage captures the severe obliviousness of these white decision-makers more clearly than the following comments of Justice Wild in the New Zealand Court of Appeal decision:

> Certainly, there was evidence from each of MrTeitiota, Mr Corcoran and Mr Teitiota's wife, that the rise in the level of the Pacific Ocean is adversely affecting homes, crops, coconut palms and freshwater supplies in Kiribati. At high tides and king tides, seawater sometimes comes into coastal homes. Salt water has killed some coconut palms and crops. It has contaminated drinking water drawn from wells. But the Tribunal was right to find that the supplies of food and water for Mr Teitiota and his family would be adequate if they were required to return to Kiribati. The Tribunal readily accepted that the standard of living of the Teitiota family back in Kiribati would compare unfavourably to that it enjoyed in New Zealand. But the Tribunal was, on the evidence it heard, *entitled to find that Mr Teitiota and his*

88. Ioane Teitiota, *supra* note 8, at 9.3.

89. *Id.* at 2.9.

90. *Id.* at 9.8 (finding for example that "the author has not provided sufficient information indicating that the supply of fresh water is inaccessible, insufficient or unsafe so as to produce a reasonably foreseeable threat of a health risk that would impair his right to enjoy a life with dignity or cause his unnatural or premature death").

> *family on return to Kiribati could "resume their prior subsistence life with dignity."*[91]

Here, Justice Wild took note of the multiple pieces of evidence demonstrating that Teitiota would face adverse conditions if deported to Kiribati, but nonetheless made the judgement that the conditions were "adequate" enough for his family to "resume their prior subsistence life with dignity." Justice Wild reached this conclusion even though there was no counter evidence (expert or otherwise) provided supporting the view that conditions for Teitiota and his family would be "adequate."

It is important to call out the significant confidence or entitlement that Justice Wild and the other white decision-makers in the Tribunal (and the Committee majority) possess. They are willing and able to effectively downplay expert evidence and the lived experiences of Teitiota and his wife in favor of their own value judgments.

These value judgments demonstrate how the law can give white decision-makers significant discretion when making decisions that can detrimentally impact Black, Indigenous, and people of color. This discretion can provide them with a safe space to make assessments that are devoid of evidence and substantiation, centered on their own limited opinions and interests. In the present case, this means that the white decision-makers were allowed to side-step evidence, instead focusing on whether they were personally comfortable and satisfied with the living conditions they were willing to impose on Black, Indigenous, and people of color. Their answer is inevitably impacted by the knowledge that they would face no consequences and repercussions for making these value judgements devoid of evidence, and that their families would never be subject to the same realities as Teitiota's family.

Therefore, I argue that the white decision-makers in the *Teitiota* litigation, in deciding to justify the deportation of Teitiota and his family, have legitimized and enforced two standards of dignity—one for themselves and another for Black, Indigenous, and people of color facing climate change-related displacement. In line with the concept of judicial white privilege, the legitimization and enforcement of these different standards serve to further white supremacy on a global scale.

2. Inadequate and Empty Lines of Reasoning

Second, the white decision-makers' judicial white privilege manifested in their inadequate and empty lines of reasoning—namely, setting impossibly high evidentiary thresholds for Teitiota, imposing a strict requirement for violations to

91. Teitiota v. Chief Exec. Ministry Bus. Innovation and Emp. [2014] NZCA 173, at 37 (emphasis added).

be personal, and making an unfounded statement of faith in the international community's willingness and ability to take action.

(a) Setting Impossibly High Thresholds

In their judgments denying Teitiota's claims, it is clear that the white decision-makers in the New Zealand courts and the Committee majority are of the view that current conditions in Kiribati do not warrant any form of protection for refugees. However, it is in realizing the implications of this view that a serious problem arises: if Kiribati is one of the areas in the world most adversely impacted by climate change, and the conditions in Kiribati do not meet this threshold in 2020, it is difficult (if not impossible) to imagine a situation that would. Did Teitiota have to provide evidence showing that he barely survived a flood? Did his wife have to escape a near-death fight with a neighbor over land or food? Did one of his children have to drown or be poisoned from drinking contaminated drinking water—or did all three of them have to? The white decision-makers blatantly avoided commenting on the wider implications of their evidentiary conclusions. However, considering how quickly they pivoted to a very optimistic "wait for international action" approach, one cannot be sure if evidence of any or all of these extreme conditions would have made a difference. In other words, it appears that these white decision-makers were never, under any circumstances, going to find in favor of Teitiota where the thresholds were intentionally applied in a way to make it impossible for him (and any other person seeking protection from climate change-related displacement) to meet. The notion that Teitiota's claim was doomed regardless of the evidence he could provide is further supported by the other two poorly reasoned, if not empty, justifications the decision-makers in the committee majority gave for their decision that are critiqued below.

(b) The Strict Requirement for Personal Violations and the Disposability of Black, Indigenous, and People of Color

One of these justifications is that there can be no "arbitrary deprivation of life" when many other citizens in Kiribati essentially face the same circumstances: violations must be personal.[92] The emptiness of this justification is most effectively elucidated by the analogy Committee member Muhumuza gives in their powerful dissent: "New Zealand's action is more like forcing a drowning person back into a sinking vessel, with the 'justification' that after all there are other voyagers on board."[93]

This analogy also helps one to realize that this justification engages what critical studies scholar Henry Giroux calls the "politics of disposability"—a

92. Ioane Teitiota, *supra* note 8, at 9.6, 9.3.

93. *Id.* at Annex 2, para. 6.

politics in which poor and racially marginalized populations are imagined to offer little value to the world of buying and selling, therefore, becoming "collateral damage in the construction of the neoliberal order."[94] Giroux argues that this "politics of disposability" was revealed most spectacularly by the US government's inaction and incompetence in the wake of Hurricane Katrina, which was deeply rooted in racism.[95] The predominantly white decision-makers perpetuated these politics in their judgments, who, with the tangible and intangible wages of their whiteness, have rendered Teitiota, his family, and all other Black, Indigenous, and people of color facing climate change-related displacement disposable.

(c) Unfounded Faith in the International Community

The other justification given is that the government of Kiribati and the "international community" are well-equipped to fight climate change or at least relocate and protect Teitiota and his family when larger scale relocation is deemed necessary in ten to fifteen years.[96] To justify their faith in the government of Kiribati's capabilities, the Committee majority relied solely on the existence of the 2007 National Adaptation Programme of Action as "adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms."[97]

However, the Committee majority did not mention whether the programme had proven to be successful since it was established. As the dissent by Committee member Sancin makes clear, the programme and various other initiatives by the government had either been unsuccessful or have fallen through[98]—a fact conveniently not addressed by the majority.

More egregiously, the majority provided absolutely no evidence or analysis supporting their statement that the "international community" is and will be willing and able to assist Kiribati "to take affirmative measures to protect and, where necessary, relocate its population" in ten to fifteen years.[99] I argue that this is simply because such evidence does not exist. Rather, the current realities demonstrate that countries are failing in their obligations to reduce their emissions,[100] including New Zealand,[101] and that climate change denialism and

94. HENRY GIROUX, STORMY WEATHER: KATRINA AND THE POLITICS OF DISPOSABILITY 11 (2006).

95. *Id.*

96. Ioane Teitiota*, supra* note 8, at 9.12.

97. *Id.*

98. *Id.* at Annex 1, para. 4.

99. *Id.*

100. Stanley *et al.*, *supra* note 3; Tollefson, *supra* note 3.

101. For example, it was reported in December 2018 that New Zealand is "still falling woefully short of international commitments" made under the Paris Agreement, in which "New Zealand pledged to reduce its emissions 30 percent by 2030 on 2005 levels." Michael Neilson, *'We need to do*

deregulation in the United States is a major barrier to climate action.[102] I posit that the decision-makers were slightly or acutely aware of this reality of inaction and, instead of addressing the inherent human rights violations in this inaction, opted to feign ignorance to avoid the political ramifications of telling this truth.

Some may defend the Committee majority's ruling on the grounds that they understandably did not want to make a major political decision on behalf of New Zealand and other States. However, this CRT critique of their reasoning has illuminated how their judicial white privilege, in being backed by State power, resulted in the detriment of Teitiota and other Black, Indigenous, and people of color facing climate change-related displacement. This is an instance in which these decision-makers have become not only complicit but also key participants in racist climate change inaction.

3. The Hidden Racist Roots of Climate Vulnerability

Third, judicial white privilege manifests in the inability of the predominantly white decision makers to appreciate the racist historical roots of Kiribati's particular vulnerabilities to climate change. These decision makers fail to appreciate that climate change vulnerability is the reason for the continued existence, or even growth, of these racist roots today. Unlike the manifestations outlined above, however, this does not necessarily reflect a glaring omission by the decision makers, as Teitiota's counsel did not raise this point. Rather, this is better understood as a reflection of the inability of current legal frameworks to hold State parties accountable for their racist roots.[103]

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more': New Zealand falling short on international climate change greenhouse gas commitments, THE NEW ZEALAND HERALD, Dec. 19, 2019.

102. *See* Pulido, *supra* note 73, at 520 (arguing that Trump's "spectacular racism," racism characterized by sensational visibility, helps obscure the profound deregulation underway. The white nation plays a critical role here, as Trump uses spectacular racism to nurture his base, consolidate his power, and implement his agenda); *see also* Luis E. Hestres, *Fighting Climate Change Denialism in the United States*, *in* CLIMATE CHANGE DENIAL AND PUBLIC RELATIONS: STRATEGIC COMMUNICATION AND INTEREST GROUPS IN CLIMATE INACTION (Núria Almiron & Jordi Xifra eds., 2019) (noting that "deficiencies in the U.S. public's understanding of climate change are due partly to a well-organized public communication campaign that denies the existence of climate change as a phenomenon, downplays its consequences for the United States and the rest of the world, and dismisses the ability or need for human beings to do anything about it. Driven by an alliance between the fossil fuel industry and conservative ideologues, the purpose of this campaign has been to sow doubt in the collective U.S. mind about the seriousness of the threat that climate change poses to human societies").

103. For example, history-based arguments distinguish "imminent" danger from 'current' "persecution", but also reflect how these histories of colonial racism have been effectively hidden and erased from modern memory. In any case, even if this history of colonial racism was raised by Teitiota to somehow strengthen his claims for protection, I argue that it is highly likely that any argument drawing on this history would be rejected by both the New Zealand courts and a Committee majority, who would see the racist creation of these vulnerabilities as an unfortunate but ultimately *historical* fact that current administrations of these colonizing nations cannot be held accountable for, as they are considered irrelevant to today's affairs. For example, if Teitiota was to claim persecution on the

The racist processes of colonization have contributed to the creation of the racist roots of climate change in the Pacific Islands, which, in turn, have exacerbated the islands' vulnerabilities to climate change and climate change-related displacement. As mentioned above, McAdam emphasizes that climate change-related displacement is "multi-causal" in being due to both environmental and socioeconomic vulnerabilities.[104] It appears, however, that these vulnerabilities have been incorrectly conceived of as unpreventable and natural realities of the world for which no one party can be held accountable.

This misconception is evident in the Tribunal's brief reference to them:

> . . . it is recognized. . . that broad generalizations about natural disasters and protection regimes mask a more complex reality. The relationship between natural disasters, environmental degradation, and human vulnerability to those disasters and degradation is complex. It is within this complexity that pathways can, in some circumstances, be created into international protection regimes, including Convention-based recognition. . .
>
> First, the reality is that natural disasters do not always occur in democratic states which respect the human rights of the affected population . . . In other words, the provision of post-disaster humanitarian relief may become politicized. . . .
>
> Second, although the work is controversial, increasing attention has been given to the linkage between environmental issues and armed conflict and security.[105]

The Committee majority only mentioned "existing vulnerabilities" in passing to dubiously explain that the Kiribati government was taking adequate action to address them, as noted above.[106]

Sociologists Falzon and Batur provide a historical account of environmental degradation in the Pacific Islands highlighting that their current vulnerability to climate change cannot be characterized as mere happenstance for which no one is to blame:

> Pacific Island Nations, along with regions across what is now termed the "Global South," have faced injustices for centuries. Their current vulnerability and lack of capacity to adapt to climate change on their own is premised on years of rapid resource depletion, oppression, and exploitation under colonialism, and post-colonial political marginalization on the global stage.
>
> Their current prospective or loss of land, cultures, homes, and potentially sovereignty are therefore part of a complex web of interconnected injustices, which diminishes the agency of these nations and their citizens to shape their futures. While the histories of the Pacific Island Nations do not begin with their colonization by the Western world, such colonization is the beginning of the

grounds of race in his refugee status claim (even if against New Zealand as the sending state, not Kiribati as the receiving state, as Justice Priestely noted the Convention requires in the High Court judgment).

104. McAdam, *supra* note 15.

105. Kiribati*,* [2013] NZIPT 800413 at 57-59.

106. Ioane Teitiota, *supra* note 8, at 9.12.

> oppression, marginalization, and exploitation that creates the nations' realities today.[107]

Falzon and Batur also emphasize that these processes were racially driven with regard to this "oppression, marginalization, and exploitation" in the Pacific. They illustrate how colonizers like Milo Calkin, an explorer of the islands in the 1830s, adopted overtly racist narratives of the Pacific Islanders as "dangerous immoral savages" who were sexually predatory, spiritually undeveloped, and living in primitive societies.[108] Colonizers intended these false, racist narratives to justify the need for European intervention to civilize, bring religion, and assert colonial control through imposed impoverishment and exploitation of these Pacific environments for economic gain.[109]

One egregious example of environmental exploitation is the mass extraction of phosphate in the Island of Banaba in Kiribati. British forces mined Banaba heavily from the early 20th century to the 1940s, rendering it decreasingly capable of sustaining both the locals and the growing mining industry.[110] As a result, when Japanese forces took control of the island during World War II, they forcibly moved Banabans to internment camps on other islands in Kiribati, such as Tarawa.[111] After the war, Australian forces took control of Banaba, and the British reinitiated the intensive mining of phosphate, forcefully displacing the Banabans to the island of Rabi in north-eastern Fiji.[112] By the time mining stopped on Banaba in 1979, 90 percent of the surface soil had been removed, effectively destroying the landscape, including sacred water caves.[113]

Banaba in Kiribati and Nauru[114] exemplify how extreme environmental exploitation in the Pacific has led to both environmental and socioeconomic vulnerability to climate change. While it is beyond the scope of this Article, there are many other tales of how racist colonial marginalization and oppression across other Pacific Islands link to their particular socioeconomic vulnerabilities. This includes instances like New Zealand's colonial rule of Samoa, which led to the decision to introduce a flu pandemic to Samoa in 1918, resulting in the deaths of

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107. Falzon and Batur, *supra* note 69, at 402.

108. *Id.*

109. *Id.* at 404.

110. *Id.*

111. *Id.*

112. *Id.* (noting the devastating impact of forced relocation on the Banabans, "[t]hough the island of Rabi seemed similar enough to Banaba in the eyes of the British, Banabans had to develop entirely new ways of sustaining themselves and coping with their losses. This forced move, in addition to negatively impacting the island of Rabi, was accompanied by the destruction of the peoples' sustainable lifestyle because of their unfamiliarity with this new environment.").

113. *Id.* (citing Julia B. Edwards, *Phosphate and forced relocation: An assessment of the resettlement of the Banabans to Northern Fiji in 1945*, 4 THE JOURNAL OF IMPERIAL AND COMMONWEALTH HISTORY, 783 (2013)).

114. *See generally* Antony Anghie, "*The Heart of my Home": Colonialism, Environmental Damage, and the Nauru Case*, 34 HARV. INT'L. L. J. 445 (1993).

20 percent of the population.[115] New Zealand also exploited Fiji through the Colonial Sugar Refining Company,[116] and, of course, blackbirding slavery. Two other examples include French Polynesia and New Caledonia which the British, Australia, and other colonizing nations similarly exploited.[117]

Given the degree to which these histories have been obscured, a degree of leniency might be shown to the predominantly white decision makers, who—true to their judicial white privilege—do not show even the slightest awareness of the fact that Kiribati's current climate vulnerability is due to the racist processes of colonization.

4. Where to Go from Here? Confronting the Tension in Climate Justice Discourse in the Pacific

What should follow from this Article's examination of the racism present in climate change-related displacement law? First and foremost, this Article aims to honor and serve the aspirations of the communities at the forefront of racial injustice in the spirit of CRT.

Pacific Island peoples are not a monolithic group. There is a diverse range of aspirations among Pacific Island peoples, reflecting the rich diversity of identities and experiences within both the region and the wider diaspora. Some of these aspirations can be in conflict, or at least in tension, with each other. Such is the case with legal responses to climate change-related displacement.

On one hand, there are the aspirations of Pacific Island peoples like Ioane Teitiota and others who have unsuccessfully sought legal protection from climate change-related displacement and fought for the requisite major legal developments.[118] On the other, there are Pacific Island governments and other advocates who have made clear their aspirations to resist "hopeless" displacement narratives, summarized as follows:

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115. *See generally* Ministry for Culture and Heritage, *Influenza in Samoa*, NZ HISTORY, https://nzhistory.govt.nz/culture/1918-influenza-pandemic/samoa.

116. *See generally* Bruce Knapman, *Capitalism's economic impact in colonial Fiji. 1874–1939: Development or underdevelopment*, 20 THE JOURNAL OF PACIFIC HISTORY 66 (1985).

117. *See generally* GERALD HORNE, THE WHITE PACIFIC: US IMPERIALISM AND BLACK SLAVERY IN THE SOUTH SEAS AFTER THE CIVIL WAR (2007); Merze Tate & Fidele Foy, *Slavery and Racism in South Pacific Annexations*, 50 THE JOURNAL OF NEGRO HISTORY 1 (1965). For another revelatory account of colonial environmental degradation as racist processes outside of the Pacific, *see* Nancy Tuana, *Climate Apartheid: The Forgetting of Race in the Anthropocene*, 7 CRITICAL PHILOSOPHY OF RACE 1,1 (2019) (arguing that "[d]ifferential impacts of climate change, while an important dimension, is ultimately inadequate to understanding and responding to both climate justice and environmental racism" by examining "three instances of the intermingling of racism and environmental exploitation: climate adaptation practices in Lagos, Nigeria; the enmeshment of race and coal mining in the post–Civil War United States; and the infusing of precarity and rainforest destruction in Brazil.").

118. *See* Laura Walters, *NZ plans for inevitable climate-related migration*, NEWSHUB, Apr. 24, 2019, https://www.newsroom.co.nz/2019/04/24/548955/nz-planning-for-inevitable-climate-related-migration (reporting that 11 claims for protection have been made in New Zealand since 2011).

1. To continue living in their home countries with dignity, in safety and prosperity for as long as possible by adapting to the impacts of climate change;[119]
2. To prevent the international community from escaping their obligations/commitments to reduce greenhouse emissions by offering relocation through large scale migration options as the sole solution to climate change;[120] and
3. To ensure that any migration efforts should be the last resort and take place in a planned and coordinated way that honors the resilience and strength of Pacific peoples.[121][122]

These aspirations are, in large part, a product of the harm perpetuated by several non-Pacific Western contributions to climate justice discourse, which include sensationalist narratives of "sinking islands" and "tragic victims,"[123] calls

119. Carol Farbotko, *Voluntary Immobility: Indigenous Voices in the Pacific*, 57 FORCED MIGRATION REVIEW 81, 81 (2018) (noting that "[i]ndigenous people of the Pacific are increasingly expressing a preference to stay on their lands for cultural and spiritual reasons, even in the face of significant deterioration in health and livelihoods associated with climate change. In some cases, they say that they are prepared to die there rather than relocate."); Karen E McNamara, Robin Bronen, Nishara Fernando and Silja Klepp, *The Complex Decision-Making of Climate-Induced Relocation: Adaptation and Loss and Damage* 18 CLIMATE POLICY 111, 115 (2018) (On the need to adapt rather than migrate: "As indicated by the I-Kiribati again and again, they do not want to become refugees, but want to actively decide their destiny and participate in the development of both adaptation and migration strategies.").

120. For example, in September 2017, Pacific climate justice activist group, the Pacific Climate Warriors, released "The Pacific Climate Warriors Declaration on Climate Change" ahead of COP 23, which called on the world to "1. End the era of fossil fuels and move to 100% renewable energy, 2. Kick the big polluters out of the climate talks, 3. Support the immediate delivery of finance needed for countries already facing irreversible loss and damage; 4. Do what is needed to limit warming to 1.5°C." *See* Pacific Climate Warriors, *The Pacific Climate Warriors Declaration on Climate Change*, 350 PACIFIC, https://act.350.org/act/pcw-declaration/haveyoursei.org.

121. Karen E. McNamara and Helene Jacot Des Combes, *Planning for Community Relocations due to Climate Change in Fiji*, 6 INT'L J. DISASTER RISK SCI. 315, 317 (2015) ("As an option of last resort, this position was made clear in an interview with a climate change policy officer, speaking on behalf of the Climate Change Division of the Fiji Government: ''When it comes to relocation it's the last resort for us; we want to be able to do it in a way that is very, very holistic; it's not about moving houses, it's about moving lives.").

122. Rive, *supra* note 17, at 221.

123. Carol Farbotko, *Tuvalu and Climate Change: Constructions of Environmental Displacement in the Sydney Morning Herald*, 87 GEOGR. ANN. 279, 289 (2005) (arguing that "the construction of Tuvaluans as tragic victims through a hierarchical island/mainland alterity is problematic in the way it presents a particular perspective of Tuvalu, through a lens of vulnerability"); Tanja Dreher & Michelle Voyer, *Climate Refugees or Migrants? Contesting Media Frames on Climate Justice in the Pacific*, 9 ENVIRONMENTAL COMMUNICATION 58 (2015) (positing that the "rare coverage of climate justice issues often focuses on Small Island Developing States (SIDS) such as Kiribati and commonly makes use of four main media frames: SIDS as "proof" of climate change, SIDS as "victims" of climate change, SIDS communities as climate "refugees," and SIDS as travel destinations. Yet, these frames undermine the desire of SIDS communities to be seen as proactive, self-determining, and active agents of change").

for an international treaty on climate change relocation,[124] and even proposals for citizenship in exchange for resources.[125]

The crux of this complex tension in the current climate justice discourse for the Pacific is that by addressing these claims of climate change-related displacement, one runs the real risk of conveying that displacement is inevitable and efforts towards mitigation and adaptation are futile. Teall Crossen aptly captures this tension as follows:

> Discussing how to provide for people at risk of climate-induced displacement provides an excuse to continue to pollute the global atmosphere; it privileges polluting countries and entrenches unequal global power dynamics. Arguably, you can reduce emissions and plan for protecting the climate dispossessed at the same time, but planning for the worst-case scenario fundamentally changes your attitude. It says you have given up. If your house is threatened by fire, you don't start looking for a new home, you stay and fight to put the fire out. . . .
> To be sure, there is also danger in not planning for all eventualities. If your house is already burning, and it's clear that it can't be saved from the flames, you are going to need somewhere else to live. Looking sooner, rather than later, might improve your chances of securing a viable new home. President Tong took that approach by seeking support from the international community to allow the people of Kiribati to migrate with dignity, rather than as climate refugees. . . .[126]

McAdam also emphasizes the danger of not planning for climate change-related displacement, arguing that because this climate phenomenon is happening now, planning and policy development for this displacement needs to happen concurrently:

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124. *See* Frank Biermann & Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, Global Governance Working Paper No. 33 (Nov. 2007), subsequently published as 10 GLOBAL ENVIRONMENTAL POLITICS 60 (2010); Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVT. L. REV. 349 (2009); Draft Convention on the International Status of Environmentally-Displaced Persons (CRIDEAU and CRDP, Faculty of Law and Economic Science, University of Limoges), 4 REVUE EUROPÉENE DE DROIT DE L'ENVIRONNEMENT 375 (2008). *See also* Jane McAdam, Swimming against the Tide: *Why a Climate Change Treaty Is Not the Answer*, 23 INT'L J. REFUGEE L. 2, 4 (2011) (McAdam provides a robust case against international climate migration treaty proposals, questioning "the utility – and, importantly, the policy consequences – of pinning 'solutions' to climate change-related displacement on a multilateral instrument, in light of the likely nature of movement, the desires of affected communities, and the fact that a treaty will not, without wide ratification and implementation, 'solve' the humanitarian issue.").

125. *See* Gonzalez, *Climate Change, Race, and Migration*, *supra* note 68, 127 (arguing that these approaches to climate justice "advance the racist ideologies that justify carbon capitalism by casting the North as superior and civilized while invoking the specter of disorderly, disruptive, dark-skinned migrants who threaten Northern borders" and "suggest that the future of white supremacy depends on its ability to manage and contain the teeming masses from the South that climate change threatens to unleash."); *Marshall Islands rules out relocation in climate fight*, RADIO NEW ZEALAND (Mar. 4 2019) ("Marshall Islands president Hilda Heine says her government won't consider relocating its citizens in response to climate change. Former Australian Prime Minister Kevin Rudd sparked outrage last month when he suggested Australia offer citizenship to small Pacific nations in exchange for control of their seas.")

126. CROSSEN, *supra* note 3, 109-10.

> Often people think about climate change-related displacement as something we need to maybe be thinking about at some point in the future, whereas we need to be addressing it now—to be thinking about it, understanding it, and putting in place sensible policies so that we can avert some displacement where possible but also manage it where it does occur.[127]

Crossen addresses the tension as follows:

> Right now, however, the focus of the Pacific, the countries most at risk, is calling for the global community to rapidly reduce their climate pollution and provide financial support for adaptation, as well as for loss and damage, to enable Pacific countries to build resilience and avert displacement. A just response to climate change means we should stop stealing from the Pacific. We should be doing everything we can to avoid climate change dispossessing people from their island nations.
>
> If we are forced to confront the reality of cross-border displacement in our region, however, our approach needs to be firmly grounded in international legal principles recognising the sovereign equality of all states and responsibility for the damage we have contributed to. We need to be brave enough to address the compensation owing. We can start by increasing our investment in Pacific resilience. And if asked to by the Pacific, we should be allies in developing new legal norms for the protection of the climate dispossessed in a meaningful way.[128]

Crossen's analysis clarifies that anyone arguing that the Committee and courts of New Zealand must decide claims similar to Teitiota's differently would actually be asking these institutions to dramatically develop law in climate change-related displacement without the support of Pacific Island governments. This would not only create a precedent that Pacific Island governments would likely reject and oppose, it would also result in the undermining of their sovereignty within UN fora.

Therefore, this Article does not advocate for the *Teitiota* precedent to be overruled by the Committee and courts of New Zealand.

However, this position does not mean to criticize or condemn Teitiota and other Pacific Island people seeking protection from climate change-related displacement. Nor does it mean to say that these claims are not genuine, unworthy of intervention, or that climate change-displacement is not happening now—it clearly is. It certainly does not say that Teitiota was rightfully deported by New Zealand or that it was appropriate for him to be subject to the racist white privilege that the courts and Committee majority exhibited.

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127. Jane McAdam, *Climate Change Displacement Is Happening Now*, DISPLACED SEASON 2 (Ravi Gurumurthy and Grant Gordon, Mar. 19, 2019), https://www.rescue.org/displaced-season-2/climate-change-climate-change-displacement-happening-now.

128. CROSSEN, *supra* note 3, at 110-11.

Rather, this position argues that the legal and political implications of having these claims succeed are significant and far-reaching for many Pacific Island peoples, both present and future. Therefore, the answer to climate justice for Pacific nations is not litigation that only considers particular circumstances and considerations (at least, not at this moment).

For racial justice advocates and scholars, this means looking to Pacific Island governments and other Pacific Island climate justice advocates to see if, what, when, and how any laws and policies around climate change-related displacement should be implemented. It also means simply supporting their calls for States to take action through fulfilling their obligations to reduce emissions and supporting adaptation measures of climate resilience.

Nevertheless, one question remains—what are the implications of examining the racist white privilege in climate change law?

This CRT critique demonstrates not only that a racial justice lens on climate change in the Pacific is possible, but also that it has the potential to inform calls for stronger mitigation and adaptation support measures in both international and domestic contexts.

Therefore, in looking beyond litigation-focused measures for ways forward, the next part of this Article explores how a racial justice framing of climate change in the Pacific might be achieved.

IV. TOWARDS RACIAL JUSTICE FOR PEOPLE OF COLOR FACING CLIMATE CHANGE-RELATED DISPLACEMENT

A. Framing Climate Justice as a Racial Justice Issue

1. Previous Framings of Climate Justice as a Racial Justice Issue

It is important to note that social justice advocacy groups have already attempted to frame climate justice as a racial justice issue. For example, on September 6, 2016, nine Black Lives Matter UK (BLMUK) activists chained themselves together on a runway of London City Airport, holding a sign that read "Climate Crisis is a Racist Crisis."[129] The protest was to "highlight the environmental impact of air travel on the lives of black people locally and globally."[130] Although these BLMUK activists were successful in gaining media attention after effectively grounding airplanes and passengers at the airport,[131] the aftermath exposed the dynamics of white privilege that takes place in climate

129. Matthew Weaver & Jamie Grierson, *Black Lives Matter protest stops flights at London City airport*, THE GUARDIAN (Sept. 6, 2016), https://www.theguardian.com/uk-news/2016/sep/06/black-lives-matter-protesters-occupy-london-city-airport-runway.

130. *Id.*

131. *Id.*

justice activism, and the white privilege of white judges in responding to such activism. This was aptly described by Thompson:

> [The protesters] were arrested and charged with "obstructing a person engaged in lawful activity," to which they all pled guilty. Nevertheless, all were granted a "conditional discharge" and faced no immediate punishment for their actions.
>
> Eight of the nine protesters were white, all were relatively middle-class, and most had already engaged in direct actions for issues related to climate change, extractive industries, and/or fair wages. A few had prior convictions. District Judge Elizabeth Roscoe scolded the group for the disruption of air traffic flow, and for the seriousness of trespassing in a secure and bounded landscape, such as an airport tarmac. But she also reframed their actions as sincere and well-intentioned. As she handed down sentences that effectively protected and upheld white sincerity and benevolence, Judge Roscoe explained that she did not see the links among Black Lives Matter (a movement she attributes only to the United States), an airport in London, and climate change.
>
> While they set out to argue that "the climate crisis is a racist crisis," their identities and actions are historically bound to white paternalism and patronage: the sense that "nature" belongs to, and thus needs to be protected by, the white middle-class, or to practices that manage to supplant voices of the very people they purport to defend.[132]

In addition to perpetuating "white paternalism and patronage," Anupama Ranawana and James Trafford also point out that these climate activist tactics also systematically "exclude migrants and racialized or working-class people by putting them in differentially precarious relationships to state violence" which "suggests a bewildering short-sightedness regarding the fact that arrest for people from the Global South could mean deportation."[133]

In thinking about how a racial justice framing might be adopted in future advocacy and litigation efforts, it is clear that "white paternalism and patronage" needs to be actively avoided. In 2020, following the resurgence of Black Lives Matter (BLM) protests around the world in response to the killing of George Floyd by Minneapolis police on May 25, 2020, there was an increase in public discourse around the relationship between climate change and racism. For example, climate justice advocacy groups like 350.org stood in solidarity with the BLM movement. 350.org North America director Tamara Toles O'Laughlin stated:

> There is no climate justice without a racial analysis. At 350.org, we know that the work of dismantling white supremacy is essential to building a climate movement that matters and stands any chance of winning . . . . Decades of environmental

132. Thompson, *supra* note 1, at 92–93.

133. Ranawana and Trafford note this specifically about the environmentalist group Extinction Rebellion, which adopts similar tactics that aim to raise awareness through protests that involve members being arrested and imprisoned. Anupama Ranawana & James Trafford, *Imperialist Environmentalism and Decolonial Struggle*, DISCOVER SOCIETY (Aug. 7, 2019), https://archive.discoversociety.org/2019/08/07/imperialist-environmentalism-and-decolonial-struggle/.

> justice activism has shown that communities facing racist violence and over-policing are also overrun by fossil fuel extraction, pollution, and every manner of related health disparities . . . . Our fight for climate justice must necessarily include challenging the systems of racism that protect profits for the wealthy few and destroys Black Lives.[134]

There were also powerful calls from both BLM and climate justice movements to acknowledge that climate justice must mean fighting for racial justice.[135]

However, beyond this, it appears that climate justice has not been explored further as a racial justice issue. This is not to criticize any current approaches to climate justice advocacy by groups like 350.org, including the Pacific Island section of the group, the Pacific Climate Warriors,[136] whose peaceful, non-violent approaches have garnered attention and praise.[137] Rather, one potential reason for

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134. Press Release, 350.org, 350.org in Solidarity with the Movement for Black Lives; Reinforces Commitment to Dismantle White Supremacy, (June 1, 2020), https://350.org/press-release/solidarity-m4bl/.

135. *See* Mary Annaïse Heglar, *We Don't Have To Halt Climate Action To Fight Racism,* HUFFINGTON POST (June 12, 2020), https://www.huffpost.com/entry/climate-crisis-racism-environmenal-justice_n_5ee072b9c5b6b9cbc7699c3d ("Climate change is framed as the issue that threatens 'all of us' and therefore should be everyone's priority. Climate change, the myth goes, is the Great Equalizer. Not only is this approach dismissive and insensitive, the premise is simply untrue. It's been documented again and again that climate change hurts Black people first and worst — both in the United States and globally. Moreover, Black people did the least to create the problem, and our systemic oppression runs directly parallel to the climate crisis."); *Intersectional Environmentalism: Fighting For Climate Justice Means Also Fighting For Racial Justice*, 1 MILLION WOMEN (June 2, 2020), https://www.1millionwomen.com.au/blog/intersectional-environmentalism-fighting-climate-justice-means-fighting-social-justice/.

136. Here, I note that the Warriors have not used a racial justice framing or rhetoric in their activism to date. As stated on their official website, their general approach to activism is as follows:

> Active in 15 of the Pacific Island Nations, we have a unique approach of empowering young people to understand the issue of climate change and to take action to protect and enrich our islands, cultures, and oceans . . . . What we do have is a network of courageous young Pacific Islanders – from Niue to Tuvalu – that . . . are clued up about how climate change is affecting their Islands, and are ready to stand up peacefully to the fossil fuel industry . . . as warriors for their Islands have been learning new skills and campaign tactics to take on the challenge of achieving global action on climate change – the future of our islands depend on it.

350 Pacific, *The Pacific Warrior Journey*, PACIFIC CLIMATE WARRIORS, https://world.350.org/pacificwarriors/the-pacific-warrior-journey/. It has been noted that this presentation of Pacific climate justice activists as warriors is a recent shift in their image:

> [W]hile early Pacific ICT-based climate change campaigns used iconic images of Pacific Islanders leaving their homelands, more recent campaigns have leveraged social media to depict Pacific Islanders not as victims but as 'warriors'. This new imagery aims to empower Pacific Islanders and engender a regional Pacific identity that shows strength and solidarity on the Pacific's stance towards climate change.

Jason Titifanue et al., *Climate Change Advocacy in the Pacific: The Role of Information and Communication Technologie*s, 23 PAC. JOURNALISM REV. 133, 133 (2017).

137. One of the most notable examples of the Warriors' unique approach to activism, was their blockade of the largest coal port in the world located in Newcastle, Australia in October 2014 to

the lack of racial justice framing on climate justice issues may in fact be due to the dearth of scholarship and research to help inform this framing.

In seeking to help fill this gap, the purpose of this part of the Article is to suggest that advocates in activist groups, social movements, the law, and beyond consider a racial justice framing of inaction against climate change. It is hoped that this framing will be able to help change the hearts and minds of law-makers and inspire them to take meaningful action against climate change for Pacific Island peoples, and all Black, Indigenous, and people of color, who suffer disproportionately from climate change's impacts.

2. The Potential Goal of a Racial Justice Framing

It is beyond the scope of this Article to discuss and propose a number of specific end goals for climate justice advocates to pursue with this racial justice framing.[138] However, in this part, I briefly suggest that efforts around climate change litigation should be aimed at holding governments and corporations accountable for their inaction against climate change.

Globally and in international law, climate justice advocates have already framed climate justice as a youth or intergenerational justice issue. Chazan and Baldwin provide the following snapshot of this intergenerational injustice framing and its powerful impact:

> Post 2018, youth leaders are capturing media attention with sophisticated analyses and complex demands. They are calling for deep transformation of global economic systems, away from capitalist-colonial extraction, toward different ways

demand that various companies trading in fossil fuels and greenhouse gas emitting countries take responsibility for their actions and inactions. To do this, the Warriors sailed out in traditional canoes to prevent coal ships entering and leaving the port. Although they were dressed as traditional war-time warriors in their blockade, their activism was strictly peaceful, and they used traditional music, dance, oration, and storytelling rather than force to block the ships. The blockade was considered by *The Guardian* to be the second most important sustainability campaign of 2014 worldwide and was called 'the David versus Goliath campaign of the year', Karen E. McNamara & Carol Farbotko, *Resisting a 'Doomed' Fate: An Analysis of the Pacific Climate Warrior*s, 48 AUSTL. GEOGRAPHER 17, 22–23 (2017) (citing Frances Buckingham, *Top 10 Sustainability Campaigns of 2014*, THE GUARDIAN, (Dec. 24, 2014)). More recently, the Warriors demonstrated their youth and Pacific culture centered approach at the 23rd Annual Conference of the Parties to the United Nations Framework Convention on Climate Change in November 2017, which Fiji presided over. Not only did the Warriors contribute to the conference with various performances and side events, they also announced their demands for action with the Pacific Climate Change Warriors Declaration noted above. Pacific Climate Warriors*, supra* note 120; Oliver Hasenkamp & Elisabeth Worliczek*, COP23: A "Pacific COP" with "Islandised" Outcomes?*, 49 PAC. GEOGRAPHIES 12, 15, 18 (2018).

138. However, it is important to note one potential goal from Gonzalez who argues for a "just approach to climate displacement" that "should respect the perspectives and priorities of states and peoples who face actual or imminent displacement, including their demands for self-determination with respect to migration pathways and for resources to support their mobility decisions", see Gonzalez, *supra* note 68, 127-131. While it is beyond the scope of this article to engage with Gonzalez's proposals here, I posit that this approach is consistent with the aspirations of Pacific Island governments and other Pacific Island climate justice advocates mentioned above.

> of organizing societies, economies, and lives. . . . Ultimately, they are demanding intergenerational justice: calling on older generations, particularly those who have reaped the benefits of wealth accumulation and technological advancement over their lifetimes and who now hold the balance of global power, to radically change their actions, beliefs, and lifestyles now in order to prevent the mass suffering and extinction of generations to come . . . . While these youth leaders are truly remarkable, dominant media representations of youth-led climate justice uprisings depict them as lone revolutionaries within a global movement replete with generational divisions . . . .[139]

This framing has led to a number of legal actions that youth climate justice advocates have taken in international law fora.

The first one being the petition filed by sixteen children—from Tunisia, India, Palau, Argentina, Marshall Islands, Brazil, Nigeria, France, Germany, the United States, as well as the Pacific Island nation of the Marshall Islands—on September 23, 2019 to the Committee on the Rights of the Child.[140] The petition alleged that the five respondents, Argentina, Brazil, France, Germany, and Turkey, violated their rights as children under the Convention on the Rights of the Child by failing to make sufficient reductions to greenhouse gases and failing to encourage the world's biggest emitters to curb carbon pollution.[141] The rights violations claimed included violations of the right to life, health, and the prioritization of the child's best interest, as well as the cultural rights of petitioners from Indigenous communities.[142] In terms of relief, the petition asks the Committee to declare not only that the five respondents violated their rights under the Convention, but also that the "climate crisis is a children's rights crisis" and to recommend actions for the respondents regarding climate change mitigation and adaptation.[143]

In response to the petition, Brazil, France, and Germany argued that the petition was not admissible on three grounds: (1) the Committee lacks jurisdiction; (2) the petition is manifestly "ill-founded or unsubstantiated"; and

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139. May Chazan & Melissa Baldwin, *Granny Solidarity: Understanding Age and Generational Dynamics in Climate Justice Movements*, 13 STUDIES IN SOC. JUST. 244, 245 (2019). In addition to this insight, a descriptive framing analysis has found:

> Thunberg mainly identifies climate change through a crisis frame which entails an idea that there is an inherent political and moral issue in our current political and social system. Moreover, Thunberg has also framed her cause as a need for opinion, engagement as well as established a conflict between those in power and people with less influential authority.

Sofia Murray, Framing a Climate Crisis: A Descriptive Framing Analysis of How Greta Thunberg Inspired the Masses to Take to the Streets, 33 (2020) (Independent Bachelor Thesis, Uppsala University).

140. *Sacchi, et al. v. Argentina, et al.*, Communication No. 104/2019, Communication to the Committee on the Rights of the Child, 1 (U.N. Convention on the Rights of the Child, Sept. 23, 2019).

141. *Id*.

142. *Id.* at 27–30.

143. *Id.* at 7–8.

(3) the petitioners have not exhausted domestic remedies.[144] On May 4, 2020, the petitioners filed a reply asserting that the petition is admissible on three grounds: (1) the Committee has jurisdiction as the children are "directly and foreseeably injured by greenhouse gas emissions originating in Respondents' territory"; (2) their claims are "manifestly well-founded" as they are "suffering direct and personal harms now and will continue to for the foreseeable future"; and (3) pursuing domestic remedies would be "futile".[145]

Another action seeking to frame climate justice as a youth justice or children's rights issue is the complaint filed by six Portuguese youths on September 2, 2020 against thirty-three European Union member states to the European Court of Human Rights.[146] The complaint alleges that the respondents have violated their human rights under the European Convention on Human Rights by failing to take sufficient action on climate change, and seeks an order requiring them to take more ambitious actions.[147]

At the time of writing, both the Committee's and the European Court's decisions have yet to be released, which means the effectiveness or persuasiveness of the youth or intergenerational justice framing in international fora cannot yet be examined. However, given the significant work that climate justice advocates around the world have put into framing climate justice as a youth justice or children's rights issue, and the extensive research and support that have been behind these claims,[148] I posit that there is a strong chance that these decisions will result in at least one favorable finding for climate justice advocates.

Nonetheless, I argue that a racial justice framing and a racial discrimination complaint or communication in international fora such as the Committee on the Elimination of Racial Discrimination should still be considered. This is because a youth justice or children's rights framing will not necessarily serve the Black, Indigenous, and people of color who disproportionately suffer from climate change.[149] In other words, the particular needs and priorities of Black, Indigenous,

144. Commc'ns n 105/2019 (Braz.), n 106/2019 (Fr.), n 107/2019 (Ger.) (unpublished). The arguments are summarized in *Sacchi v. Arg.*, Petitioners' Reply to the Admissibility Objections of Braz., Fr., and Ger., Commc'n to the Comm. on the Rts. of the Child (May. 4, 2020), 2.

145. *Id.* at 3.

146. *Duarte Agostinho and Others v. Portugal and 32 Other States*, Eur. Ct. H.R. (filed Sept. 2, 2020).

147. *Id.* at 8-10.

148. Here, I note that the legal representation and support for the *Sacchi v. Arg.* petition comes from Hausfeld LLP (US), Hausfeld (UK) and Earthjustice.

149. It has been noted that the youth climate justice movement has largely ignored and marginalized activists of color, Chika Unigwe, *It's Not Just Greta Thunberg: Why Are We Ignoring the Developing World's Inspiring Activists?*, THE GUARDIAN (Oct. 5, 2019), https://www.theguardian.com/commentisfree/2019/oct/05/greta-thunberg-developing-world-activists ("[W]hile we continue to work towards that goal, the moral thing for western media to do is to also highlight the contributions of the black and brown saviours trying to make that happen so that when future generations talk of it, this will not be the story of a single narrative"). Furthermore, it has been observed that "by the media and public making [Thunberg] the center of youth-led climate activism, the work of many Indigenous, Black, and Brown youth activists is often erased or obscured", Nylah

and peoples of color, such as the urgent climate adaptation needs for Pacific Island peoples, could potentially be obscured or undermined in favor of more general demands that will serve children and young people globally.

I argue that a racial justice framing and a racial discrimination complaint will allow decision makers in international fora to reckon with the racist colonial histories and ongoing forces of racism that this Article has touched on. Undeniably, as the robustly researched aforementioned petition and complaint make clear, detailed legal research is required to support these claims.

Unfortunately, it is beyond the scope of this Article to conduct this research, develop this racial discrimination claim, and discuss the likelihood of this claim succeeding in international fora. However, in noting from the youth climate justice movement that advocacy in the media should precede any legal action, the next section proposes a plan to frame climate justice as a racial justice issue.

B. A Communications Plan

To guide this framing, I suggest following the advice in the Communications Toolkit produced by the social justice communications organization, The Opportunity Agenda.[150] The Toolkit is an evidence-based guide to help social justice advocates build communications strategies capable of moving "hearts, minds, and policy over time."[151]

The Toolkit recommends the following seven steps for devising a communications strategy: (1) Determine organizational goals; (2) Determine communications goals; (3) Research; (4) Framing, narrative, and message development; (5) Create an outreach strategy; (6) Integrate and implement; and (7) Implement and evaluate.[152]

While it is beyond the scope of this Article to develop the communications strategy in the depth required,[153] for step (1), the broad purpose of this plan is to persuade an international decision making body, such as the Committee on the Elimination for Racial Discrimination or the Human Rights Committee, to find that inadequate action against climate change constitutes racial discrimination under international law.

For step (2), I propose the primary target audience for this strategy to be the persuadable demographic of decision-makers in international fora, which I

Burton, *Meet the Young Activists of Color Who Are Leading the Charge Against Climate Disaster*, VOX (Oct. 11, 2019).

150. THE OPPORTUNITY AGENDA, VISION, VALUES, AND VOICE: COMMUNICATIONS TOOLKIT 2.0, 2 (2014), https://www.opportunityagenda.org/sites/default/files/2019-05/2019.05.06%20Toolkit%20Without%20Comic%20Book.pdf.

151. *Id.*

152. *Id.* at 6–8.

153. It is beyond the constraints of this Article to explore the practical steps (6) and (7), especially given no opportunity for input from the Warriors and other interested activists.

broadly assume to be people who see climate change and racism as serious issues worth addressing, but do not necessarily understand their relationship to each other.

With regard to step (3), it is not possible in this Article to conduct the required public opinion, media, and field research required.[154]

Accordingly, the central contribution of this Article is to propose an approach to step (4) around framing, narrative, and message development[155] for the Warriors and other potentially interested climate justice advocates to take in consideration. As Lakoff explains, when the current framing of an issue is not fit for purpose, there needs to be an honest "reframing" of the issue:

> Reframing is telling the truth as we see it—telling it forcefully, straightforwardly, articulately, with moral conviction and without hesitation . . . . It is not just a matter of words, though the right words do help evoke a progressive frame: . . . Reframing requires a rewiring of the brain. That may take an investment of time, effort, and money. The conservatives have realized that . . . . Moral: The truth alone will not set you free. It has to be framed correctly.[156]

For step (5), I propose a dual communications strategy to reframing that includes: (1) targeted media communications by activists that emphasizes the racism in inaction regarding change related displacement; and (2) developing legal scholarship on this racism by activist legal scholars to present a robust body of legal authority to the target audience (which the key decision-makers are likely to belong to) that they cannot ignore and dismiss as illegitimate. While the first part is aimed at changing their hearts, the second is more geared towards changing their minds.

Unfortunately, without proper media research[157] and any communications and creative expertise,[158] it is beyond the scope of this Article to propose what the first part of this reframing strategy will involve. However, it is possible and

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154. THE OPPORTUNITY AGENDA, *supra* note 150, at 6.

155. *Id.* at 14 (defining "framing" as "the identification of a set of values and themes within which we will present our issue. Because there are usually many ways to think about and talk about each issue we work on, it's important to be strategic in the way we present our story to audiences."; defining "narrative" as "the set of frames we use to tell the story of a specific issue. By identifying overarching key themes and values we want our audiences to identify with an issue, we can help to ensure a level of resonance and consistency that won't happen if we frame each sub-issue independently of a larger theme.").

156. George Lakoff, *Simple Framing* (2006), https://tmiller.faculty.arizona.edu/sites/tmiller.faculty.arizona.edu/files/Simple%20Framing_0.doc.

157. THE OPPORTUNITY AGENDA, *supra* note 150, at 6 ("Media research is an important component in this step. Regular media monitoring and analysis show trends over time in coverage and conversations and can also show how and if your strategy is working. It may also help to identify reporters and commentators who can help to convey your message.").

158. *Id.* at 23. Here, the Toolkit explains that "the fields of advocacy and art can and should work for even more intentional alignment and alliances. Socially engaged artists, media makers, and cultural organizations play a vital role in building the national will for equal and greater opportunity."

important to explain the second part of this dual strategy, as it may initially appear to be unorthodox, if not inappropriate, for climate justice advocates to adopt.

This proposal to develop legal scholarship on the racism in climate change inaction is inspired by a key tactic of a movement that has achieved success: the movement led by the National Rifle Association (NRA). That movement, although on the other side of the political spectrum, resulted in the law providing an unfettered right of individual gun ownership in the United States under the Second Amendment.[159] As Michael Waldman argues, in order to pave the road to the US Supreme Court's decision in *District of Columbia v. Heller*,[160] the NRA promoted a "fusillade of scholarship and pseudo-scholarship insisted that the traditional view [of the Second Amendment]—shared by courts and historians—was wrong" and had to be "overturned."[161] Waldman explains how much of this scholarship was poorly written and evidenced, and some of it was downright "funny," but nonetheless, "all this focus on historical research began to have an impact. And eventually these law professors, many toiling at the fringes of respectability, were joined by a few of academia's leading lights."[162]

Of course, the Warriors and other activists do not have the resources and political maneuvering, the NRA possessed to make this "profusion of scholarship" as powerful. However, I argue that a commitment to developing a similar body of scholarship is worth serious consideration by activists for two reasons.

First, while the racial justice reframing of climate change is indeed honest, key decision-makers may actually see it as dishonest and "funny", just like how decision-makers in the US first thought Second Amendment arguments were before the "profusion of scholarship" helped them to believe otherwise.[163] Therefore, to effectively address the robust forces of white privilege and unconscious racism underpinning of the protection deficit, a body of legal scholarship committed to transforming the biased views of the target audience (and therefore decision-makers) will go a long way in building what is a legitimate academic and legal basis for racial discrimination claims to them. It should be noted that this body of scholarship would not be poorly evidenced and "funny" like the one fostered by the NRA on the road to *Heller*, but would instead be dignified, robust, and persuasive.

Secondly, while activists engaging in this reframing may lack resources and political connections, I posit that the potential for radically imaginative

159. Michael Waldman, *The Road to Heller*, LEGAL CHANGE: LESSONS FROM AMERICA'S SOCIAL MOVEMENTS, 53, 53–54 (Jennifer Weiss-Wolf & Jeanine Plant-Chirlin ed., 2015).

160. D.C. v. Heller, 554 U.S. 570 (2008).

161. Waldman, *supra* note 159, at 56.

162. *Id.* at 57. In describing the bi-partisan, cross-party influence of the scholarly movement, Waldman notes that "Levinson was soon joined by Akhil Reed Amar of Yale and Harvard's Laurence Tribe. These prominent progressives had differing opinions on the amendment and its scope. But what mattered was their political provenance — they were liberals! (One is reminded of Robert Frost's definition of a liberal: someone so open-minded he will not take his own side in an argument.)".

163. *Id.* at 56–57.

scholarship designed to serve and empower radical social justice movements is limitless. Here, I draw on the inspiring words of Amnar Akbar, in arguing the power of radically "reimagining" the law as demonstrated by the Vision for Black Lives movement:

> [V]isions of . . . radical social movements offer an alternative epistemology for understanding and addressing structural inequality. By studying not only the critiques offered by radical social movements, but also their visions for transformative change, the edges of law scholarship can be expanded, a deeper set of critiques and a longer set of histories—of colonialism and settler colonialism . . . and a bolder project of transformation forwarded. These visions should push legal scholars toward a broader frame for understanding how law, the market, and the state co-produce intersectional structural inequality . . . . [164]

Therefore, in the spirit of expanding the "edges of legal scholarship," I urge other scholar-activists in CRT, climate justice, and other scholarly movement groups to learn and be inspired by the radical bravery of climate justice advocates on the ground and build on the foundations of this Article in order to "reimagine" and work towards a world where Black, Indigenous, and people of color are able to hold wealthy, high-contributing states accountable for their climate and racial injustices.

V. CONCLUSION

While the decision of the Committee in *Ioane Teitiota v. New Zealand* was celebrated, this Article has adopted a CRT lens to expose the racism perpetuated by the predominantly white decision-makers. With their judicial white privilege, the Committee and the courts legitimized poor living standards for displaced Black, Indigenous, and people of color, provided inadequate and poorly evidenced lines of reasoning to avoid holding majority-white countries accountable for their continued environmental harms, and obscured the racist historical roots of climate vulnerability in Kiribati and the wider Pacific Islands that continue to grow today.

It is tempting with this racial justice framing to immediately pursue racial discrimination claims to overturn the *Teitiota* precedent. However, this Article

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164. Amnar A. Akbar, *Towards a Radical Reimagination of Law*, 93 N.Y.U. L. REV. 405, 405 (2018). As Akbar concludes at 479:

> [The Movement for Black Lives] wants to build another world, organized very differently than the one we have inherited. It is not just deconstructive and critical; it is reconstructive and visionary, pushing for a radical reimagination of the state and the law that serves it. It is here that legal scholars may have the most to learn from, and the most to contribute, if we imagine collaboratively with these movements. As legal scholars, we are too often unwitting volunteers in a project of law reform that addresses racial capitalism's brutal excesses, effectively extending its lifespan. These movements, and the histories they point to, suggest this is a fool's errand. It is time to turn to something new, time for a radical reimagination of the state and of law—time to imagine with social movements.

acknowledges that there is a tension between overturning the *Teitiota* precedent to make major reforms for climate change-related displacement at international law, with the calls from Pacific Islanders to avoid an international focus on displacement narratives and their push for the international community to fulfill their mitigation obligations and support adaptation measures.

In opting to support the latter calls, this Article argues that the insights gained from the CRT critique demonstrates that climate justice advocates should consider pursuing a racial justice framing of climate justice to make racial discrimination claims in international fora that are aimed at persuading states to improve their mitigation and adaptation measures.

Accordingly, this Article draws on social justice communication principles to propose for a racial justice framing of climate justice. This framing involves, but is not limited to: targeted media communication that inspires action by exposing and emphasizing the racism in climate change inaction and developing radically reimaginative legal scholarship that builds on the insights of this Article. Ideally, this framing will help keep stories like *Movers* firmly in the realm of outrageous and baseless fiction.