

# Navigating the Legal Framework of Sinking Countries and Climate Migrants in International Law

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## Abstract

While most discussions on climate change focus on mitigating its impacts, there is consensus that climate change will have widespread impacts that require preparedness to adapt. Climate change drives human migration domestically and internationally due to the need for safer, more stable living conditions, especially in countries at risk of sinking. This paper examines the legal status of sinking countries and the legal protection of climate-induced migrants through a statutory and conceptual approach. The study reveals significant gaps in the current international legal framework, highlighting the urgent need for comprehensive policies and legal instruments to protect the rights and dignity of climate-induced migrants and to address the unique challenges faced by sinking countries.

**Keywords:** Climate Change, Climate Migrant, Sinking Countries.

## I. Introduction

Throughout the course of international relations, the physical disappearance of an entire nation has never been witnessed. However, the drastic climate changes observed over the past few decades have raised the alarming prospect of such a phenomenon becoming a reality. Climate change has triggered a global rise in air temperatures, leading to the accelerated melting of ice and snow. The most concerning consequence of this phenomenon is the global rise in sea levels. This poses an existential threat to small island nations that lie just a few meters above sea level. In fact, there is a real possibility that entire territories of these nations could be submerged entirely.

A recent study has detailed regions worldwide that are susceptible to submerge to the water. This research, titled "Unprecedented Threat to Cities from Sea Level Rise in Centuries," was conducted by a consortium of experts from various international institutions, including Climate Central in the United States. The study notes that under a scenario of global warming up to 4°C and a rise in average sea levels of about 8.9 meters over the next 200 to 2000 years, approximately 50 cities globally will require new mitigation efforts (if feasible) or even face the loss of their territories, partly or entirely. Most of these 50 cities are situated in Asia. The regions of East, Southeast, and South Asia are projected to bear the greatest impacts, both in this century and beyond. Scientists have projected these scenarios centuries into the future, with various temperature increase levels of 1.5, 2, 3, and 4°C.

Climate change is a significant issue for Earth's ecosystems. UN Secretary-General Antonio Guterres has stated that we are no longer experiencing global warming but facing it. Several causes include increased consumption of fossil fuels, deforestation, agricultural and livestock industries employing excessive chemical fertilizers, resulting in the emission of dangerous greenhouse gases such as nitrous oxide. About 62 percent of nitrous oxide emissions come from agricultural products. Livestock, such as cattle and goats, also contribute significantly to methane emissions into the atmosphere. Climate change has real and visible impacts, including ongoing sea level rise threatening many islands. Despite efforts by various international organizations, including the UN, to address this issue, climate change continues unabated, bringing serious consequences.

One of the most striking impacts of rising sea levels is the threat of submersion faced by low-lying islands. Most of these islands are located in the Pacific nations, often referred to as "floating continents." These islands are extremely small, with maximum elevations only about 12 meters above sea level, some as low as 1.83 to 2 meters above sea level. Sea level rise due to climate change threatens fertile land in coastal low-lying areas, significantly impacting rural income, food security, and commodity exports. By the middle of this century, sea level rise will affect nearly one billion people in the Asia-Pacific region. For small island nations in the Pacific such as Nauru, the Solomon Islands, Vanuatu, and Tuvalu, rising sea levels pose a threat to their survival.

While the Asia-Pacific region suffers from the impacts of climate change, it is also a primary source of the issue. The Asia-Pacific region generates approximately half of the global carbon dioxide (CO<sub>2</sub>) emissions and is home to five of the largest greenhouse gas-producing countries. Considering Asia's significant contribution to current emissions and expected emission growth in the future, mitigation measures and efforts by countries such as China and India to control emissions will be crucial in global efforts. In addition to influencing climate change, emissions from coal-fired power plants, carbon-intensive heavy industries, motor vehicles, agriculture, and air pollution issues have caused serious problems, including dangerous levels of particulate matter in the air. The use of fossil fuels must be limited to reduce air pollution, which is a leading cause of death and respiratory diseases in developing countries in Asia. Climate change threatens economic growth, livelihoods, productivity, and well-being across countries in this region. However, fiscal policies can play a crucial role in addressing these issues. In a recent paper, we discuss how policymakers in the Asia-Pacific region can accelerate mitigation and adaptation efforts, using fiscal policies to facilitate the transition to a low-carbon economy. (Alonso, etc., 2021).

Vanuatu recently urged the world to take serious action to address climate change in order to protect its citizens threatened by rising sea levels. In his speech at the 76th United Nations General Assembly, Prime Minister of Vanuatu, Bob Loughman, stated that climate change is the greatest threat to his country and other island nations worldwide. Tuvalu's Foreign Minister, Simon Kofe, even delivered a speech at the United

Nations Climate Conference (COP 26) while standing in the midst of seawater. This action was taken to demonstrate the extent to which Pacific island nations are at the forefront of confronting climate change. Simon Kofe's photo, standing at a podium amidst the sea dressed in a suit and tie, with rolled-up pants, went viral on social media and drew global attention to Tuvalu's struggle against sea level rise due to climate change.

Countries in the Asia-Pacific region have ratified the Paris Agreement and committed to addressing climate change and its impacts. The Boe Declaration of 2018 stated that climate change is the greatest threat to the security and well-being of Pacific communities. Additionally, the 2021 Declaration on the Preservation of Maritime Zones in the Face of Sea Level Rise related to Climate Change and the 2050 Strategy for the Blue Pacific Continent, supported by leaders of the Pacific Island Forum, were adopted last year. Relevant Regional Pacific Security Assessment Guidelines for the purpose are in the final stages of development, and an upcoming General Assembly resolution will seek advisory opinions from the International Court of Justice on states' obligations in addressing climate change.

Sea level rise is not only a threat in itself but also amplifies other threats. Rising sea levels endanger lives, disrupt access to clean water, food, and healthcare, while saltwater intrusion can devastate livelihoods and economies, especially in key sectors such as agriculture, fisheries, and tourism. According to the latest data from the World Meteorological Organization (WMO), global sea levels have risen faster since 1900 compared to the previous three thousand years. The global oceans have experienced faster warming in the past century than in the last 11,000 years, and even if climate change is limited to 1.5°C, sea level rise remains significant. If temperatures rise by 2°C, sea level rise could double, indicating that island nations are at risk of submersion under various scenarios.

The considerations of the International Law Commission on the topic "Sea Level Rise in Relation to International Law," along with adopted regional and cross-regional declarations such as the "Declaration on the Preservation of Maritime Zones in the Face of Sea Level Rise" from the Pacific Islands Forum on Sea Level Rise, emphasize the importance of maintaining or "freezing" baseline and outer limits of maritime zones to uphold legal stability and security. This means that sea level rise cannot be used as a reason to terminate or withdraw from agreements that have established maritime boundaries. Furthermore, in facing the possibility of de facto statelessness situations, various actions must be taken, including safeguarding the basic rights and identity of individuals forced to reside in third-country territories. Issues of citizenship, national identity, refugee status, state responsibility, access to resources, and maritime jurisdiction must also be addressed. The international community needs to consider how

to uphold the principle of self-determination and maintain statehood continuity after territories are threatened with loss.

The potential submersion of these countries raises various questions concerning their statehood status. Subsequently, if these countries were to submerge, would their sovereignty automatically be nullified? There is also the possibility of population relocation and the future status of relocated citizens. Additionally, this includes considerations regarding the status of the country's membership in international organizations.

## II. Method

This article employs the Statute Approach and the Conceptual Approach. The Statute Approach involves examining legislation pertinent to the legal issues under investigation. Subsequently, the Conceptual Approach is based on perspectives and doctrines that have evolved within legal science. By studying these doctrinal views in legal science, researchers will uncover ideas that give rise to legal understandings, legal concepts, and legal principles relevant to the issues at hand.

## III. Results

### A. *Status of Singking Countries in International Law*

In accordance with Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States, hereinafter referred to as the Montevideo Convention, there is a general consensus that a state, as a subject of international law, must possess the following qualifications such as; permanent population, defined territory, government, and the capacity to enter into relations with other states.

The issue arises when a state loses its territory. The majority view among legal scholars is that the loss of one of the constitutive elements under the Montevideo Convention results in the cessation of the state or the end of its status as a state. Marek argues that a state ceases to exist if its territory disappears, thus, in his view, the loss of a state's territory necessarily implies the end of its statehood. Similarly, Carven asserts that when a state's territory submerges, it logically follows that the state has ceased to exist. In contrast, Burkett contends that the loss of a state's territory does not automatically infer the end of the state. However, the prevailing view among legal scholars is that the disappearance of a state's territory can be considered as the cessation of the state itself.

Since its establishment over 80 years ago, each of these qualifications has been further elaborated. For instance, the requirement that a state must have a defined territory does not imply that its borders must be finalized and definitive at the time of recognition. Similarly, while it is undisputed that a state must have a permanent population, merely having people in the territory is not enough to establish statehood. It is also necessary for

the political leadership of the new state to be recognized as having authority. Moreover, there is no specific minimum size requirement for statehood in terms of either territory or population. The requirement for a state to have a government means not only that it must be capable of self-governance but also that it must be genuinely independent and not under de facto colonial control. Additionally, the capacity to engage in relations with other states now includes a broader range of entities and international organizations beyond traditional state actors.

What happens if one of those criteria above are not fulfilled? The concept of statehood and the rise of new states have been extensively studied, whereas the decline of states has received less attention. This is primarily because instances of state disappearance are uncommon in modern times. Since 1816, only nine out of 207 states that ceased to exist have disappeared since 1945. Modern instances of state disappearance typically stem from changes in governance conditions rather than physical alterations in population or territory. There are three recognized forms of state disappearance linked to governance changes: conquest, disintegration, and merger. Of these, conquest is largely seen as outdated under international law, which now asserts that external military aggression does not lead to a state's dissolution. A clear example is Iraq's annexation of Kuwait in 1990, declared null and void by United Nations Security Council Resolution No. 662, urging states and organizations not to recognize it.

Conversely, disintegration and merger are now the most common forms of state disappearance. For examples, the dissolution of the Soviet Union, Czechoslovakia, and Yugoslavia in the early 1990s. Significant mergers in recent decades include the formation of Tanzania through the union of Tanganyika and Zanzibar in 1964, the forced unification of North and South Vietnam in 1975, the reunification of West and East Germany in 1990, and the merger of the Yemen Arab Republic and the People's Democratic Republic of Yemen in 1990. In each of these cases, the process described as the disappearance of a state actually signifies a shift in sovereign authority over a territory, understood through the principles of state succession where sovereignty transitions from one state to another.

It is different when there is a loss of effective government, population, or territory. The loss of a government or the effectiveness of governance tends not to result in the disappearance of a state in the modern era. There are several countries without an effective government that are still recognized as states by the international community, often for an extended period. For instance, Somalia fragmented into several regions in the 1990s. Despite Somalia's inability to fulfill its duties and obligations, no effort was made to declare the state extinct or to withdraw recognition of its sovereignty. Somalia continues to participate in UN forums. In such cases, the prevailing view is that the loss of government or effective governance is temporary and does not affect the statehood

status of a country. This reflects the understanding that statehood is a resilient concept, where the international community may sustain recognition despite internal challenges.

Conversely, the complete loss of population would indeed pose far more serious challenges to the continuity of a state. However, such a scenario is unlikely to occur, except perhaps in the aftermath of natural disasters necessitating total evacuation, though no such cases are recorded in the modern era. Aside from natural disasters, in cases where a state's territory remains intact, the likelihood of a state disappearing due to a lack of population seems very small, as evidenced by Mongolia, which has the lowest population density among nations. The most critical concern is the complete loss of a state's territory, which presents a fundamental challenge and realistic implications for statehood status. The prevailing view among international legal experts is that without territory, there can be no state. As Derek Wong articulated, international law has traditionally assumed that territory will always exist. However, there is a risk from climate crises that could lead to the complete loss of territory. It is important to discuss the implications for the continued existence of a state, considering that the loss of territory would inevitably involve the loss of settled populations as well.

International law recognizes the principle of continuity in the existence of a state. Once an entity is recognized as a state, there is a practical necessity for the rights and obligations of that state to continue even in the face of territorial changes. This is crucial to avoid legal uncertainty where every territorial change alters a state's obligations. The principle also applies when a state fails to maintain effective governance. However, experts argue that this principle may seem impractical as it grants legitimacy to states that no longer meet the legal qualifications of statehood. Despite this critique, the continuity principle aims to uphold international stability because the disappearance of a state would lead to consequences such as instability.

Crawford and Grant critique the qualifications of statehood outlined in the Montevideo Convention. They argue that the application of these requirements should be flexible. Regarding territory, this means that territory does not necessarily need to be determined with absolute certainty, but there must be a territorial base for the continuity of a state. However, the principle of continuity and flexible application of requirements has its limits. In this context, ineffective governance does not affect a state's status, but the permanent loss of territory can indeed lead to the loss of statehood. Despite the flexibility in the qualifications of statehood, there must be core criteria that determine a state's status. Referring to the fundamental concept that states are essentially territorial entities, territory becomes a decisive factor in determining a state's status.

### *B. Legal Protection for Climate Migrants in International Law*

The climate crisis, affecting sea-level rise, extreme weather changes, and droughts, compels the international community not only to make changes to mitigate its impacts but also necessitates adaptation to sustain livelihoods. One adaptation strategy is

migration or relocation. These movements are driven by the loss of livelihoods, particularly in developing countries heavily dependent on agricultural commodities.<sup>1</sup>

Currently, there is no uniform terminology for describing the movement of people due to climate-related crises. Various terms are in use, such as climate refugees, environmental migrants, environmental displacees, eco-refugees, and environmentally displaced persons. The International Organization for Migration (IOM) uses the term climate migrants, which refers to individuals or groups who, due to sudden or gradual environmental changes that negatively impact their livelihoods or living conditions, are forced or choose to leave their homes, either temporarily or permanently, and relocate either within their own country or internationally.”<sup>2</sup>

The term adopts a realistic approach without discrimination, encompassing individuals displaced by climate and its processes, those who move temporarily or permanently, those forcibly displaced, and those who choose to relocate.

As described, climate migrants not only move within regions within their own country but also cross international borders seeking protection and assistance from other countries. This exposes climate migrants to vulnerabilities such as human rights violations, marginalization, and uncertainty regarding their legal status in the host country. This article will analyze the legal protection framework for climate migrants through refugee law regimes and human rights law, and attempt to propose a protection model that can be applied.

### *C. Protection within the Framework of Refugee Law*

Within the framework of international law, there is currently no legal protection specifically for climate migrants. Some legal scholars argue that the international refugee law regime, as governed by the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees, is the appropriate framework to protect the rights of climate migrants. However, the narrow definition of refugee under the international refugee regime does not allow for the extension of protection to climate migrants. According to the Refugee Convention, a refugee is someone who:

*“[o]wing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former*

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<sup>1</sup> Benoit Mayer, 'the International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework' (2011) 22 COLO. J. INT'L ENVTL. L. & POL'Y 357, 363–365.

<sup>2</sup> IOM, Discussion Note: Migration and the Environment (2007), IOM Document MC/INF/288, paras 6 and 7.

*habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”*

There are significant challenges in applying the Refugee Convention to climate migrants for legal protection. The Refugee Convention defines refugees as individuals unable or unwilling to return to their home country due to a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion. The primary issue in fitting climate migration within this framework is defining climate change as a form of persecution. Natural events like rising sea levels, increased salinity, storms, earthquakes, and floods are dangerous but do not equate to persecution. Consequently, climate migrants cannot be granted refugee status under this definition.

Additionally, even if climate crises were seen as persecution, legal recognition would still require this persecution to be linked to race, religion, nationality, political opinion, or social group membership. Thus, international refugee law has inherent limitations in protecting climate migrants due to its strict interpretation of the traditional refugee definition. Examining the Refugee Convention and related laws shows a clear gap in protection for climate migrants, as terms like "environment," "climate," or "natural disaster" are not included.<sup>3</sup> These laws also overlook internal migration and displacement, which the World Bank predicts will rise significantly in the future.

The difficulty of applying the refugee definition in international refugee regime to climate migrants is evident in cases like *Teitiota v Chief Executive Ministry of Business, Innovation and Employment in New Zealand*.<sup>4</sup> In this case, the New Zealand High Court denied asylum to a Kiribati citizen, stating he would not face continuous and systematic rights violations if he returned to his country. The court also rejected the argument that global greenhouse gas emissions constitute persecution, as there is no intent by the international community to harm climate-vulnerable nations. Furthermore, claims of persecution related to climate change do not fit within the five grounds for refugee status under the Refugee Convention.

#### *D. Protection within the framework of Human Rights Law*

International human rights law is essential for addressing climate-induced displacement in three key reasons. First, it sets minimum care standards that states must provide to individuals within their territory or jurisdiction and offers mechanisms to evaluate violations of rights disrupted by climate change, assigning primary responsibility to national authorities for managing these risks. Second, if these rights are at risk, human rights law can serve as a legal foundation for obtaining protection in another state,

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<sup>3</sup> A. Edwards, *Refugee Status Determination in Africa* (2006) 14 AFR J INT COM L 204, 225–227.

<sup>4</sup> *Teitiota v Chief Exec of the Ministry of Bus Innovation and Emp't* [2013] NZHC 3125, Para 63.



known as complementary protection.<sup>5</sup> Third, if relocation is necessary, human rights law dictates the minimum care standards that the receiving state or host country must provide, which also pertains to the legal status of climate migrants.

The issues arising from using human rights law regime as a legal framework for climate migrants are the limited human rights principles that impose obligations on states as part of the international community. Human rights law can provide adequate protection to prevent the expulsion of climate migrants through the principle of non-refoulement. However, under contemporary treaty law and customary international law, the principle of non-refoulement mandates only non-return to situations of persecution, torture, or cruel, inhuman, or degrading treatment or punishment. It is clear that this principle cannot assist individuals migrating due to climate change.<sup>6</sup> Furthermore, the traditional Western approach in making individual decisions regarding refugee status is highly unsuitable for situations induced by climate displacement. In cases of climate migrants, responsibility for displacement is highly diffuse (caused by numerous countries contributing to environmental degradation over many years, rather than direct mistreatment by specific governments).

In theory, all climate migrants have rights under international human rights law. However, there is no institutional mechanism in place to ensure that these rights are upheld in practice. There is no international organization formally tasked with protecting individuals with human rights against being returned home if they fall outside the refugee definition in refugee law.

In response to the existing legal protection gap, legal experts recommend that the international community either update the 1951 Refugee Convention to include climate refugees or establish a new convention to guarantee specific rights and protections for these individuals. The Faculty of Law at the University of Limoges has proposed a Draft Convention on Climate Refugees, which defines environmentally-displaced persons in Article 2(2) as: "Individuals, families, groups, and populations forced to leave their homes due to sudden or gradual environmental disasters that affect their living conditions."<sup>7</sup>

Although creating a new convention is a lengthy and complex process, it may be the most effective way to properly address the link between climate change and migration. Some organizations argue that a new convention should recognize individuals and communities unable to receive government assistance for climate impacts as 'persecuted,' thus allowing them to seek asylum in their chosen country without needing to identify

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<sup>5</sup> Jane McAdam & Ben Saul, 'An Insecure Climate for Human Security? Climate-Induced Displacement and International Law', Sydney Centre for International Law Working Paper 4, (University of Sydney, 2010) 9 – 12.

<sup>6</sup> Jane McAdam & Ben Saul, *An Insecure Climate for Human Security*, (n 21) 12.

<sup>7</sup> Law Faculty of Limoges University Draft of Convention on Climate Refugees.

specific pollutants or industrial processes as the cause of their persecution. Furthermore, international non-profit organizations urge countries to fulfill their obligations under the United Nations Framework Convention on Climate Change (UNFCCC) to limit global warming to 1.5°C above pre-industrial levels, which, while not directly protecting climate migrants, can reduce the number of people displaced.

The Head of the Migration, Environment, and Climate Change Division at the International Organization for Migration (IOM) emphasizes that prevention and mitigation measures following the Paris Agreement should be central to protecting climate refugees. Therefore, nations should be encouraged to meet their international commitments under the Paris Agreement and future climate accords that regulate greenhouse gas emissions.

#### IV. Conclusion

Climate change is widely recognized as a significant catalyst for migration, impacting human movement both domestically and internationally. There is ongoing debate regarding whether the loss of any of these elements would result in the disappearance of a state. Some perspectives argue that the loss of territory can be considered as the disappearance of a state. However, there are differing opinions, and some experts argue that the loss of territory does not always lead to the disappearance of a state. Cases of state disappearance are rare in the contemporary era and are usually associated with changes in governance, disintegration, or merging with other states. In international law, there is the principle of continuity, which aims to maintain the rights and obligations of a state despite changes in territory. However, this principle has also received criticism, particularly concerning the flexibility in applying the qualifications for statehood.

Direct and indirect consequences of climate change can have widespread impacts on environmental, social, and economic conditions in various regions, shaping patterns of human mobility. Climate-induced displacement, which involves the forced relocation of individuals due to climate change consequences such as rising sea levels, extreme weather events, and environmental degradation, poses significant challenges to the current international legal framework. Traditional laws governing refugees and migration may not adequately address the distinct circumstances of those displaced due to climate-related factors. While there is no consensus yet on the terminology for climate-induced population movements, several terms are used, including "climate migrants" defined by the International Organization for Migration (IOM). The vulnerabilities of climate migrants to human rights abuses, marginalization, and legal uncertainty in host countries underscore the need to analyze the legal protection framework through refugee regimes and human rights law.

The current international legal framework does not recognize a specific legal status for individuals as "climate change refugees." This absence highlights a formal and universally acknowledged gap in existing international law. Unlike refugees or internally displaced

persons (IDPs), there is no globally agreed definition or legal status for individuals specifically displaced due to the impacts of climate change. The legal definition of refugee, as outlined in the 1951 Refugee Convention, is narrower and tailored to persecution, excluding those displaced by environmental factors. Individuals displaced by climate change often fall under broader categories such as IDPs or migrants. While existing frameworks like the Guiding Principles on Internal Displacement provide a basis for protecting IDPs, they do not specifically address the unique challenges related to displacement caused by climate factors. The Global Compact on Refugees and the Global Compact for Safe, Orderly, and Regular Migration, adopted in 2018, recognize the importance of addressing the impacts of climate change on displacement. However, these agreements are non-binding and do not establish new legal categories.

International human rights law also plays a crucial role in the context of climate-induced displacement. Firstly, this law establishes minimum standards of treatment that states must provide to individuals within their territory or jurisdiction, and it provides a framework for assessing violations of rights affected by climate change. Secondly, international human rights law can provide a legal basis for seeking protection in recipient countries, known as complementary protection, if these rights are threatened. Thirdly, in the context of relocation, international human rights law sets minimum standards of treatment that must be met by the receiving country or host country, which also relates to the legal status granted to climate migrants. However, challenges arise due to the limited human rights principles that establish state obligations for protection as part of the international community. The principle of non-refoulement, which prevents the expulsion of migrants facing persecution, is not fully relevant to climate migrants due to its limitations. The traditional Western approach to refugee status is also considered inadequate for situations of climate-induced displacement, where responsibility for displacement is diffuse and involves many countries. In theory, all climate migrants have rights under international human rights law, but there is no institutional mechanism ensuring that these rights can be effectively applied.

There is a correlation between climate change and human migration, highlighting climate-induced displacement as a consequence of rising sea levels, extreme weather events, and environmental degradation. The international legal framework faces challenges because existing refugee and migration laws may not effectively address the unique circumstances of those displaced due to climate-related factors. Specifically, there is no specific legal category for "climate refugees" in international law. Existing frameworks, such as the 1951 Refugee Convention, do not explicitly cover individuals displaced due to climate-related issues such as sea-level rise. Various initiatives and agreements, such as the Nansen Initiative and the Paris Agreement, have been discussed in relation to displacement caused by climate change. However, current efforts are focused on building a more comprehensive legal framework within international law to

address the specific challenges posed by climate-induced displacement. The current legal landscape acknowledges the complex relationship between climate change and migration but underscores the need for further development and refinement to effectively address the complex issues associated with climate-induced displacement.

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