

Unrecognized and Unprotected: Climate Refugees and International Legal Gaps

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Introduction

Climate change has become increasingly rapid¹ in its devastation, particularly for Small Island Developing States (SIDS), such as Vanuatu and Kiribati. The threat that climate change poses to these nations is often overlooked — sinking states in the Pacific due to sea level rise. While it may be argued that complete immersion of territory would result in the extinction of a state, potentially rendering its citizens stateless, this assumption is legally contested and not necessarily true. The International Court of Justice (ICJ) would likely follow the prevailing legal argument that statehood persists in the absence of physical territory, due to the widespread international recognition of these states and their continued governmental functionality.² If this interpretation is correct, submerged state citizens would not thereby become automatically stateless, but still would remain displaced and in need of immediate legal protection as climate refugees.³ This research specifically seeks to investigate and inform readers of the urgency surrounding the unprecedented legal and humanitarian crisis affecting climate refugees and stateless persons. Existing international legal frameworks, such as the 1951 Refugee Convention and its 1967 Protocol, do not offer explicit protection for the people impacted by sinking states. Furthermore, this paper aims to examine, through both a policy and legal perspective, how the International Court of Justice (ICJ) Advisory Opinion could shape consecutive action taken in favor of these vulnerable populations. This includes legal obligations to recognize, protect, and preserve the rights of displaced populations and climate refugees, beyond territorial, political, and legal borders. Lastly, for this analysis, international human rights law, customary law, environmental law, and theories of deterritorialized statehood will be explored.

A Legal Vacuum

Ambiguous definitions

Firstly, and most importantly, it is crucial to define and distinguish the status of a climate refugee. In general terms, “climate refugee” refers to persons forced to leave their home as a result of the effects of climate

¹ Intergovernmental Panel on Climate Change. “Climate Change 2023: Synthesis Report,” *Intergovernmental Panel on Climate Change*, 2023. <https://www.ipcc.ch/report/ar6/syr/>.

² Rosemary Rayfuse, *International Law and Disappearing States: Maritime Zones and the Preservation of Statehood* (University of New South Wales Faculty of Law, 2011)

³ Maxine Burkett, “The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood, and the Post-Climate Era,” *Climate Law* 2, no. 3 (2011): 345–374; United Nations Human Rights Council, “The Slow Onset Effects of Climate Change and Human Rights Protection for Cross-Border Migrants,” *UNHRC*, 2020, <https://www.ohchr.org/en/climate-change/reports>.

change on their environment.⁴ To take a more precise definition, “a key characteristic of climate change-related migration is that it is in response to a long-term trend or set of trends, and a return to environmental conditions that existed before migration is likely to be unobtainable.”⁵ This includes populations displaced from rising sea levels, natural disasters, droughts, and related forms of environmental degradation. Currently, nations most at risk of encountering mass displacement due to climate change are in Melanesia, Micronesia, and Polynesia.⁶

Legal invisibility

The term “climate refugee” is currently unrecognized under international law, as opposed to news headlines. The United Nations High Commissioner for Refugees (UNHCR) notes, “people fleeing environmental degradation are not considered refugees under the 1951 Refugee Convention”⁷ unless they also face persecution based on race, religion, nationality, social group or political opinion. While still recognized as citizens of the country they are fleeing, climate-displaced populations fall into a legal void, becoming unrecognized in the eyes of international law. Even in life-threatening conditions, these individuals are not entitled to asylum, resettlement programs, or protection—an unacceptable fate. A more crucial question, perhaps, would be how domestic legal systems consider these populations. Nonetheless, the decision of the UN Human Rights Committee in *Teitiota v. New Zealand* (2020)⁸ demonstrated that the principle of non-refoulement— which forbids people from being sent back to areas where their life or freedom would be at risk⁹— could also apply to climate change displaced individuals. The Committee ruled that while climate refugees are not automatically eligible for refugee protection, states may not send people

⁴ *Oxford English Dictionary*, s.v. “climate refugee,” accessed May 31, 2025, <https://www.oed.com/view/Entry/60318374>.

⁵ John R. Campbell, “Climate-Change Migration in the Pacific,” *The Contemporary Pacific* 26, no. 1 (2014): 2, <https://www.jstor.org/stable/23725565>.

⁶ International Organization for Migration, “Climate Risk Index,” *Environment and Climate Change Division of Germanwatch*, 2025, <https://www.germanwatch.org/sites/default/files/2025-02/Climate%20Risk%20Index%202025.pdf>.

⁷ UNHCR, *Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters*, 2020, <https://www.refworld.org/policy/legalguidance/unhcr/2020/en/123356>.

⁸ UN Human Rights Committee, “Ioane Teitiota v. New Zealand, Communication No. 2728/2016, CCPR/C/127/D/2728/2016,” *Climate Case Chart*, 2020, para. 9.4, <https://climatecasechart.com/non-us-case/un-human-rights-committee-views-adopted-on-teitiota-communication>

⁹ “Ioane Teitiota v. New Zealand,” para. 9.7.

back to a circumstance in which the effects of climate change (such as rising sea levels or scarce resources) render life impossible.¹⁰

The Teitiota decision demonstrates that nations have to address this matter in their legislation. Since there is no fixed "climate refugee" status in international law, national authorities and courts have a significant role in deciding how to protect such persons.

Weak frameworks

The 1954 Convention Relating to the Status of Stateless Persons or the 1961 Convention on the Reduction of Statelessness also fails to recognize climate refugees. These treaties do not consider the possibility of nationality becoming 'invalid' when a state loses its functionality and stability criteria, as outlined in the 1933 Montevideo Convention on the Rights and Duties of States.¹¹ Stability criteria include a defined territory and a permanent population, while functionality criteria include a representative government and the ability to enter into relations with other states. If a state ceases to have territory due to rising sea levels or natural disasters, its ability to maintain legal personality under international law is at risk.

For instance, Vanuatu's submission especially emphasized that "extinction of statehood due to climate change would violate fundamental human rights," and urged the ICJ to interpret statehood criteria dynamically.¹² Germany also noted that international law must evolve to ensure the "sovereign equality" of drowning states.¹³ Such arguments, still not written into codified form, echo an emerging consensus that international society cannot afford inaction.

Soft law and human rights frameworks also fall short. As mentioned, the UNHCR acknowledges that climate-displaced persons fall outside the traditional definition of a refugee, instead calling for alternative protection pathways.¹⁴ However, without a binding force, these proposals remain void and aspirational. Generally, in international law, the lack of enforcement mechanisms renders treaties and conventions

¹⁰ "Ioane Teitiota v. New Zealand," para. 9.11.

¹¹ "Montevideo Convention on the Rights and Duties of States," December 26, 1933, 165 L.N.T.S. 19.

¹² Vanuatu, "Written Statement of the Republic of Vanuatu," *International Court of Justice*, March 2024, paras. 112, <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-WRI-22-00-EN.pdf>.

¹³ Germany, "Written Statement of the Federal Republic of Germany," *International Court of Justice*, March 2024, <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-WRI-15-00-EN.pdf>, para. 29.

¹⁴ UNHCR. "Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters."

ineffective and weak.¹⁵ Nonetheless, displacement continues to grow, as the Internal Displacement Monitoring Centre (IDMC) reported 28.3 million people displaced by weather-related disasters in 2024.¹⁶ Since 2021, the World Bank projects that climate change could displace over 216 million people across six regions by 2050.¹⁷ Despite these urgencies, there is still no official convention or mechanism to protect these vulnerable populations.

Case Studies

Kiribati and Tuvalu

Without a doubt, the most affected nations are the Small Island Developing States (SIDS) that lie in the Pacific. These nations include low-lying islands, Tuvalu and Kiribati, which have experienced rising sea levels contaminating freshwater supplies and submerging parts of entire communities' villages. In 2014, the government of Kiribati purchased land in Fiji as a contingency plan. While symbolically significant, the acquisition provided no clear legal status to Kiribati citizens who might relocate.¹⁸

Tuvalu, on the other hand, entered the Australia-Tuvalu Falepili Union Treaty in 2023. This bilateral treaty foresaw the gradual relocation of Tuvaluans to Australia with a special visa, preserving Tuvalu's heritage. As benevolent as this treaty sounds, it depends highly on the willingness of host states, and cannot serve as a global solution for large-scale displacement.¹⁹

Latin America and Haiti

The last case can be observed in Latin America, as Chile and Brazil have implemented special visa programs following the Australian model where Haitians displaced due to climate change are offered limited legal recognition.²⁰ The Platform on Disaster Displacement (PDD), a state-led initiative, has also recommended

¹⁵ Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005), 203–205.

¹⁶ Internal Displacement Monitoring Centre. "Global Report on Internal Displacement 2024," *Internal Displacement Monitoring Centre*, 2024. <https://www.internal-displacement.org/publications/global-report-on-internal-displacement-2024>.

¹⁷ World Bank. "Groundswell Part II: Acting on Internal Climate Migration," *World Bank*, September 2021, <https://hdl.handle.net/10986/36248>.

¹⁸ Government of Kiribati. "Kiribati Buys Land in Fiji," *Government of Kiribati*, 2014.

¹⁹ Government of Australia and Government of Tuvalu. "Australia-Tuvalu Falepili Union Treaty," *Government of Australia and Government of Tuvalu*, 2023.

²⁰ Platform on Disaster Displacement. "Mapping the Protection Landscape for People Displaced Across Borders in the Context of Disasters and Climate Change," 2022.

cross-border temporary protection for individuals fleeing disasters, but once again, like many of these initiatives, the guidelines are non-binding.²¹

The common factor among these two cases is that climate-displaced populations remain outside the reach of existing refugee protection systems. There is uncertainty in granting asylum, social services, and even basic human rights— a scenario that should not be a reality for any human being. Additionally, many mechanisms, common to the dilemma of international law, lack proper enforcement and implementation, becoming useless, to a degree.

Contextualizing displacement

Referring to *Figure 1*, added below, John R. Campbell's migration framework contextualizes the various factors of displacement, resulting in a spectrum. The diagram categorizes movement from voluntary to forced migration, determined by factors such as atoll submersion, salinization, drought, resource scarcity, and environmental extremes. The spectrum illustrates how populations, especially from SIDS, respond to severe climate change phenomena by either relocating temporarily, migrating internally, or undergoing permanent displacement. This table addresses how, in legal systems and treaties, these distinctions are not recognized at all to begin with, and none of these displacements are either. Current international legal frameworks fail to accommodate the needs of these populations.²²

²¹ Platform on Disaster Displacement. "Recommendations for the Protection of Cross-Border Disaster-Displaced Persons," 2021, https://disasterdisplacement.org/wp-content/uploads/2024/10/PDD_Good_Practices_Report_2024.pdf.

²² John R. Campbell, "Climate-Change Migration in the Pacific," *The Contemporary Pacific* 26, no. 1 (2014): 1–28. <https://www.jstor.org/stable/23725565>.

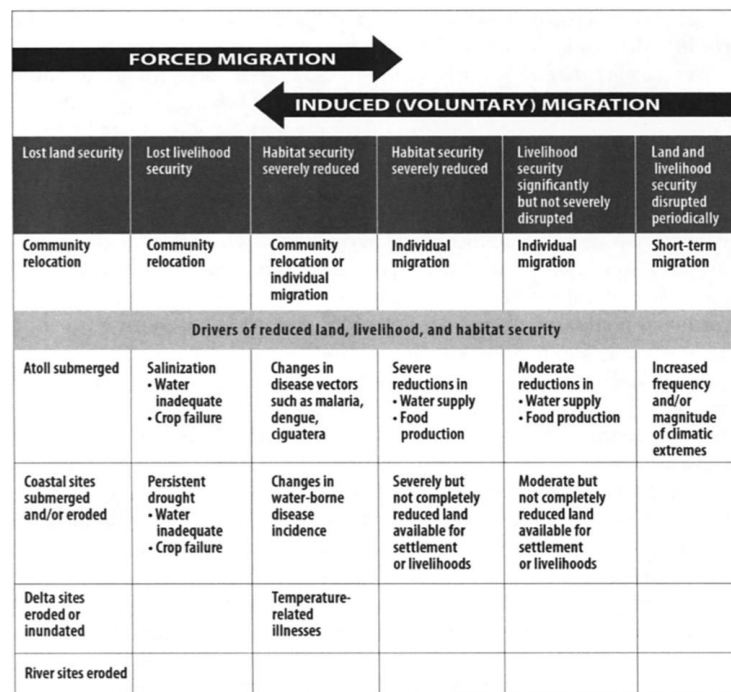


Fig. 1. Forced and induced migration in the context of climate-change effects on land, livelihood, and/or habitat security.

Source: Campbell and Bedford (2013).

From Recognition to Rights

Legal instruments

To combat the legal invisibility that these populations face, there are only two ‘vague’ strategies that have been proposed. The first involves revisiting and amending the 1951 Refugee Convention, in hopes of expanding its scope and including climate refugees. However, this approach would take far too long, needing the approval and willingness of states to open asylum systems to a new category of claimants, some of whom are resistant.

The second pathway would require the creation of a new legal instrument, specifically applicable to climate-displaced persons. Legal scholars such as Jane McAdam and Maxine Burkett have advocated for a treaty or a protocol that recognizes this category of refugees and guarantees legal protection and preservation.²³ This includes mobility rights, residence, and nationality preservation.²⁴ Regional mechanisms

²³ Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press, 2012); Maxine Burkett, “The Nation Ex-Situ,” *Climate Law* 2, no. 3 (2011): 345–374.

²⁴ Kälén, Walter. “Conceptualising Climate-Induced Displacement.” In *Research Handbook on Climate Change, Migration and the Law*, edited by Benoît Mayer and François Crépeau, Edward Elgar, 2017.

like the Cartagena Declaration in Latin America or humanitarian visas in certain countries could offer temporary solutions, but must be adapted and strengthened in the long term, as climate refugees will only increase by 2050. Alternatively, the Nansen Initiative, a precursor to the PDD, also explores policy responses to cross-border disaster displacement, but similarly lacks binding authority.²⁵

Additionally, the American Convention on Human Rights (ACHR) could also serve as a relevant instrument. It prohibits the collective expulsion of foreigners through its Article 22(8)²⁶, and Article 5²⁷ (right to be treated humanely), and could prevent returns to inhuman conditions. The Inter-American Court of Human Rights (IACtHR) has progressively interpreted these articles: In its 2024 advisory opinion (requested by Colombia/Chile),²⁸ the Court underscored states' obligation to prevent cross-border displacement from climate harm. Amicus briefs cited *Teitiota v. New Zealand*²⁹ to argue that ACHR protections must include climate migrants. However, like other regional regimes, the application of ACHR is patchy,³⁰ meaning that there is a need for a dedicated global regime.

International Court of Justice Advisory Opinion

The most authoritative measure may be an advisory opinion from the International Court of Justice on the legal obligations of states to recognize, protect, and preserve climate refugees. Requested by the UN General Assembly, such an opinion could strengthen customary laws and human rights regarding refugee crises, clarifying duties towards them even if non-binding.³¹ More specifically, the ICJ's Advisory Opinion (requested by the UNGA in 2023) could clarify state obligations under human rights law (such as Teitiota's non-refoulement standard) and refugee law (1951 Convention). The ICJ could also affirm the continuity of statehood for submerged nations (such as the SIDS) via mechanisms such as maritime zones or "deterritorialized sovereignty". For instance, Vanuatu's 2024 submission included "Extinction of statehood due to climate change violates the right to self-determination (ICCPR Art. 1) and demands reinterpretation

²⁵ International Court of Justice. *Legal Consequences of the Separation of the Chagos Archipelago*, Advisory Opinion, 2019.

²⁶ "American Convention on Human Rights," 22 November 1969, OAS Treaty Series No. 36, Art. 22(8).

²⁷ "American Convention on Human Rights," Art. 5(1).

²⁸ Inter-American Court of Human Rights, "Advisory Opinion OC-XX/24 on the Climate Emergency and Human Rights," 7 February 2024, para. 89.

²⁹ Center for Justice and International Law (CEJIL), "Amicus Curiae Brief to IACtHR in Advisory Opinion OC-XX/24," 15 November 2023, para. 17.

³⁰ Jorge Contesse, "The Promise and Limits of the Inter-American Human Rights System" *Yale Journal of International Law* 47 (2022): 321, 345-348.

³¹ Nansen Initiative. "Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change," *Nansen Initiative*, 2015.

of Montevideo Convention criteria."³² While Kiribati's 2023 oral arguments and Germany's 2024 written statements highlighted that "the 1951 Refugee Convention must evolve to include displacement from uninhabitable environments"³³ and "high-emitter states bear responsibility for cross-border displacement under the no-harm principle."³⁴

The Inter-American Court of Human Rights

The IACtHR's 2024 advisory opinion, as mentioned previously, was requested by Colombia and Chile, adding to the ICJ by shedding light on regional human rights obligations. For instance, the principle of non-refoulement under ACHR article 22(8) to prohibit returns to climate change devastated areas could be widened to a regional level. Another example, Brazil's submission, argued that climate change displacement creates "due diligence" duties under ACHR Article 1(1), emphasizing state responsibility.³⁵

The International Tribunal for the Law of the Sea

The ITLOS advisory opinion of 2023 on climate obligations under UNCLOS is also highly relevant to climate refugees, asserting maritime rights and the duty to prevent harm. Tuvalu argued that sea-level rise must not limit maritime zones, which are critical for relocated populations' economic survival.³⁶ Furthermore, the Marshall Islands linked states' failure to cut emissions (a UNCLOS violation) to forced migration from coastal zones.³⁷

Collective recognition

Lastly, various legal scholars (such as Rayfuse and Biurkett) have debated redefining the requirement for statehood and recognizing a new form of legal personality—"deterritorialized statehood", to protect the rights of nationals from disappearing nations such as those in the Pacific. If a state can fulfil all other roles of a nation by having (1) a permanent population, (2) a government, and (3) the capacity to enter into relations with other states, then its international status and obligations towards the international community could

³² Vanuatu, "Written Statement of the Republic of Vanuatu," *International Court of Justice*, March 2024, <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-WRI-22-00-EN.pdf>, para. 112.

³³ Kiribati, "Oral Argument Transcript", *International Court of Justice*, 2023, 14.

³⁴ Germany, "Written Statement of the Federal Republic of Germany," *International Court of Justice*, March 2024, <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-WRI-15-00-EN.pdf>, para. 29.

³⁵ Brazil, "Amicus Brief to IACtHR" (2024), para. 12.

³⁶ Tuvalu. *Written Comments to the International Tribunal for the Law of the Sea*, 2023, paras. 40–45.

³⁷ Marshall Islands, "Oral Pleadings to International Tribunal for the Law Of the Sea", 2023, Day 2, 11:45–12:30.

still be kept. Although legally complex, this type of collective recognition would allow for the challenge of climate refugees to be acknowledged on an international scale, leveraging more support.³⁸

Key ICJ advisory proceedings have been from Vanuatu³⁹ and Germany⁴⁰ in 2024, arguing "statehood cannot be contingent on territory alone, where climate change forcibly displaces populations. International recognition and governance capacity must suffice." The Marshall Islands have also brought forth crucial arguments in 2023, emphasising "our maritime boundaries and diplomatic relations demonstrate ongoing state functionality, irrespective of land loss."⁴¹ There is scholarly consensus among authors as well, such as Rayfuse, who proposes fixed maritime zones to keep statehood without terrestrial territory,⁴² and Burkett's idea of a "nation-ex-situ", where governments operate extraterritorially.⁴³ However, opposing states such as Australia in 2024 ICJ proceedings argue that this would "undermine sovereignty's territorial basis."⁴⁴ More generally, there is also a lack of precedent for non-territorial UN membership.

Conclusion

In conclusion, there are considerable gaps in the international legal frameworks that currently exist in providing recognition and protection for climate refugees. Climate change is advancing, and populations in states at risk, such as the SIDS, are only growing, posing a risk of mass displacement without the possibility of asylum by 2050. Refugee law remains narrow, unadapted, and outdated, and now, so does the 1933 Montevideo Convention, in terms of defining statehood and territory. Climate refugees are a 'grey area' of international law, which limits and challenges the actual aid that they can currently receive. Soft laws and international law lack enforcement, and real-world cases show that more legal action must be taken by both national legislation and the international community in preserving the rights of these vulnerable populations.

The way forward is by demanding both political and legal justice, as well as flexibility, to accommodate the needs and challenges faced in the 21st century. Whether through updated protocol, a new treaty, an advisory opinion, or a reinterpretation of existing treaties, actions speak louder than words for these categories of individuals. It is not by choice that legal justice is given, but by necessity. Without the most

³⁸ Emma Allen, "Climate Change and Disappearing Island States: Pursuing Remedial Territory," *Brill Open Law*, 2018.

³⁹ Vanuatu, "Written Statement to ICJ," para. 118.

⁴⁰ Germany, "Written Statement to ICJ," para. 31.

⁴¹ Marshall Islands, "Oral Arguments to ICJ" 9:22–10:05.

⁴² Rosemary Rayfuse, "International Law and Disappearing States," *UNSW Press*, 2011, 52–55.

⁴³ Maxine Burkett, "The Nation Ex-Situ," *Climate Law* 2, no. 3 (2011): 350–352.

⁴⁴ Australia, "Written Statement to ICJ," para. 67.

fundamental rights, the most vulnerable will remain the most invisible. Thus, the international community as a whole must act before this crisis reaches the point of no return, and countless lives are lost.

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