Climate litigation and climate-induced displacement: assessing judicial responses to a governance gap

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Abstract: Contenzioso climatico e migrazioni indotte dalle condizioni climatiche: un'analisi delle risposte del giudiziario a un governance gap - The escalating climate crisis exposes a critical governance gap regarding human displacement that international law has yet to adequately address. Here we show that strategic litigation is functioning as a necessary gap-filler through two distinct categories: cases seeking protection status (migration as subject) and systemic cases invoking displacement as evidence of harm (migration as impact). We find that while individual protection claims frequently founder on doctrinal obstacles, they nonetheless articulate legal standards that contribute to a transnational process of normative sedimentation. By analyzing case-law from international treaty bodies and domestic courts, we demonstrate how vulnerable communities are acting as norm entrepreneurs, compelling legal systems to begin recognizing state obligations spanning prevention and remedy. Our results highlight that this iterative judicial dialogue is gradually constructing a normative framework to manage climate mobility in the absence of specific legislative action.

Keywords: Climate litigation; Climate-induced displacement; International human rights law; Non-refoulement; Climate migration

1. Climate litigation as gap-filler: the climate-migration nexus at the intersection of law and governance

As extensively acknowledged in the literature, the proliferation of climate litigation over the past two decades represents a striking response to the structural inadequacies of multilevel climate governance[1]. Where international negotiations have moved with glacial slowness, where legislative frameworks remain incomplete or unimplemented, and where policy measures fall short of scientific imperatives, courts have increasingly

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[1] J. Setzer, L. Vanhala, *Climate change litigation: A review of research on courts and litigants in climate governance*, in *WIREs Climate Change*, 2019.

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emerged as critical arenas for translating climate commitments into justiciable rights and enforceable obligations: strategic litigation reflects a fundamental reconfiguration of the relationship between judicial and political institutions in the era of the climate crisis[2].

The role of climate litigation as a gap-filler operates across multiple dimensions: courts have been called upon to enforce existing but systematically neglected obligations, compelling governments to implement pledges made under international agreements or to comply with domestic statutory frameworks[3]. Litigation has challenged the adequacy of mitigation targets[4] and adaptation measures[5], courts have articulated due diligence standards derived from international climate commitments and scientific consensus, translating soft law into judicially enforceable benchmarks. Litigation has established corporate liability for greenhouse gas emissions and climate-related misrepresentations[6], tested the boundaries of environmental impact assessment requirements[7], and invoked fundamental rights guarantees to impose positive obligations for climate action where legislative frameworks remain incomplete or inadequate[8]. Courts have

[2] J. Peel, H.M. Osofsky, *Climate change litigation*, in 16 *Ann. Rev. L. & Soc. Sci.* 21 (2020); H. Colby, A.S. Ebbersmeyer, L.M. Heim, M.K. Røssaak, *Judging climate change: the role of the judiciary in the fight against climate change*, in 7(3) *Oslo L. Rev.* 168 (2020).

[3] L. Maxwell, S. Mead, D. van Berkel, *Standards for adjudicating the next generation of Urgenda-style climate cases*, in 13(2) *J. Hum. Rts. & Env't* 35 (2022).

[4] B. Mayer, *Interpreting States' General Obligations on Climate Change Mitigation: A Methodological Review*, in 28(2) *Rev. Eur. Comp. Int'l Env'l L.* 107 (2019); Id., *Temperature Targets and State Obligations on the Mitigation of Climate Change*, in 33 *J. Env'l L.* 585 (2021).

[5] R. Luporini, *Climate Change Adaptation, Disaster Risk Reduction and Human Rights in International Law*, London, 2024.

[6] C. Macchi, *The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of 'Climate Due Diligence'*, in 6(1) *Bus. Hum. Rts. J.* 93 (2021); R. Heede, *Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010*, in 122 *Clim. Change* 229 (2014); G. Ganguly, J. Setzer, V. Heyvaert, *If at First You Don't Succeed: Suing Corporations for Climate Change*, in 38(4) *Oxford J. Legal Stud.* 841 (2018); O. De Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law*, in P. Alston (Ed.), *Non-State Actors and Human Rights*, Oxford, 2013, 227; G. Naglieri, *From Tort to Statute and Back: the Interplay of Legal Models in Rights-Based Corporate Climate Litigation And the Rise of a Vigilance Gap Litigation*, in *Corporate Gov.* 2025, 2.

[7] B. Mayer, *Climate effects in environmental impact assessment*, in 14(2) *Transnat'l Env'l L.* 342 (2025); D. Shapovalova, *Climate Change and oil and gas production regulation: an impossible reconciliation?*, in 26 *J. Int'l Ec. L.* (2023).

[8] For the specific use of human rights as a gap filler in climate litigation, see, e.g.: A. Savaresi, J. Auz, *Climate Change Litigation and Human Rights: Pushing the Boundaries*, in 9(3) *Clim. L.* 244 (2019); A. Savaresi, J. Setzer, *Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers*, in 13(1) *J. Hum. Rts. & Env't* 7 (2022). On the broader use of human rights for bridging the gaps in environmental governance generally, see, e.g., A. Boyle, M. Anderson (Eds.), *Human Rights Approaches to Environmental Protection*, Oxford, 1998; D. Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, in 28 *Stan. J. Int'l L.* 103 (1991); A. Boyle, *Human Rights or Environmental Rights? A Reassessment*, in 18 *Fordham Env'l L. Rev.* 471 (2007); D. Shelton, *Human Rights and the Environment*, Cheltenham, 2011; D. Anton., D. Shelton, *Environmental Protection and Human Rights*, Cambridge, 2012; A. Boyle, *Human Rights and the Environment: Where Next?*, in 23 *Eur. J. Inte'l L.* 613 (2012); A. Boyle,

engaged in evolutionary interpretation of constitutional and statutory provisions, tort law and administrative law principles—adapting categories forged in different contexts to accommodate climate change's unprecedented temporal, spatial, and causal dimensions[9].

Yet the gap-filling function of climate litigation is far from being uniform or uncontroversial. Courts navigate a delicate balance between their role as guardians of fundamental rights and the constraints imposed by principles of democratic legitimacy, separation of powers and by established legal frameworks ill-suited for addressing the polycentric, global, and intergenerational nature of the climate crisis[10].

The intersection of climate change and human mobility constitutes a particularly acute manifestation of these governance gaps and the corresponding potential—and limits—of judicial intervention[11]. Climate-induced displacement challenges multiple areas of international and domestic law simultaneously: refugee law, human rights law, environmental law, migration governance, climate law and governance[12]. Yet none of these regimes was designed with climate migration in mind, and their application to displacement driven by slow-onset environmental degradation or extreme weather events remains profoundly uncertain[13]. The 1951 Refugee Convention, cornerstone of international protection, requires persecution for reasons of one of five specified grounds (race, religion, nationality, political opinion, membership in a particular social group)—a framework manifestly ill-suited to environmental displacement lacking identifiable persecutors or discriminatory intent[14]. Complementary protection mechanisms, though more flexible, typically require individualised risk assessments and intentional harm, criteria that align poorly with the diffuse, collective, and often probabilistic nature of climate threats. Meanwhile, international climate agreements and migration frameworks acknowledge the phenomenon in increasingly explicit terms but stop short of creating binding obligations or protective entitlements[15].

Climate Change, the Paris Agreement and Human Rights, in 67 *Int'l & Compar. L.Q.* 759 (2018).

[9] E. Fisher, E. Scotford, E. Barritt, *The Legally Disruptive Nature of Climate Change*, in 80(2) *Modern L. Rev.* 173 (2017).

[10] L. Burgers, *Should judges make climate change law?*, in 9(1) *Transnat'l Env'l L.* 55 (2020).

[11] A. Kent, S. Behrman, *Strategic climate litigation and its impact on the governance of climate migration*, in *Rev. Catalana de Dret Ambiental*, 2023, 14(1), 3.

[12] For a comprehensive critical analysis of the conceptual and epistemological challenges inherent in the climate migration discourse, questioning the very possibility of isolating climate as a distinct driver of migration, see generally C.T.M. Nicholson, B. Mayer (Eds.), *Climate Migration: Critical Perspectives for Law, Policy and Research*, Oxford, 2023.

[13] S. Atapattu, *A new category of refugees? 'Climate refugees' and a gaping hole in international law*, in S. Behrman, A. Kent (Eds.), *'Climate Refugees': Beyond the legal impasse?*, Abingdon, 2018.

[14] A. Kent, S. Behrman, *op. cit.*, 7; D. Ziebarth, *Climate-Induced Migration and the Fragmentation of International Law*, available at SSRN 5341079, 2025; J.M.M. van der Vliet, *The international legal protection of environmental refugees: a human rights–based, security and state responsibility approach*, The Hague, 2020.

[15] A. Kent, S. Behrman, *op. cit.*, 9; D. Ziebarth, *op. cit.*, 4; E. Cusato, *The Environment-Conflict Nexus in International Law*, Cambridge, 2021.

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It is within this legal vacuum that climate litigation addressing migration has emerged. The growing body of cases represents an attempt—at times explicit, at times implicit—to compel legal systems to catch up with empirical realities. These cases pursue multiple objectives: establishing that climate impacts can trigger protection obligations; clarifying the scope of states' duties toward their own climate-vulnerable populations; and, more ambitiously, articulating a right not to be forcibly displaced by foreseeable climate harm. The outcomes have been decidedly mixed. Most applications for climate-based protection have failed, foundering on doctrinal obstacles embedded in existing frameworks. Yet certain decisions, particularly within UN human rights treaty bodies, have begun to articulate standards that could, over time, crystallise into more robust protections.

As typically observed across most climate cases, what renders climate migration cases particularly challenging is the legally disruptive nature of climate change itself. The characteristics that make climate change scientifically unprecedented also make it legally problematic. Climate impacts are diffuse rather than targeted, affecting entire populations rather than identifiable individuals; they result from cumulative global processes rather than discrete acts by specific perpetrators; they unfold across extended and uncertain temporal horizons rather than manifesting in immediate, causally traceable harms; and they erode the territorial boundaries upon which much of international and domestic law depends. These features systematically frustrate legal doctrines premised on different assumptions: that harm can be individualised, that perpetrators can be identified, that causation can be demonstrated with reasonable certainty, and that territorial sovereignty provides a stable framework for allocating rights and responsibilities.

These disruptions appear with particular force in migration-related cases, where the structural limitations of traditional adjudication become acute barriers to relief. The obstacles that plague systemic climate litigation—questions of standing, causation, temporality, and remedy—resurface here but are compounded by the specific requirements of migration law. Specifically, an applicant seeking international protection faces a formidable evidentiary burden: she must demonstrate not merely that climate change poses a generalized threat to her community, but that she is personally exposed to a risk that is sufficiently individualised and immediate to trigger non-refoulement obligations. This requirement of imminence often proves fatal in the context of slow-onset climate processes: as illustrated by the *Teitiota* ruling, courts may acknowledge the scientific reality of sea-level rise yet deny protection on the grounds that the catastrophic threshold has not yet been crossed, thereby trapping applicants in a legal limbo where protection is denied until the harm becomes irreversible.

Conversely, when communities attempt to pre-empt displacement by challenging inadequate mitigation policies, they confront a causality conundrum[16]. Litigants struggle to attribute specific future territorial loss

[16] For a radical critique of the very premises of this discourse, see C.T.M. Nicholson, B. Mayer (Eds.), *op. cit.* The editors and several contributors argue that climate migration is an empirically unfounded concept and that attempting to isolate climate as a distinct driver constitutes an epistemological error, suggesting that the search for causality is

to the diffuse accumulation of global emissions by a single state actor, a difficulty exacerbated by the multi-causal nature of migration itself[17], where environmental drivers interact inextricably with socio-economic factors[18].

These doctrinal and evidentiary challenges take different forms depending on the type of litigation pursued: understanding climate litigation at the climate-migration nexus requires distinguishing between two distinct types of cases, each responding to different dimensions of the governance gap and pursuing different legal strategies.

The first category comprises cases in which migration or displacement itself constitutes the subject matter of the litigation[19]. Here, individuals or communities facing climate-related threats seek legal protection or recognition, whether through cross-border protection mechanisms—refugee law, complementary protection, humanitarian visas—or through domestic frameworks for internal displacement. These "migration as subject" cases test whether existing protection architectures, designed primarily to address persecution, armed conflict, and targeted violence, can accommodate climate-driven displacement. The core question is whether climate impacts can generate obligations of non-refoulement, trigger

a wild goose chase. While acknowledging these conceptual pitfalls, this article proceeds from the observation that, regardless of its epistemological validity, the concept has acquired social and legal reality through judicial practice.

[17] Empirical research confirms the difficulty of isolating climate as a distinct driver in the perception of migrants themselves. Data collected from 348 migrants in Italy reveals that while only 19.8% initially identified climate change as a primary driver, a much larger portion reported direct exposure to life-threatening environmental events (floods, droughts) upon detailed questioning, confirming that environmental factors often operate as second-order drivers hidden behind economic motivations: M. Di Pierri, M. Marano (Eds.), *Migrazioni ambientali e crisi climatica. Speciale Le Rotte del Clima* (2025).

[18] T. Pfrommer, T. Goeschl, A. Proelss, M. Carrier, J. Lenhard, H. Martin, U. Niemeier, H. Schmidt, *Establishing causation in climate litigation: admissibility and reliability*, in 152 *Clim. Change* 67 (2019); K. Sulyok, *Speaking in the language of law or science? Epistemic hard cases and reasoning dilemmas for courts in adjudicating climate change*, in 28 *New Zeland J. Env'l L.* 21 (2024); O. Quirico, *Climate Change and State responsibility for Human Rights violations: causation and imputation*, in 65 *Netherlands Int'l L. Rev.* 185 (2018). Yet scholars have suggested that litigants have simply not presented the most recent scientific evidence in climate cases. R.F. Stuart-Smith, F.E. Otto, A.I. Saad, G. Lisi, P. Minnerop, K.C. Lauta, T. Wetzer, *Filling the evidentiary gap in climate litigation*, in 11(8) *Nature Clim. Change* 651 (2021).

[19] A similar but distinct taxonomy has been developed by Diogo Andreolla Serraglio, Fernanda de Salles Cavedon-Capdeville and Fanny Thornton. Originally conceptualized as waves of litigation in F. de Salles Cavedon-Capdeville, D.A. Serraglio, *Vidas em movimento: os sistemas de proteção dos direitos humanos como espaços de justiça para os migrantes climáticos*, in *Rev. Direito Internac.*, 2022, 19(1), 104, 122, their framework was later expanded into three chronological generations in D.A. Serraglio, F. de Salles Cavedon-Capdeville, F. Thornton, *The Multi-Dimensional Emergence of Climate-Induced Migrants in Rights-Based Litigation in the Global South*, in 16(1) *J. Hum. Rts. Prac.* 227 (2024). Unlike their evolutionary approach—which distinguishes based on the historical progression and thematic centrality of migration—the binary distinction adopted in this article (Subject vs. Impact) is structural. It categorizes cases based on the function displacement plays within the legal argument: whether it constitutes the substantive subject matter of the claim or serves argumentatively as evidence of the severity of state inaction.

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recognition as displaced persons, or create entitlements to protective legal status and corresponding socio-economic rights.

Paradigmatic examples include *Teitiota v. New Zealand*, in which the Human Rights Committee acknowledged in principle that climate-related threats could trigger protection obligations even while rejecting the specific claim, and the series of recent Australian tribunal decisions addressing applications from Pacific islanders affected by cyclones and sea-level rise.

The second category encompasses systemic climate litigation cases[20] in which displacement features as a prospective consequence of state inaction. In these "migration as impact" cases, applicants—typically communities facing territorial degradation or litigants pertaining to categories particularly vulnerable to climate impacts—argue that governmental failure to adopt adequate mitigation or adaptation measures violates their fundamental rights, with the foreseeable forced displacement serving as evidence of the severity and imminence of the threatened harm. The migration dimension functions argumentatively: it demonstrates the concrete, foreseeable consequences of climate inaction and strengthens claims that states bear positive obligations to prevent such outcomes. The landmark *Billy v. Australia* decision (and the subsequent case at national level) exemplifies this approach, with Torres Strait Islander communities successfully arguing before the UN Human Rights Committee that Australia's inadequate climate response violated their rights to culture, private life, and even life itself, with anticipated displacement serving as a key indicator of the gravity of harm.

Each of these two categories of litigation illuminates different facets of the legally disruptive character of climate change and different dimensions of judicial gap-filling. Migration-as-subject cases foreground the doctrinal obstacles embedded in protection frameworks: the absence of persecution grounds, the difficulty of establishing individualised risk, the presumption of internal relocation, the requirement of intentional harm. Migration-as-impact cases replicate the challenges inherent to systemic climate litigation: problems of standing, causation, remedy, and institutional competence that arise when attempting to translate collective, future-oriented climate threats into actionable legal claims. Yet both categories also reveal moments of judicial innovation, instances where decision-makers stretch inherited categories or articulate novel principles in response to the challenges of climate displacement: assessing the impact of climate litigation addressing displacement requires looking beyond the formal outcomes of individual decisions. As recent scholarship has demonstrated, beneath the surface of rejection that dominates the caselaw in this field, a legal framework is gradually emerging in which states are being held bound by obligations ranging from displacement prevention to respect for non-refoulement principles adapted to the climate crisis context. The protective gaps remain significant—most notably the absence of a recognized right to cross borders when necessary and the lack of binding mechanisms for planned mobility. Yet the analysis must capture ongoing processes of normative

[20] Also called government-framework cases in the taxonomy of the Grantham Research Institute. See J. Setzer, C. Higham, *Global Trends in Climate Change Litigation: 2021 Snapshot*, London, 2021.

sedimentation: climate litigation, even when it rejects claimants' demands, contributes to clarifying applicable standards, delineating the contours of state obligations, and preparing the ground for future developments.

This incremental perspective proves particularly important given the systematic failure rates documented in both categories of litigation examined here. In migration-as-subject cases, protection claims founder on doctrinal obstacles embedded in frameworks designed for persecution rather than environmental degradation. Yet decisions like *Teitiota*, while dismissing the specific claim, have articulated legal standards that could provide applicable parameters for future cases. Similarly, in migration-as-impact cases, while domestic courts often defer to executive prerogatives on climate policy, international human rights bodies have begun recognizing violations where inadequate adaptation measures fail to prevent displacement, as demonstrated in *Billy v. Australia*.

The question, therefore, is not whether cases win or lose, but whether and how they contribute to progressive evolution of international and domestic law in a domain characterized by profound legal uncertainty.

2. Migration as subject: testing the boundaries of protection frameworks

Cases in this first category center on claims for legal protection based on climate-related displacement or threats. Applicants invoke climate impacts as grounds for obtaining legal recognition and protection, though the specific forms of protection sought and the legal frameworks invoked vary considerably.

One set of cases involves invocation of international protection frameworks. Applicants argue that climate-related threats in their countries of origin constitute grounds for protection under the 1951 Refugee Convention, regional refugee instruments, complementary protection regimes, or human rights-based non-refoulement principles—frameworks not designed with environmental displacement in mind. These cases test whether inherited international protection architectures can accommodate climate-driven mobility.

A distinct variant involves internal displacement, where applicants seek recognition under domestic frameworks or the extension of protection systems originally designed for different displacement scenarios. Rather than seeking international protection status or the right to remain in another country, these claimants seek recognition as internally displaced persons and corresponding socio-economic rights—adequate housing, water, sanitation, healthcare, and in cases involving indigenous or ethnic communities, rights to prior consultation and climate adaptation measures.

When domestic judicial avenues prove ineffective, some internally displaced communities—particularly Indigenous groups—have invoked international human rights mechanisms, filing complaints with UN Special Rapporteurs or petitioning regional human rights commissions to frame climate displacement as a human rights violation requiring international scrutiny.

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Focusing first on cross-border protection claims, several structural features are readily identifiable. First, the immediate stake is whether the applicant qualifies for protection status under applicable legal instruments. Second, the climate threat dimension operates as cause or legally relevant context for the claimed need for protection. Third, the strategic focus centres on invoking states' positive obligations—duties of non-refoulement, rights to life and dignity, prohibitions on cruel treatment—as bases for protective entitlements. Fourth, these cases typically proceed through immigration tribunals, administrative review bodies, or domestic courts applying international protection norms. Fifth, claimants increasingly invoke international human rights treaty bodies via individual communications procedures.
Within the cross-border category, two distinct analytical strategies emerge. Climate refugee cases seek to expand the definitional requirements of refugee or protected person status under applicable legal instruments. Territorial uninhabitability claims, by contrast, involve residents of climate-vulnerable territories—typically small island states or low-lying coastal areas—seeking anticipatory protection or status recognition based on progressive or imminent uninhabitability, or other bases rather than individualized risk assessments than collective vulnerability to territorial degradation.

Dominant legal arguments span several registers. Advocates attempt to extend the five persecution grounds of the Refugee Convention—race, religion, nationality, political opinion, membership in a particular social group—to encompass climate vulnerability, often proposing that residents of climate-affected territories constitute a particular social group sharing immutable characteristics and social perception. Complementary protection claims invoke the principle of non-refoulement as elaborated in human rights instruments, arguing that return to face climate-related threats violates rights to life (ICCPR Article 6), such that returning someone to face such threats violates fundamental guarantees.

The paradigmatic case remains *Teitiota v. New Zealand*, decided by the UN Human Rights Committee in January 2020. Ioane Teitiota, a Kiribati national, sought asylum in New Zealand based on sea-level rise, saltwater contamination of freshwater supplies, land disputes over diminishing habitable territory, and broader environmental degradation rendering Kiribati progressively uninhabitable. New Zealand's immigration authorities, courts at every level, and ultimately the Supreme Court rejected his claims, finding insufficient evidence of persecution for a Convention ground and no significant harm individualized to Teitiota[21] as distinct from risks faced by Kiribati's population generally[22].

The Human Rights Committee's decision broke new ground even if it rejected the specific claim. The Committee acknowledged explicitly that

[21] G. Lauria, *International Law, the Climate-Migration Nexus, and Teitiota v New Zealand*, in C.T.M. Nicholson, B. Mayer (Eds.), *op. cit.*, 235-249. The author notes that the decision oscillates between a restrictive interpretation (requiring imminent harm) and a broader recognition of climate impacts as triggers for non-refoulement, leaving the legal threshold uncertain.

[22] M. Baker-Jones, *Teitiota v the chief executive of ministry of business, innovation and employment-a person displaced*, in 15(2) *QUT L. Rev.* 102 (2015).

environmental degradation and climate change can create conditions threatening the right to life (ICCPR Article 6), such that returning someone to face such conditions «may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending states». This represented the first authoritative recognition by an international human rights body that climate impacts can, in principle, generate protection obligations. Yet the Committee held that Teitiota had not demonstrated a «real, personal and reasonably foreseeable risk» to his right to life. The Committee noted Kiribati government efforts at adaptation, observed the ten-to-fifteen-year timeframe before potential submersion, and concluded that intervening measures might yet prevent the realization of threatened harms[23].

The decision's significance lies less in its immediate outcome than in its acknowledgment that non-refoulement can apply to climate contexts[24]. Its standard—real, personal, and reasonably foreseeable risk to life with dignity—provides a potential pathway but sets an evidentiary bar that subsequent cases have struggled to clear[25].

Similar cases also appeared at the domestic level in New Zealand courts. In *AD (Tuvalu)* (2014), the New Zealand Immigration and Protection Tribunal denied asylum to a Tuvaluan family but granted humanitarian status on discretionary grounds, citing family ties and community integration rather than climate threats per se. This decision illustrates an alternative pathway: non-climate-specific humanitarian mechanisms that might, in practice, accommodate climate-displaced persons without formally recognizing climate as a basis for protection.

The most striking recent developments, however, emerge from Australia's Administrative Review Tribunal (formerly the Administrative Appeals Tribunal). Between 2023 and 2025, a significant number of applications for protection from Pacific Islander nationals—primarily from Vanuatu, Kiribati, Fiji, and Tonga—invoked climate impacts as grounds for refugee or complementary protection status[26]. These cases arose against a specific factual backdrop: devastating cyclones in Vanuatu (Cyclones Judy, Kevin, and Lola in 2023), progressive sea-level impacts in Kiribati and Tuvalu, and Australia's signature of the *Falepili Union agreement* with Tuvalu (August 2024), establishing a dedicated climate mobility pathway for

[23] S. Behrman, A. Kent, *The Teitiota case and the limitations of the human rights framework*, in 75 *Questions Int'l L.* 25 (2020).
[24] Moreover, as noted by C. Farbotko, *Identifying as a "Climate Migrant": Implications for Law, Policy, and Research*, in C.T.M. Nicholson, B. Mayer (Eds.), *op. cit.*, 218-231, Teitiota's significance lies in his performative role: he was arguably the first to publicly self-identify as a climate migrant in a legal forum, challenging abstract policy categories with lived experience and thereby enacting the phenomenon socially even if legal recognition was denied.
[25] M. Foster, J. McAdam, *Analysis of 'Imminence' in International Protection Claims: Teitiota v New Zealand and Beyond*, in 71(4) *Int'l & Compar. L.Q.* 975 (2022).
[26] F. Simmons, C. Bostock, *Administrative Review in Refugee Cases: The Impact of the Vulnerable Persons Guidelines and the Role of Legal Representatives*, in 47 *UNSWLJ* 448 (2024).

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up to 280 Tuvaluans annually[27]. The Tribunal's decisions show a systematic failure of climate-based protection under Australia's legal framework.

From this larger body of litigation, eleven cases were selected[28] for analysis based on their representativeness of dominant legal strategies and outcomes. These cases can be divided into two subcategories. Four involve primarily climate motivations—applicants citing exclusively environmental triggers such as cyclones, sea-level rise, land loss, and infrastructure inadequacy. Seven present mixed motivations, combining climate factors with political opinions, economic hardship, domestic violence, or criminality concerns. The pattern of rejection is near-total[29]. Only in cases where alternative grounds (political persecution, membership in a particular social group defined by non-climate characteristics) appeared potentially viable did applicants receive favourable reconsideration; climate factors alone or even as aggravating circumstances proved insufficient.

The obstacles recur across decisions with striking consistency. First, applicants cannot establish persecution "for reasons of" a Convention ground. Climate impacts lack persecutors; they result from diffuse global processes rather than targeted acts by identifiable agents. Even where applicants attempted to construct "particular social groups" based on residence in climate-vulnerable territories or subsistence dependence on degraded environments, tribunals rejected these formulations as lacking the requisite social perception or immutability, or as tautological where group membership is defined by the very risk from which protection is sought.

Second, complementary protection claims founder on Section 36(2)(aa) of the Migration Act, which requires that removal would expose the applicant to «a real risk of significant harm» as a necessary and foreseeable consequence. Tribunals consistently find climate risks either insufficiently imminent (necessary consequence demands near-certainty, not probabilistic future harm) or inadequately individualized. Even applicants from small island states facing existential threats cannot demonstrate personalized risk distinct from population-wide exposure.

Third, and most critically, Section 36(2B)(c) excludes from complementary protection any significant harm «faced by the population of

[27] A. Green, D. Guilfoyle, *The Australia-Tuvalu Falepili Union Treaty: Statehood and security in the face of anthropogenic climate change*, in 118(4) *Am. J. Int'l L.* 684 (2024); J. Barnett, C. Farbotko, T. Kitara, B. Aselu, *Migration as Adaptation? The Falepili Union Between Australia and Tuvalu*, in 16(1) *Wiley Interdisc. Revs. Clim. Change* 924 (2025).

[28] The cases were selected in the Sabin Center Climate Case Chart database (www.climatecasechart.com) and include: Refugee Application No. 1822451; Refugee Application No. 1916631; Refugee Application No. 2317975; Refugee Application No. 2318773; Refugee Application No. 2320671; Refugee Application No. 2401197; Refugee Application No. 2401199; 0907346 (2009) RRTA 1168; Refugee Application No. 2320711; Refugee Application No. 2402655; Refugee Application No. 2402656.

[29] See D. Ghezelbash, M. Crock, M. Bridle, K. Dorostkar, *Sensible Tactics or Missed Opportunity? Evaluating The Exceptional Treatment Of Migration and Refugee Decisions In The Administrative Review Tribunal Act*, in 53(1) *Fed. L. Rev.* (2025), available on SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5213725 highlighting how the retention of 'exceptional' and restrictive procedural rules for migration matters in the ART -including inflexible time limits and codified hearing rules- creates a systemic disadvantage that hinders the effective presentation of complex protection claims.

the receiving country generally». This provision systematically barred climate-based claims.

Cases presenting climate change as the exclusive or dominant basis for protection claims consistently fail. In Refugee Application No. 2320711 (Vanuatu), the applicant claimed fear of returning due to recurring natural disasters and environmental challenges, citing cyclones, volcanic eruptions, and rising sea levels as creating precarious living conditions. The Tribunal acknowledged country information supporting Vanuatu's vulnerability to natural hazards and accepted that the applicant had previously experienced such threats and would likely face them again. However, the Tribunal found that harm arising from natural disasters does not amount to persecution under the refugee criterion because such harm is not linked to any protected persecution ground—race, religion, nationality, political opinion, or membership of a particular social group—and does not involve systematic and discriminatory conduct. The Tribunal further concluded that natural disaster harm fails to satisfy the complementary protection criterion's definition of significant harm because that definition requires an intentional act by a perpetrator, which natural disasters lack.

Similarly, Refugee Application No. 2402656 (Vanuatu) involved an applicant arguing that natural disasters in Vanuatu had increased in frequency and severity due to climate change, causing widespread destruction, displacement, and inadequate government response due to insufficient infrastructure. The applicant expressed fear for their safety and that of loved ones. While the Tribunal accepted that Vanuatu is vulnerable to climate change and prone to natural disasters, it found the applicant's claimed fear did not relate to any persecution ground under the refugee definition. The Tribunal reasoned that climate change consequences do not involve a deliberate act or omission by a perpetrator with intention to inflict significant harm and therefore do not constitute a real risk of significant harm as required for complementary protection.

Mixed-motivation cases fare no better when climate factors appear alongside other claimed grounds. In Refugee Application No. 1822451 (Fiji, decided September 21, 2022), an applicant asserted fears based on political opinion due to a 2015 altercation with Fijian government officials concerning bauxite mining operations affecting communal farmland, environmental degradation, and associated climate change impacts. During the September 19, 2022 Tribunal hearing, the applicant expressed concerns about potential economic hardship and threats to subsistence due to environmental impacts from mining and climate-related effects on agriculture and fisheries near his village. He also raised broader concerns about political corruption, police brutality, and general insecurity in Fiji, particularly if returned as a failed asylum seeker. The Tribunal found the applicant had not established a well-founded fear of persecution on political grounds, noting that after the 2015 incident he had not experienced further persecution or targeting. The Tribunal concluded that environmental and climate-change-related hardships, although genuinely challenging, did not amount to persecution or pose real risk of significant harm as defined under the Migration Act.

Refugee Application No. 2317975 (Tonga, decided March 14, 2024) illustrates how tribunals handle claims combining political opinions, socio-

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economic conditions, and climate vulnerability. The applicant claimed fear of persecution due to political opinions, lack of employment opportunities, and Tonga's socio-economic situation. He referenced an article characterizing Tongans as victims of an "economic war", highlighting poverty, land control by nobility, and criticism of government policy. The Tribunal found the applicant had not provided sufficient detail or supporting evidence to establish well-founded fear of persecution or real risk of significant harm. The claims lacked specificity and failed to link potential harm to a protected ground. Regarding climate change, the Tribunal noted that while Tonga is vulnerable to climate-related events, the applicant did not make claims linking environmental harm to a Convention ground or show any intention by authorities to harm him for environmental reasons. The Tribunal found no evidence of climate-related persecution or risk of significant harm.

In Refugee Application No. 2318773 (Tonga), an applicant cited fears related to political opinion, freedom of speech, economic hardship, and rising sea levels. During the hearing, the applicant indicated his primary motivation was working in Australia to support family in Tonga, and denied ever expressing political opinions in Tonga. The Tribunal found the applicant could not identify who would persecute him due to climate change, and that claimed harm was not directed at the applicant or a specific group for reasons of race, religion, nationality, membership of particular social group, or political opinion. The Tribunal noted that climate change impacts affect Tonga's entire population and found no evidence the applicant had experienced or would face targeted serious harm due to climate change that would engage Australia's protection obligations.

Refugee Application No. 1916631 (Fiji, decided August 27, 2024) concerned applicants claiming protection based on fear of harm from violent youths in their area, with climate change relevant to broader environmental problems affecting farming viability on Taveuni Island. Reports indicated that intensive farming practices combined with climate-related events—particularly Tropical Cyclone Winston in 2016—and ongoing environmental degradation had significantly reduced agricultural productivity, affecting economic stability. However, the Tribunal concluded these climate-related concerns, although challenging, did not amount to persecution or significant harm as required by law.

These cases reveal consistent patterns in tribunal reasoning. Climate impacts fail as primary grounds because they lack identifiable persecutors, do not involve intentional targeting, affect populations collectively rather than individually, and cannot be linked to protected persecution grounds. When climate factors appear in mixed-motivation cases, tribunals treat them as general hardship rather than persecution, finding them neither intentional nor individualized. The definitional architecture of refugee and complementary protection law—requiring persecution "for reasons of" protected grounds, intentional infliction of harm, and individualized rather than collective risk—systematically excludes climate-driven protection claims regardless of how they are framed.

Beyond cross-border protection claims, domestic constitutional frameworks have addressed internal displacement with greater receptiveness. Two Colombian Constitutional Court decisions have

addressed climate-induced displacement through domestic internal displacement frameworks[30]: these are the *Raizal Community of Providencia and Santa Catalina v. Colombia* (T-333/22, decided in 2022) and *José Noé Mendoza Bohórquez et al. v. Department of Arauca* (T-123/24, decided in April 2024) case. What makes these cases particularly significant is not their outcomes—which remain partial and incomplete—but how they expose structural inadequacies in legal frameworks designed for armed conflict when applied to climate-driven mobility.

The Raizal case emerged from the devastation wrought by Hurricane Iota in November 2020. The Category 5 storm destroyed 98% of the infrastructure on Providencia and Santa Catalina, small Caribbean islands forming part of Colombia's archipelago. The Raizal people – an Afro-Caribbean ethnic community with their own creole language and distinct cultural identity – found themselves scattered from their ancestral territory. The Colombian government launched a reconstruction effort through its disaster management agency (UNGRD), implementing a Special Action Plan (PAE) without consulting the Raizal community. New houses were delivered incomplete, lacking rainwater collection systems, and equipped with defective sanitation. Most troublingly, the reconstruction simply rebuilt the islands' pre-existing vulnerabilities rather than integrating climate adaptation measures, despite scientific projections showing increased hurricane risk in the region due to climate change[31].

Josefina Huffington Archbold, acting both personally and as president of the Old Providence Civic Oversight Committee, brought a *tutela* action, Colombia's constitutional complaint for fundamental rights violations. The claimant argued that the Raizal community should be recognized as experiencing climate-disaster displacement *(desplazamiento climático)* and entitled to the protections afforded to Colombia's internally displaced persons under the framework developed for the armed conflict (Laws 387 and 1448)[32].

In its decision of September 26, 2022 (Sentencia T-333/22), the Constitutional Court addressed these vulnerabilities. While the Court deemed the request to legally equate the situation to armed conflict displacement *improcedente* (inadmissible) because a specific legal regime for natural disasters already exists, it ruled that the government's execution of that regime had failed. The Court found violations of the rights to adequate housing, potable water, basic sanitation, health, and a healthy environment.

Crucially, the decision established a precedent regarding prior consultation rights in emergencies. The government had invoked emergency circumstances to bypass the constitutional requirement of prior

[30] F.S. Cavedon-Capdeville, D.A. Serraglio, J. Velez-Echeverri, M.F. Madrigal-Pérez, E. Castro-Buitrago, *La movilidad humana en los litigios climáticos: aportes de América latina desde la perspectiva de los derechos humanos*, in *Rev. Catalana de Dret Ambiental*, 2023, 14(1).
[31] J. Vélez-Echeverri, *A risk-based approach to legal mobilisation: A case study of communities experiencing climate-related (Im)mobility in Colombia*, Doctoral dissertation, University of Reading (2023).
[32] C. Bustos, *Climate Change and Internal Displacement in Colombia: Chronicle of a Tragedy Foretold?*, in 56 *Case W. Res. J. Int. L.* 369 (2024); J. Velez-Echeverri, C. Bustos, *A Human Rights Approach to Climate-Induced Displacement: A Case Study in Central America and Colombia*, in 31 *Mich. St. Int. L. Rev.* 403 (2023).

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consultation. The Court rejected this argument for the reconstruction phase. Even in disaster contexts, the obligation to meaningfully consult communities about long-term decisions affecting their territories and cultural survival remains binding. Reconstruction measures that shape a community's relationship with its land cannot be exempt from consultation simply because they follow a disaster.

Beyond ordering immediate remedial measures, the Court mandated that the reconstruction process incorporate climate adaptation principles and the Sendai Framework's principle of "building back better". The government's approach had been to rapidly restore pre-existing infrastructure, an approach the Court characterized as repeating the islands' vulnerabilities. Relying on scientific evidence indicating that hurricane trajectories in 2021-2055 would shift southward, the Court ruled that reconstruction without adaptation rendered future displacement a near certainty. The Court thus framed the disaster not merely as a momentary crisis, but as an ongoing vulnerability requiring forward-looking adaptation measures.

The Arauca case, decided nearly two years later, addressed a quite different displacement scenario yet reached equally transformative conclusions. José Noé Mendoza Bohórquez and Ana Librada Niño de Mendoza, an elderly farming couple from Saravena in eastern Colombia, were forced to abandon their rural home following repeated flooding of the Bojabá River. The flooding began in 2015, intensified in 2017, and rendered their property uninhabitable. Government authorities installed temporary engineering works but never addressed the underlying flood risk. The couple moved to Saravena's urban center, losing their crops and livelihood in the process. When they sought recognition as displaced persons and access to the benefits provided to conflict-displaced populations, they were turned away. UARIV—the agency managing assistance for victims of armed conflict—claimed it lacked jurisdiction over environmentally displaced persons.

The couple's *tutela* action made the same fundamental argument the Raizal community had advanced: environmental displacement triggers state obligations comparable to those owed to conflict-displaced populations. The Constitutional Court, in a landmark April 2024 ruling, agreed. The decision began with an extensive survey of international instruments addressing internal displacement, including the Guiding Principles on Internal Displacement, the Peninsula Principles on Climate Displacement within States, and various human rights treaties. The Court noted that Colombia's displacement framework had evolved in response to armed conflict and remained conceptually locked within that paradigm. Colombian law distinguished between *desplazados* (displaced persons entitled to substantial protections) and *damnificados* (disaster-affected persons eligible only for emergency relief). This bifurcation created a protection gap that left environmentally displaced populations without meaningful legal recourse.

The Court identified a constitutional protection deficit for environmental displacement. While acknowledging important differences between displacement caused by violence and displacement driven by environmental factors—particularly the multi-causal nature of environmental displacement, the difficulty in establishing precise temporal

boundaries between sudden and slow-onset events, and challenges in determining the involuntary character of gradual migration—the Court concluded these differences necessitated an adapted rather than entirely separate response. Environmental displacement shares displacement's core characteristics: involuntary departure from one's home or habitual residence, coercion by external forces, and movement within national borders. The Court therefore recognized the couple as victims of forced displacement entitled to fundamental rights protections. The Court's orders reflected this analysis. It found UARIV and the national social prosperity agency lacked competence for environmental displacement cases, but held that Arauca's departmental government, Saravena's municipal government, and the national disaster prevention system bore responsibility for protecting the couple's rights. The department was ordered to ensure access to food, water, housing, clothing, and medical services, providing humanitarian assistance as necessary. The municipality was directed to conduct risk assessments to determine whether the couple's original residence could be made safe. Most significantly, the Court urged Congress to develop comprehensive public policy addressing forced displacement due to environmental factors, recognizing that judicial intervention alone cannot create the systematic protections such displacement demands.

Beyond domestic constitutional frameworks, Indigenous communities facing climate-driven displacement have invoked international human rights mechanisms to seek recognition and assistance. In January 2020, five U.S. tribes—the Native Village of Kivalina in Alaska and four Louisiana coastal tribes (Point-au-Chien Indian Tribe, Grand Caillou/Dulac Band, Atakapa-Ishak Chawasha Tribe of Grand Bayou, and Isle de Jean Charles Band)—filed a complaint with UN Special Rapporteurs on the Human Rights of Internally Displaced Persons and on the Rights of Indigenous Peoples[33]. The recourse to international human rights mechanisms by Indigenous communities is not a novel strategy but rather a persistent avenue pursued in response to repeated failures in U.S. domestic courts. Strategic climate litigation within the United States has frequently foundered, as illustrated by the dismissal of landmark cases such as *Native Village of Kivalina v. ExxonMobil Corp.*, where courts deferred to the legislative branch under the political question doctrine rather than addressing the existential threats facing these communities. Faced with this judicial deadlock, tribes have historically looked beyond domestic frameworks.

This international advocacy effort traces back to the pioneering 2005 Inuit Petition filed by Sheila Watt-Cloutier and the Inuit Circumpolar Conference before the Inter-American Commission on Human Rights (IACHR), which first framed global warming caused by U.S. acts and omissions as a violation of human rights[34]. Although that petition was

[33] Alaska Institute for Justice, Complaint Submitted to the U.N., Rights of Indigenous People in Addressing Climate-Forced Displacement, January-1-2020, available at: https://cdn.climatepolicyradar.org/navigator/XAA/2020/rights-of-indigenous-people-in-addressing-climate-forced-displacement_96b0a5d615458b8fd38af50bb5d441b9.pdf.

[34] S. Jodoin, S. Snow, A. Corobow, *Realizing the right to be cold? Framing processes and outcomes associated with the Inuit petition on human rights and global warming*, in 54(1) *Law & Soc'y Rev.* 168 (2020).

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deemed inadmissible on procedural grounds, it established a critical precedent, followed in 2013 by the Arctic Athabaskan Council's petition regarding black carbon emissions.

The 2020 complaint alleged that the U.S. government violated their human rights by failing to address climate-forced displacement, citing the Guiding Principles on Internal Displacement, the Peninsula Principles, and provisions of the ICCPR and ICESCR.

The tribes described how rising seas, coastal erosion, permafrost thaw, and extreme weather events had rendered their ancestral territories progressively uninhabitable. Despite tribal resolutions to relocate and identification of safer sites, federal and state agencies refused assistance or imposed cost-benefit analyses that subsistence communities could not satisfy. The complaint sought recognition of climate displacement as a human rights crisis, requiring funding for tribal-led relocation processes, recognition of tribal sovereignty and self-determination, federal recognition for Louisiana tribes to access disaster resources, and establishment of institutional frameworks guaranteeing rights to culture, health, water, and adequate housing during relocation. In September 2020, the Special Rapporteurs issued a communication to the U.S. government noting that even absent ICESCR ratification, the U.S. could not act against the treaty's object and purpose, and highlighting state obligations regarding housing, health, food, water, and cultural rights under Article 27 ICCPR.

While the U.S. government did not formally respond to this communication, the tribes' mobilization helped catalyze a shift in domestic policy[35]: in October 2021, the White House released a report on the impact of climate change on migration, and in November 2022, the Biden administration announced a $135 million commitment to assist the relocation of eleven tribal communities, including some of the complainants.

Furthermore, the international scrutiny intensified in 2023 with an official visit by the Inter-American Commission on Human Rights (IACHR) and the Office of the Special Rapporteur on Economic, Social, Cultural, and Environmental Rights (REDESCA). Their subsequent report, published in August 2023, served as a stark validation of the tribes' 2020 allegations[36]. The report documented how the situation had deteriorated following Hurricane Ida in 2021, which left many families in Pointe-au-Chien and Grand Caillou/Dulac living in substandard conditions due to the destruction of homes and cultural sites.

Crucially, the Commission confirmed the systemic barriers cited in the original complaint, noting instances where coastal protection projects—such as the Pointe-au-Chien's oyster reef initiative—were rejected for failing to meet cost-benefit analysis criteria. The report also highlighted how the lack of federal recognition continued to impede access to relief funds, citing bureaucratic hurdles as trivial as the denial of aid due to document formatting issues. Closing the loop on the tribes' initial legal strategy,

[35] L.C. Diaconu, *The Time is Now for the IACHR to Address Climate Action as a Human Right: Indigenous Communities Can Lead (Again)*, in 9 *Am. Indian L.J.* 213 (2020).
[36] Special Rapporteur on Economic, Social, Cultural, and Environmental Rights (REDESCA), *Concluding Observations and Recommendations from REDESCA after its Visit to Louisiana and Alaska: Climate Induced Displacement of Indigenous Communities*, Report, Inter-American Commission on Human Rights, August 2023.

REDESCA's final recommendations explicitly urged the United States to develop a federal relocation framework that takes into consideration the Peninsula Principles on Climate Displacement —the very framework invoked by the tribes three years prior.

3. Migration as impact: systemic litigation and displacement as anticipated harm

Cases in the second category embed displacement within broader challenges to governmental climate policy. Here, migration appears not as the immediate stake of adjudication but as a prospective consequence—evidence of the magnitude and imminence of harm threatened by inadequate mitigation or adaptation policy. These "migration as impact" cases exemplify the gap-filling function that courts have increasingly assumed where traditional legislative and policy frameworks prove inadequate, with human rights arguments serving as the primary legal pathway to establish state accountability for climate action failures.

Within this category, however, an important analytical distinction emerges. In some cases, displacement and territorial loss constitute the central argumentative focus, with the threat of forced mobility functioning as the primary indicator of rights violations. In other cases, displacement appears as one among several prospective harms invoked to demonstrate the severity of inadequate climate action, alongside impacts on health, traditional way of living, infrastructure, or ecosystems. This distinction matters for understanding how displacement functions strategically within systemic climate litigation

The structural features differ markedly from protection claims. First, the legal dispute centres on state obligations regarding climate measures, not on individual migration status. Such cases demonstrate concrete, foreseeable consequences of climate inaction and inadequate mitigation or adaptation. Second, claimants articulate the threat of displacement as harm to be prevented rather than status to be achieved. Third, remedies include declarations of rights violations, orders to enhance climate action, adaptation investments, and reparations for climate harms rather than individual protection status. Fourth, cases proceed through domestic courts, regional human rights bodies, or international treaty mechanisms, using climate and displacement projections as evidence of rights-threatened harm.

The landmark case is *Daniel Billy and Others v. Australia*[37] before the UN Human Rights Committee. Eight Torres Strait Islander applicants, Indigenous residents of low-lying islands in Australia's Torres Strait, claimed the Australian government had violated their rights under Articles 6 (right to life), 17 (protection of privacy, family, and home), and 8 (right to

[37] M.G. Lentner, M.W. Cenin. *Daniel Billy et al v Australia (Torres Strait Islanders Petition): Climate change inaction as a human rights violation*, in (33)1 *Rev. Eur. Compar. & Int'l Env'l L.* 136 (2024); B. Hagiarian, *The Daniel Billy v Australia Case; Its Semantics and the Characterization of a Climate Threat as a Cause for Migration*, in 15 *Amsterdam L. Forum* 3 (2023); F. McGaughey, A. Maguire, S. Purcell, *Torres Strait Islanders Leading the Charge on the Human Rights Implications of Climate Change: Daniel Billy Et Al V Australia*, in 51 *UW Austl. L. Rev.* 88 (2023).

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life). The applicants described environmental degradation—coastal erosion destroying ancestral burial sites, saltwater intrusion rendering land uncultivable, storm surges threatening homes and infrastructure—and emphasized the existential threat this posed to Indigenous culture irreversibly linked to particular territories[38].

Forced displacement featured centrally in the claim. The applicants argued that climate impacts would render their islands uninhabitable, destroying relocating communities and severing territorial connections essential to cultural survival. As applicant Kabay Tamu testified: «You can't just pick up our land and move it. If we are disconnected from the land, we are disconnected from our culture, language and traditions. We will be climate refugees in another country».

The Committee's decision, rendered in September 2022, marked a watershed[39]. On Article 6 (right to life), the Committee found violation. It accepted evidence of environmental impacts on ancestral lands and territories «closely linked to [applicants'] culture and community lands». Combined with the intensity and duration of interference, this constituted arbitrary interference with privacy, family, and home. On Article 27 (right to culture), the Committee found Australia in breach. The Committee emphasized that «in the case of indigenous peoples, the enjoyment of culture may relate to a way of life closely associated with territory and use of its resources», noting that «although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by the State may be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture». The Committee concluded that Australia's inadequate adaptation measures—including failure to provide adequate seawalls and infrastructure protection against storm surges and rising seas—violated Torres Strait Islanders' cultural rights[40].

[38] Although litigated in the Global North, the Billy case illustrates that the North/South divide is defined by exclusion and vulnerability rather than geography. The Torres Strait Islanders' experience reflects Global South characteristics, where communities contributing least to the crisis face the most acute risks to habitability: D.A. Serraglio, F. de Salles Cavedon-Capdeville, F. Thornton, *The Multi-Dimensional Emergence of Climate-Induced Migrants in Rights-Based Litigation in the Global South*, in 16 *J. Hum. Rts. Prac.* 238 (2024).

[39] While acknowledging the landmark nature of the decision, scholars have highlighted its significant limitations, particularly the Committee's refusal to explicitly recognize a state's positive obligation to mitigate climate change (limiting the finding to adaptation failures) and its narrow interpretation of the right to life with dignity, which failed to account for the existential threat posed to Indigenous cultural integrity. See S.E. Quist, A. Krafcik, *Promising More than It Delivers? A Critical Reading of the HRC's Daniel Billy et al v. Australia (2022) Decision Linking Climate Change and Human Rights*, in 41(2) *UCLA J. Env'l L. & Pol'y* 411 (2023).

[40] R. Luporini, *Climate change litigation before international human rights bodies: insights from Daniel Billy et al. v. Australia (Torres Strait Islanders Case)*, in 3(2) *Italian Rev. Int'l Compar. L.* 238 (2023); C. Bhardwaj, *Adaptation and human rights: a decision by the Human Rights Committee Daniel Billy et al. v. Australia CCPR/C/135/D/3624/2019*, in 25(2) *Env'l L. Rev.* 154 (2023).

Most significantly, on Article 27 (right to culture), the Committee found Australia in breach. The Committee emphasized that «in the case of indigenous peoples, the enjoyment of culture may relate to a way of life closely associated with territory and use of its resources», noting that «although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion». This provision systematically links rights threatened by climate-induced displacement to indigenous cultural integrity, acknowledging that forced mobility—whether actualized or threatened as imminent risk—can itself constitute a violation of cultural rights when it severs communities from territories essential to cultural practice[41].

Subsequent domestic litigation has attempted to translate Billy's framework into Australian tort law, with mixed results. In *Pabai and Guy Paul Kabai v. Commonwealth of Australia*, decided by the Federal Court in July 2025, Torres Strait Islander applicants brought a representative action alleging the Commonwealth owed them a duty of care to take reasonable steps to set emissions reduction targets consistent with best available science and to fund adequate adaptation measures. The case arose from the same factual circumstances as Billy—devastating impacts of sea-level rise, coastal erosion, and extreme weather events on Torres Strait Islands, threatening to render them uninhabitable and force permanent displacement.

Justice Wigney's decision rejected the negligence claims on legal grounds while making extensive factual findings favourable to the applicants. The Court found that the Torres Strait Islands have been, and continue to be, ravaged by the impacts of human-induced climate change with devastating impact on the traditional way of life of Torres Strait Islanders and their ability to practise Ailan Kastom, their unique and distinctive body of customs, traditions, observances and beliefs. The Court further found that «the Commonwealth's response to climate change and the threat it has posed, and continues to pose, to the Torres Strait Islands and their traditional inhabitants has, at least in some respects, been wanting» particularly regarding emissions reduction targets that «were plainly not consistent» with Paris Agreement objectives.

However, the Court concluded that imposing a duty of care would require judicial evaluation of «high or core government policy and political judgment» regarding emissions targets and resource allocation for adaptation—matters properly falling within the province of the elected representatives and executive government». The Court emphasized that the applicants' primary case against the Commonwealth failed not so much because there was no merit in their factual allegations, but rather, because the law in Australia as it currently stands provides no real or effective avenue

[41] This legal strategy is increasingly conceptualized as asserting a right to stay or voluntary immobility, standing in stark contrast to claims seeking entry elsewhere. See M. Scott, Y. Kamel, B. Mosselmans, S. Hader, *Legal Pathways for Climate and Disaster Displacement: Consolidating Case Law to Support Litigation around the World*, in *Researching Internal Displacement*, 19 September 2024. The authors highlight how the Billy case exemplifies litigation where Indigenous Peoples invoke international human rights law specifically to compel state actors to prevent displacement and secure their continued existence on ancestral lands.

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through which the applicants were able to pursue their claims. The applicants have appealed the decision.

The Sacchi case before the UN Committee on the Rights of the Child (decided October 2019) further illustrates how displacement functions as evidence of rights violations in systemic climate litigation[42]. Sixteen child petitioners from twelve countries challenged Argentina, Brazil, France, Germany, and Turkey for inadequate climate action. The petition emphasized that climate change impacts «were directly affecting [children] by the impacts of climate change, which include the disruption of livelihoods, exposure to diseases, loss of traditional territories, as well as the risk of climate-related disasters». The petition particularly highlighted how climate change threatens children's rights by creating conditions that may force future displacement from traditional territories and homelands, emphasizing the dignity-based dimensions of maintaining stable residence and connection to place across generations.

Beyond framing harm specific to child petitioners, Sacchi emphasized intergenerational dimensions of climate-induced displacement. The petition argued that states' current emissions trajectories would condemn future generations to worlds where displacement becomes normalized—where children inherit not stable communities but rather constant vulnerability to forced mobility. By presenting displacement as both present harm and escalating future threat, the petition sought to establish a liability framework capturing climate change's temporal dimensions: harms that have already materialized alongside trajectories ensuring displacement will intensify absent immediate intervention.

Though the Committee found the petition inadmissible on jurisdictional grounds (petitioners had not exhausted domestic remedies in their countries of residence), the decision engaged substantively with climate change as a rights issue[43]. The Committee acknowledged that «environmental degradation and climate change can create conditions threatening the right to life under articles 6 or 7 of the Covenant» and emphasized states' obligations even regarding transboundary harm. The Committee noted that states can generate rights violations through extraterritorial effects of their emissions, affirming that climate harms—including those manifesting as displacement risk—trigger human rights obligations regardless of where those harms materialize.

Other systemic cases illustrate how displacement functions as one element within broader climate harm narratives. In *Greenpeace Netherlands and citizens of Bonaire v. Dutch State*, concerning the Caribbean island of Bonaire, claimants challenge inadequate climate adaptation and mitigation measures that threaten the island's inhabitants—a minority population within the Kingdom of the Netherlands with distinct culture tied to their territory[44]. While the case invokes rights to life, private and family life, and

[42] Y. Suedi, *Litigating climate change before the Committee on the Rights of the Child in Sacchi v Argentina et al.: breaking new ground?*, in 40(4) *Nordic J. Hum. Rts.* 549 (2022).
[43] M.A. Tigre, V. Lichet, *The CRC Decision in Sacchi v Argentina*, in 25(26) *Am. Soc'y Int'l L.* 1 (2021); F. Paz Landeira, *Temporalities in Crisis: Analysing the Sacchi v. Argentina Case and Children's Rights in the Climate Emergency*, in 39(4) *Child. & Soc'y* 854 (2025).
[44] For the full complaint see: https://www.greenpeace.org/nl/klimaatzaak-bonaire-waarom-klagen-we-de-staat-aan/.

culture under the ECHR and ICCPR, displacement appears alongside other climate impacts rather than as the exclusive focus[45]. Similarly, in *Navahine F. v. Hawaii Department of Transportation*, thirteen young plaintiffs successfully challenged the state's transportation emissions policies, arguing that inadequate climate action violated their constitutional right to a clean and healthful environment[46]. The settlement—requiring zero-emission transportation by 2045—emerged from litigation where climate harms to Indigenous Hawaiian families' agricultural livelihoods and cultural practices featured prominently, including threats from drought, flooding, and sea-level rise to ancestral taro farming lands.

These cases reveal displacement functioning differently than in protection claims. Rather than seeking legal status permitting residence elsewhere, claimants invoke threatened or actual displacement as evidence of rights violations requiring preventative mitigation and adaptation state action. Displacement serves as both symptom and measure of inadequate climate response—concrete manifestation of harm that transforms abstract mitigation targets into tangible human consequences. By centering displacement within systemic climate cases, litigants challenge states not merely to accommodate those already displaced but to prevent displacement through adequate mitigation and adaptation measures. The legal architecture shifts from reactive protection of those forced to move toward proactive prevention of conditions that force movement—from managing displacement's consequences to addressing its causes. Whether displacement occupies the argumentative center or appears among multiple threatened harms, its invocation in systemic litigation serves a dual function: demonstrating the concrete human dimensions of abstract climate failures and establishing that states bear positive obligations to prevent the conditions that would render territories uninhabitable and communities displaced.

4. Climate change and human mobility in the 2025 advisory opinions

July 2025 marked a watershed in the landscape of climate justice, witnessing the issuance of two advisory opinions that addressed—albeit through divergent methodological lenses—the nexus between climate change and human mobility. On July 3, 2025, the Inter-American Court of Human Rights (IACtHR) published Advisory Opinion OC-32/25 on the Climate Emergency and Human Rights, which had been adopted on May 29, 2025, following a joint request by Chile and Colombia. Subsequently, on July 23, 2025, the International Court of Justice (ICJ) delivered its Advisory Opinion on the Obligations of States in respect of Climate Change, requested by the UN General Assembly at the initiative of Vanuatu and supported by over 130 States. While both decisions engage with the issue of human mobility

[45] R. van Gestel, J. Sybesma, *Klimaatzaak Bonaire*, in 39(4) *RegelMaat* 353 (2024).
[46] A.K. Rodgers, M. Beaucage, *Navahine v. Hawai 'i Department of Transportation: Redressing Constitutional Youth Climate Change Injuries Through a Court-Enforced Settlement Agreement*, in 33(3) *Int'l J. Child. Rts.* 617 (2025).

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within the climate context, their treatments diverge significantly in scope and analytical depth.

The Inter-American Court dedicated an entire section of Advisory Opinion OC-32/25 to human mobility, framing it within the right to freedom of movement and residence enshrined in Article 22 of the American Convention on Human Rights. The Court's approach is holistic and multifaceted, acknowledging that climate change is already a significant driver of human mobilityboth internal and cross-border[47],. The IACtHR developed a normative framework that encompasses the full spectrum of climate-related mobility, recognizing that structural factors—such as poverty, systemic inequality, and marginalization—intersect with environmental degradation to the extent that the distinction between voluntary migration and forced displacement becomes increasingly blurred. Significantly, OC-32/25 addressed not only cross-border displacement but also internal displacement, planned relocations, and even involuntary immobility—situations where individuals or communities are unable or choose not to move despite climate risks, due to a lack of means or deep cultural, traditional, economic, or social ties to the territory. The Court imposed precise obligations on States, mandating the adoption of preventive measures to avert forced migration and displacement resulting directly or indirectly from disasters and other climate impacts, in accordance with a standard of enhanced due diligence. Furthermore, it required the development of normative, public policy, institutional, and budgetary instruments to address the needs of populations in situations of involuntary mobility. Regarding cross-border movements, the Court specified that States must establish an adequate regulatory framework providing effective domestic legal and administrative mechanisms to guarantee legal and humanitarian protection for persons displaced across international borders due to climate impacts. This includes appropriate migratory categories such as humanitarian visas, authorizations to stay, and forms of protection analogous to refugee status that ensure protection against refoulement. This approach is organically integrated into the broader loss and damage architecture, with explicit reference to Article 8 of the Paris Agreement, the Warsaw International Mechanism, and the new Loss and Damage Fund, urging the operationalization of international funds to enable vulnerable countries to address climate-induced human mobility.

In contrast, the International Court of Justice reserved a significantly more limited treatment for climate-related human mobility, essentially confining it to a single paragraph (378) dedicated to the principle of non-refoulement. The ICJ acknowledged that conditions resulting from climate change that endanger individual lives may compel persons to seek safety in another country or prevent their return. It affirmed that States bear obligations deriving from the principle of non-refoulement when there are substantial grounds for believing that a real risk of irreparable harm to the right to life—protected under Article 6 of the International Covenant on Civil and Political Rights—exists should individuals be returned to their country of origin. In doing so, the ICJ explicitly referenced the Human

[47] L. Riemer, L. Scheid, *The Inter-American Court's Advisory Opinion on Climate Change and Human Mobility Rights*, in *Verfassubgsblog*, 10th July 2025.

Rights Committee's key 2019 decision in *Teitiota v. New Zealand*, which marked the first recognition by a human rights body that climate-induced displacement could trigger non-refoulement obligations under international human rights law. While this recognition is undoubtedly relevant and marks a jurisprudential consolidation of the non-refoulement principle in the climate context—signaling an emerging convergence among international judicial bodies regarding the legal consequences of climate-induced harm—the exclusive focus on non-refoulement leaves vast dimensions of climate-related mobility unexplored. The ICJ Advisory Opinion fails to address internal displacement, voluntary migration, planned relocation, and, crucially, involuntary immobility where populations are unable to move despite facing existential risks. Moreover, the Court's cautious language and the absence of a differentiated analysis of the specific vulnerabilities of particular groups stand in contrast to the more progressive approach of contemporary human rights jurisprudence.

5. Conclusion: climate litigation and the gradual emergence of a normative framework

The cases examined in this article confirms that existing legal architectures—whether refugee law, complementary protection mechanisms, national regimes or international migration governance—remain structurally inadequate for addressing climate-induced displacement. The doctrinal obstacles are formidable and recurrent. Protection frameworks premised on persecution by identifiable perpetrators cannot readily accommodate harm resulting from diffuse global processes. Individualization requirements systematically exclude claims based on collective exposure to environmental degradation. Temporality constraints deny protection until catastrophic thresholds are crossed, trapping applicants in legal limbo where safeguards are withheld until harm becomes irreversible. Finally, the territorial logic underpinning internal relocation collapses at the prospect of entire island nations being submerged.

Yet beneath this pattern of formal failure, a normative framework is gradually emerging, characterized by state obligations operating across three interconnected dimensions: preventive, protective, and reparative. The preventive dimension encompasses duties to adopt adequate adaptation measures to avert the conditions that would compel forced mobility—obligations articulated most clearly by the Human Rights Committee in *Billy v. Australia* and elaborated extensively in the Inter-American Court's Advisory Opinion OC-32/25. The protective dimension extends non-refoulement principles to climate contexts, establishing that states cannot return individuals to face life-threatening environmental degradation—a threshold recognized in *Teitiota* despite that case's ultimate rejection, and reaffirmed by both the IACtHR and ICJ in their 2025 opinions. The reparative dimension requires recognition of rights violations and provision of remedies when displacement occurs due to inadequate state climate policies, as demonstrated in the Colombian Constitutional Court's decisions requiring the extension of internal displacement protections to climate-

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affected communities and mandating consultation, adaptation, and socio-economic support.

This framework remains partial, contested, and unevenly developed across jurisdictions and levels of governance. Critically, it does not yet resolve what may be the most consequential gap: the absence of a right to cross borders when such movement becomes necessary for survival, and the lack of binding mechanisms for planned, dignified mobility pathways. The *Teitiota* decision exemplifies this limitation—even while establishing that climate threats can trigger protection obligations in principle, the Committee's stringent evidentiary requirements and deference to state adaptation efforts leave the door barely ajar. The Australian tribunal decisions analyzed here demonstrate how domestic complementary protection regimes systematically exclude climate-based claims through provisions that treat population-wide risks as falling outside protection mandates. The reluctance of adjudicative bodies to extend cross-border mobility rights likely reflects the recognition of the profound implications—political, demographic, and systemic—of creating new categories of entitled mobility in an era of restrictive migration governance.

Nevertheless, domestic constitutional frameworks have proven more adaptable than international protection regimes where pre-existing legal architectures capable of extension exist and where courts demonstrate receptiveness to legal innovation. The Colombian displacement cases reveal how rights-based constitutional claims can accommodate climate displacement through innovative applications of internal displacement protections, consultation requirements, and positive obligations to provide adaptation measures and socio-economic support. This judicial development suggests that the gap-filling function of climate litigation may operate most effectively at the domestic level, where constitutional rights frameworks provide more flexible doctrinal resources and where courts can order concrete remedial measures—reconstruction with climate adaptation, risk assessments, humanitarian assistance—rather than merely declaring violations.

Climate litigation addressing displacement reveals an ongoing process of normative construction that unfolds as a transnational legal process—a dynamic evident across the broader landscape of climate litigation, where courts worldwide, through iterative cycles of successful and unsuccessful claims, legal innovation and cross-fertilization, are progressively constructing new legal frameworks governing state and corporate obligations in the climate crisis. In the specific context of climate-induced displacement, the governance gap identified in literature, while far from filled, is gradually narrowing through repeated interaction, interpretation, and internalization across multiple fora—treaty bodies, regional courts, domestic tribunals, and advisory opinions. Courts that reject individual claims nonetheless often articulate legal standards that shape future litigation. Systemic cases secure findings of rights violations even when remedies remain partial. Domestic constitutional tribunals forge alternative pathways where international protection frameworks prove inadequate. Advisory opinions consolidate these scattered developments, creating normative baselines that courts across jurisdictions can invoke and build upon. Through repeated judicial engagement with novel fact patterns, these

interpretations trickle down and become progressively internalized into domestic legal systems, creating increasingly sticky normative commitments. This transnational judicial dialogue—with courts citing, building upon, and refining standards articulated by other fora[48]—exemplifies how legal norms migrate across jurisdictional boundaries and become embedded in domestic frameworks, generating convergence toward increasingly explicit recognition of state obligations spanning prevention, protection, and remedy[49].

However, this gradual emergence should not be romanticized. For individuals facing imminent climate threats, abstract normative developments provide cold comfort when protection is denied at borders or when adaptation measures arrive too late. The temporal mismatch between the urgency of climate impacts and the glacial pace of legal evolution imposes real human costs. The strategic litigation approach—accepting losses in individual cases while building foundations for future victories—reflects a necessary pragmatism given judicial caution about transgressing into political domains, but it does so at the expense of present claimants.

Yet it is precisely these claimants—indigenous communities with territorial-cultural ties to climate-vulnerable lands, residents of low-lying island states facing existential threats, populations inhabiting coastal and marginal territories exposed to progressive environmental degradation, economically marginalized communities lacking resources for autonomous mobility, and those trapped in involuntary immobility despite escalating climate risks —who are serving as the primary agents of this transnational legal process[50]. By bringing their lived experiences of territorial losscultural disruption, and forced mobility before courts and human rights bodies, these communities from the world's most climate-vulnerable territories have rendered visible the human dimensions of climate change, translated abstract scientific projections into concrete rights claims, and compelled legal systems to confront displacement as a foreseeable consequence of

[48] This function of litigation is described in doctrine as standard-setting. See M. Wewerinke-Singh, M. Antoniadis, *Vessel for Drowning Persons? The Standard-Setting Potential of International Human Rights Litigation in Addressing Climate Displacement*, in 3(1) *Y. Int'l Disaster L. Online* 240 (2022), noting that in the absence of specific treaties, the application of open-textured human rights provisions to specific climate facts allows treaty bodies to authoritatively clarify state obligations, thereby guiding future state practice and closing legal protection gaps.

[49] The necessity of systematizing this fragmented case law to facilitate such transnational dialogue is central to recent scholarship. See M. Scott, Y. Kamel, B. Mosselmans, S. Hader, *op. cit.*, arguing that the complexity and novelty of these issues require a strategic litigation initiative supported by consolidated repositories (such as the Climiglaw Database) to enable practitioners to identify promising avenues for the progressive development of the law across different jurisdictions.

[50] Sociological literature defines this activation as a form of agency distinct from simple resilience. While resilience implies an internal adaptation to shocks, 'claims-making' is inherently relational: it presupposes the perception of an injustice and targets an external actor (the State or corporations) to hold them accountable. See A. Arnall, C. Hilson, C. McKinnon, *Climate displacement and resettlement: the importance of claims-making from below*, in 19(6) *Climate Pol'y* 665 (2019), highlighting how claims-making allows communities to choose how and where to direct power, contrasting with passive participation in top-down humanitarian schemes.

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inadequate climate action[51],. Their role as norm entrepreneurs in this evolving framework cannot be overstated, even as many individual claims fail.

Yet understanding climate litigation's contribution requires this longitudinal perspective. The legally disruptive nature of climate change systematically challenges frameworks designed for different phenomena. Legal evolution necessarily proceeds incrementally, through repeated confrontation with novel facts and gradual adaptation. The framework emerging from climate litigation is neither comprehensive nor settled, but it represents meaningful progress from the near-total normative vacuum that existed a decade ago.

As climate impacts intensify and displacement pressures mount, this emerging framework—however incomplete—provides critical normative resources for advocacy, adjudication, and policy development. Whether it will prove adequate to the scale and urgency of climate-induced displacement remains an open and deeply consequential question.

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[51] This agency is further conceptualized through the lens of intersectionality, particularly within the European context. See A. Hefti, *Intersectional Victims as Agents of Change in International Human Rights-Based Climate Litigation*, in 13(3) *Transnat'l Env'l L.* 610 (2024). Analyzing the KlimaSeniorinnen and Duarte Agostinho cases, the author argues that recognizing intersectional victimhood empowers marginalized groups (such as elderly women and children) to challenge unequal power dynamics and participate in climate decision-making, thereby fulfilling the requirements of procedural climate justice. The conceptualization of litigants as active agents of change rather than passive victims directly extends to the displacement cases analyzed herein. Just as intersectional victims challenge unequal power dynamics to participate in climate decision-making, the Indigenous and frontline communities facing displacement act as norm entrepreneurs: by asserting their rights, they challenge the structural exclusions of international law and actively reshape the normative landscape regarding climate mobility, compelling legal systems to bridge the gap between abstract climate commitments and human rights obligations.