



How the ICJ's Advisory Opinion on Climate Change Addresses Displacement, International Protection and Ongoing Statehood

The International Court of Justice's long-awaited Advisory Opinion on the Obligations of States in respect of Climate Change embeds important principles of international human rights law. It confirms that people may be entitled to international protection – that is, as refugees or beneficiaries of complementary protection – where the effects of climate change expose them to life-threatening risks. It also affirms that even if a State's population and territory were to decline on account of sea-level rise, the State would continue to exist. Finally, by affirming the binding obligations of climate change treaties and the obligation of States to cooperate in the context of climate change, the Advisory Opinion potentially strengthens the case for more climate adaptation and loss and damage funding, including to support people to stay in place or to move elsewhere in a safe and dignified manner.

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Introduction

In what has been [described](#) as a 'game-changer for human rights', the International Court of Justice (ICJ) has released its long-awaited [Advisory Opinion](#) on the Obligations of States in respect of Climate Change. The court found that 'States have obligations under international human rights law to respect and ensure the effective enjoyment of human rights by taking necessary measures to protect the climate system and other parts of the environment' (para 457). In doing so, the court's authoritative analysis has built upon and consolidated existing

jurisprudence, embedding important principles of international human rights law.

As previously [explained](#), the court was not formally requested to advise on States' obligations concerning displacement in the context of climate change. This was despite the fact that nearly a third of States' written submissions – plus many civil society submissions – mentioned displacement or other aspects of climate-related movement. [Several](#) of these argued that displacement in the context of climate change affects the realization of fundamental human rights, with concrete examples detailed by multiple countries from multiple regions. Vanuatu's [submission](#), for instance, detailed the extent of existing internal displacement and likely future movement, stating that:

This forced displacement from ancestral lands and ecosystems leads to grave cultural losses. It impairs territorial sovereignty and inhibits the affected peoples from making a free choice about their futures.

Some argued that States whose wrongful acts had significantly contributed to climate change should provide reparations. This means restitution, where possible – including 'non-monetary redress for the human mobility, including displacement and migration' ([Vanuatu](#)) – or otherwise compensation, including for 'the cost of human mobility including displacement and migration' ([Saint Lucia](#)).

While the ICJ did not address all these elements, it acknowledged that displacement is among the 'severe and far-reaching' consequences of climate change, which pose an 'urgent and existential threat' (para 73). It noted, too, that 'sea level rise is likely to have adverse consequences for States, particularly small island States and low-lying coastal States, potentially leading to the forced displacement of populations within their territory or across borders, as well as affecting the territorial integrity of States and their permanent sovereignty over their natural resources' (para 357).

In both these aspects, the ICJ made important findings.

States' obligations to people displaced in the context of climate change

First, the court affirmed that people may be entitled to international protection – that is, as refugees or beneficiaries of complementary protection – where the effects of climate change expose them to life-threatening risks.

The Court considers that conditions resulting from climate change which are likely to endanger the lives of individuals may lead them to seek safety in another country or prevent them from returning to their own. In the view of the Court, States have obligations under the principle of non-refoulement where there are substantial grounds for believing that there is a real risk of irreparable harm to the right to life in breach of Article 6 of the ICCPR if individuals are returned to their country of origin (see Human Rights Committee, *Teitiota v. New Zealand*, 24 October 2019, UN doc. CCPR/C/127/D/2728/2016, para. 9.11) (para 378).

In [*Teitiota v New Zealand*](#), the Human Rights Committee helpfully [clarified](#) the application of the principle of *non-refoulement* in this context, establishing a clear line of authority from the national to the international level. The ICJ has now affirmed this principle definitively.

Indeed, over the past decade, a [significant body](#) of case law and guidance has developed which shows how, in certain circumstances, people displaced across borders in this context may qualify as refugees under the Refugee Convention, or as beneficiaries of complementary protection under human rights law. As explained in a new [practical toolkit](#) (which I co-authored):

In the context of climate change and disasters, international refugee and human rights law apply in the same way as in any other context, prohibiting the *refoulement* of those at risk of persecution or other serious harm. While the relevant instruments do not explicitly mention displacement in the context of climate change and disasters, where the impacts of climate change and disasters on the ground generate or exacerbate the risk of persecution or

other serious harm, those affected may be entitled to international protection.

The impacts of climate change and disasters interact with other social, economic and political drivers of displacement, forming part of a broader '[hazard-scape](#)'. The practical toolkit emphasizes the importance of assessing the impacts of climate change and disasters within this wider social context – including underlying systemic issues of discrimination or inequity that may impact on how particular people experience harm. The court implicitly acknowledged the differential impacts of climate change (eg para 384), which requires an intersectional and holistic approach (see Judge Charlesworth's [separate opinion](#), para 13ff).

A [cumulative assessment](#) of risk is crucial, given the wide range of human rights that may be affected by climate change and disasters, including rights to life, water and sanitation, food security, shelter and health. Adverse impacts may emerge suddenly or over time: they do not necessarily need to result from a single, extreme event.

As [UNHCR](#) explained in its legal guidance of 2020,

[t]he adverse effects of climate change and disasters are often exacerbated by other factors such as poor governance, undermining public order; scarce natural resources, fragile ecosystems, demographic changes, socio-economic inequality, xenophobia, and political and religious tensions, in some cases leading to violence. As a result of these negative impacts of climate change and disasters, combined with social vulnerabilities, people may be compelled to leave their country and seek international protection.

While it would have been helpful for the ICJ to underscore this approach in more detail (on which, see Judge Aurescu's [separate opinion](#), para 25), its clear affirmation of the applicability of the principle of *non-refoulement* in this context is still useful. In its own recent [Advisory Opinion](#), the Inter-American Court of Human Rights similarly recognized that people displaced across borders in the context of climate change

may be entitled to international protection, but [did not](#) go on to explain how the relevant legal frameworks apply. Importantly, though, ‘by framing displacement as a response to structural and compounding risks, rather than isolated climate events, the Court emphasized that States must address both immediate triggers and the broader social, political, and environmental conditions that drive people to move in search of safety and dignity’. It did [state](#) (at para 433) that:

States should establish an adequate normative framework that provides for effective domestic legal and/or administrative mechanisms to ensure the legal and humanitarian protection of persons displaced across international borders due to the effects of climate change. States should establish effective mechanisms to guarantee the humanitarian protection of these persons through the establishment of appropriate migratory categories such as humanitarian visas, authorisation to stay, and the establishment of a legal framework for the protection of persons displaced across international borders due to the effects of climate change, temporary, and/or protection under refugee or other similar status which can provide them with protection against refoulement.

One additional element of the ICJ’s Advisory Opinion that could have particular relevance for future international protection claims is the finding that ‘a clean, healthy and sustainable environment is a precondition for the enjoyment of many human rights, such as the right to life, the right to health and the right to an adequate standard of living’ (para 393). If States are not safeguarding the environment, then ‘it is difficult to see how these obligations can be fulfilled’ (para 393). In the [practical toolkit](#), we suggested that ‘[a] failure by authorities to guard against known future climate risks could support a claim to international protection, at least in situations where risk reduction actions would not pose “[a]n impossible or disproportionate burden’ on the government”’ (referring to [Budayeva v Russia](#), para 135). The authority of the ICJ’s views on this point pave the way for future jurisprudential development.

Statehood, sea-level rise and the duty to cooperate

Secondly, the ICJ affirmed that even if a population were displaced and its territory diminished on account of sea-level rise, the State would continue to exist: ‘once a State is established, the disappearance of one of its constituent elements would not necessarily entail the loss of its statehood’ (para 363). Again, this confirms a line of authority emerging in the UN Sixth Committee, the [International Law Commission](#), the [International Law Association](#) and in the 2023 [Pacific Declaration](#) on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-Related Sea-Level Rise. The court recognized that these principles are ‘closely connected with the right to self-determination’, meaning that ‘sea level rise is not without consequences for the exercise of this right’ (para 357).

The court affirmed that the ‘duty to co-operate lies at the core of the Charter of the United Nations’ and is also ‘a central obligation under the climate change treaties (para 140). Additionally, ‘in the context of climate change, States have a customary obligation to co-operate’ (para 364; see also paras 140–142 and 301–308). While the court was not prescriptive about what such cooperation might look like, it recognized that sea-level rise poses many challenges, ‘including of an economic, social, cultural and humanitarian character’, and found that ‘the duty to co-operate assumes particular significance in this context, requiring States to take, in co-operation with one another, appropriate measures to address the adverse effects of this serious phenomenon’ (para 364). It requires States to ‘work together’ to achieve ‘equitable solutions’ (para 365). This would include meeting ‘obligations of adaptation and co-operation, including through technology and financial transfers’ (para 457) under the Paris Agreement.

In its [oral submissions](#), Portugal had contended that States have a duty to cooperate to address climate mobility.

Depending on the circumstances, States might have the duty to facilitate the cross-border movement of people or offer possibilities of temporary or permanent residence in their territory. Co-operation may also include the creation of bilateral or

regional arrangements to manage migratory displacement patterns. It is also important to consider that, in certain circumstances, some effects of climate change, such as for instance sea-level rise, might make the return of persons to their place of original residence impractical or impossible. For this reason, co-operation should also include the co-ordination of efforts to find sustainable and durable solutions.

Likewise, the Netherlands [argued](#) that 'States have a duty to cooperate to ensure that such persons are accommodated elsewhere. This is a collective responsibility of the international community as a whole.'

The ICJ did not opine on what specific obligations States might have in this regard. However, they could potentially include obligations to assist people to [stay in place](#) through financial and technical assistance for adaptation and disaster risk reduction measures. The [Cook Islands](#) stressed 'the critical importance of honouring Cook Islanders' aspirations to remain on their ancestral homelands for their health and wellbeing', citing an expert report by Professor Yvonne Te Ruki Rangi a Tangaroa Underhill-Sem and Dr Christina Newport that stated: 'Contemplating the loss of belonging to one's place, to one's ancestral home is more than a loss of indigenous ties to land sea and sky, it is a loss of deep belonging to one's generations past, present and future.'

In its written submissions, Tuvalu [explained](#) that its 'priority' and 'prerogative' was for its people to remain at home. Notwithstanding the much publicized special human [mobility pathway](#) created by the 2023 [Falepili Union](#) between Australia and Tuvalu – which will allow up to 280 Tuvaluans to move to Australia each year – the Tuvaluan government stressed that the treaty 'first and foremost' commits both States to 'work together to help the citizens of Tuvalu to stay in their homes with safety and dignity'. 'If Tuvaluans were to be displaced', the submission explained,

they would suffer a loss of place, property, identity, culture, way of life, traditions, and more represented by fenua, particularly as

Tuvaluans' unique culture and traditions require maintaining the intimate connection with their land.

Both aspects – remaining in place and having opportunities to move in a safe and dignified manner – were emphasized in the 2023 [Pacific Regional Framework on Climate Mobility](#). In it, Pacific leaders 'recognise[d] the desire of Pacific people to continue to live in their own countries where possible', as well as 'the critical role that rights-based migration – whether internal or cross-border – can play in enabling people to move safely and on their own terms in the context of climate change'.

The recently established Loss and Damage Fund could help to [promote](#) 'equitable, safe and dignified human mobility in the form of displacement, relocation and migration in cases of temporary and permanent loss and damage'. Given the ICJ's unanimous view that 'climate change treaties set forth binding obligations for States parties to ensure the protection of the climate system and other parts of the environment from anthropogenic greenhouse gas emissions' (para 457), it remains to be seen how this will translate into concrete financial and technical support for adaptation and disaster risk reduction, including through loss and damage mechanisms.

Conclusion

The length and depth of the ICJ's opinion show just how extensive States' obligations are when it comes to climate change and human rights. While it examined many issues in detail, it could not feasibly cover every aspect comprehensively. Some may lament this as a missed opportunity to clarify or expand upon existing jurisprudence on States' obligations with respect to *non-refoulement*, cooperation, prevention and preparedness when it comes to the risk of displacement in the context of climate change. Others will be content that the court has clearly affirmed the applicability of legal principles, including the principle of *non-refoulement* in the context of climate change, continuity of statehood in the face of sea-level rise, and the centrality of the duty to cooperate to find equitable solutions.

As the court itself observed, the questions it was asked went well beyond international law, concerning ‘an existential problem of planetary proportions that imperils all forms of life and the very health of our planet’ (para 456). The role of international law here is ‘important but ultimately limited’. At the end of the day, ‘a lasting and satisfactory solution requires human will and wisdom – at the individual, social and political levels – to change our habits, comforts and current way of life in order to secure a future for ourselves and those who are yet to come’ (para 456).

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Selected bibliography

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[2023 Pacific Regional Framework on Climate Mobility](#)

[2023 Pacific Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-Related Sea-Level Rise](#)